THIRD DCA REJECTS USE OF STRICT COMPLIANCE STANDARD FOR PARAGRAPH 22 NOTICES, EXPRESSLY ADOPTS SUBSTANTIAL COMPLIANCE

USA November 6 2015

Many judges in Miami-Dade County and elsewhere held the view that "strict" compliance was the standard to determine if a notice of default complied with the provisions of a paragraph 22 of a mortgage. To this day, no appellate court has ever adopted that standard in the mortgage foreclosure context. Instead, substantial compliance appeared to have strong support in cases examining contractual notice provisions. However, for many years, the absence of an opinion in the mortgage foreclosure context expressly adopting substantial compliance created an out for many judges in South Florida and elsewhere to ostensibly distinguish the substantial compliance cases on their facts. The rule adopted by many judges in Miami-Dade County was so strict that any deviation from the language used in paragraph 22, be it material or manifestly immaterial, would merit prohibiting foreclosure. Although it had never been approved by an appellate court, the widespread adoption of this view by many South Florida judges resulted in the dismissal of a large number of foreclosures, and many appeals ensued.

To the relief of many lenders and their counsel, on November 4, 2015, the Third District Court of Appeal expressly adopted the substantial compliance standard in the context of a notice of default sent pursuant to paragraph 22. In *Bank of New York Mellon v. Nunez*, 3D15-83, the Third District Court of Appeal stated: "The primary issue raised in this appeal is whether the Bank's default notice to the defendants must strictly comply or merely substantially comply with paragraph 22 of the mortgage. For the reasons that follow, we conclude that substantial compliance is sufficient."

Frustratingly, the Third District Court of Appeal's opinion does not provide the actual language used in the letter approved. A review of the briefs however shows that the letter under review contained the language routinely rejected by Miami-Dade's trial judges as non-compliant including the phrase "bring a court action" regarding the right to assert defenses to foreclosure, the use of the word "may" to describe the existence of a right to cure the default after acceleration of the mortgage, and a description of the amount of the default as a sum certain plus "any additional regular monthly payments, late charges, fees and charges which become due" in the future.

Thus, the *Nunez* opinion should offer some protection to lenders faced with the usual hyper-technical arguments concerning non-prejudicial differences between the language used in the form notices of default employed by many lenders and the slightly different verbatim language of paragraph 22. The *Nunez* opinion is an excellent companion to *Gorel v. Bank of New York Mellon*, 165 So. 3d 44, 46 (Fla. 5th DCA 2015) and *Green Tree Servicing, LLC v. Milam*, No. 2D14-660, 2015 WL 4549200, at *3 (Fla. 2d DCA July 29, 2015) which discuss in greater detail the necessity that some prejudice be worked by the deviation between the language used in paragraph 22 and the lender's performance thereof before a defense to foreclosure will arise under paragraph 22 for failure to perform condition's precedent. Hopefully these decisions, when taken together, will bring some sanity back to the discussion about whether the difference between "may" and "shall" in a letter is adequate grounds to deny a lender's right to foreclose in South Florida after years of non-payment by the borrower.