

STOPA LAW FIRM

Mark P. Stopa, Esq.

July 5, 2010

Honorable Thomas McGrady
14259 49th Street N.
Clearwater, FL 33762

RE: Foreclosure lawsuits; Mediation Program

Judge McGrady:

This letter is written in my respectful attempt to convey my concerns and suggestions about the mediation process that the Court has implemented in the hopes that mediation can be more fruitful for everyone involved.

The mediation process has successfully resolved lawsuits in Florida courtrooms for decades. As I see it, mediation works for two reasons: the parties (1) avoid expense (attorneys' fees) and (2) eliminate their risk of loss.

Anyone who has ever been to a mediation has heard the old adage that mediators give - "you never know what the jury/judge is going to do". But that's precisely the problem in foreclosure cases; everyone knows what judges are going to do - enter another foreclosure judgment. That's why the mediation process, as it currently exists, cannot work. The banks perceive they have no risk of loss, so they have no incentive to mediate. Take it from someone who deals with these issues every day - banks view mediation no differently than paying the filing fee - it's just another hoop they have to jump through to get a foreclosure judgment.

I'm not trying to be critical; I know you are working hard to fix this foreclosure crisis (and I'm counsel in a lot of counties, so I have a basis for comparison). And I'm not trying to create the impression this is hopeless; I believe the mediation process can work. However, I strongly believe the only way mediation will ever work is if banks start to perceive they have a risk of loss. Unfortunately, that's not something any lawyer or homeowner can do - that requires judges to hoist banks on their petard when the law requires. If a homeowner has a bona fide standing defense, judges have to rule accordingly and enter judgment for the homeowner (even if the homeowner defaulted on the mortgage). If a homeowner has a bona fide motion to dismiss, judges have to grant it (even if the homeowner defaulted on the mortgage). Otherwise, banks perceive no risk of loss and have no incentive to settle and the mediation process, no matter how well-intentioned, is doomed to fail.

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If you polled the judges in your circuit, I'm sure they'd all say they follow the law. Yet I have the distinct impression that if you polled these same judges, some of them would admit they've never granted a motion to dismiss in a foreclosure case, much less entered a judgment for the homeowner based on the bank's lack of standing or failure to fulfill a condition precedent. Respectfully, how can that be? Out of the thousands of cases that each judge has handled, there has never been a time when the bank lacked standing in a foreclosure case? Really? Particularly when you consider that standing cannot be acquired after a suit is filed, I'm confident the banks lack standing in a huge percentage of these cases. The lack of rulings in favor of homeowners is, in my view, a huge part of the problem.

I know judges want to push these cases. And in a sense, what I am suggesting runs contrary to that. After all, granting a motion to dismiss with leave to amend extends the life of a case, granting a motion to dismiss without prejudice but without leave to amend prompts a new lawsuit, and entering judgment on a standing defense ends the current suit but may create a new one (by a different bank). But if these types of rulings happen now and again, banks will perceive a risk of loss and start settling cases in a way they're currently unwilling to do. It's a short-term loss, perhaps, but a long-term gain.

For comparison's sake, suppose that judges/juries started systematically ruling for defendants in every personal injury and property damage case, over and over again, hundreds of cases at a time, over a period of months, then years. Do you think mediations would be as successful as they are now? Or do you think that, eventually, State Farm and all of the other insurance conglomerates would stop settling cases and systematically push towards final judgment in every case? As I see it, banks, insurance companies, and other big businesses don't care about morality, keeping people in their homes, or clogged dockets – they're only going to do what's best for their bottom line. Until judges start hitting them where it hurts, in their bottom line, by entering rulings against them (consistent with the law, of course), the system is not going to change no matter how many mediations take place.

This letter is not meant to be critical. I truly believe that you want the mediation process to work and I respect your efforts to do so. I'm counsel in a lot of counties (so I have a basis for comparison), and I believe Pinellas to be further along in the process than others in our state. I just think, as things are going now, the process is not going to work. Perhaps the best way to summarize my thoughts in that regard is this. I'm counsel in hundreds of these cases, but with rare exceptions, I typically discourage my clients from mediating. You may be disappointed to hear that, but, respectfully, why should I encourage my clients to incur the time and expense of mediation (a 4-6 hour affair, once all of the requisite disclosures are done, the mediation process is explained, and the mediation takes place), and turn over financial documents to a bank that is pursuing a deficiency judgment, when banks make it so clear they won't settle? I've tried, believe me. So have my clients. So have colleagues of mine. Settlements just aren't happening, and requiring mediation, without more, is not going to change that.

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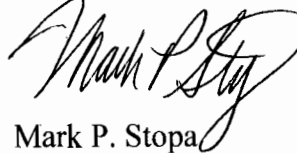
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At some point, if the mediation process is going to work in any meaningful way, judges have to show they're willing to do more than "push through" foreclosure cases and enter foreclosure judgments. Judges must be willing, in appropriate cases, to enter orders and, yes, even judgments, in favor of homeowners. If that starts happening, the mediation process will take care of itself, as parties will settle, both in mediation and on their own, because both sides will perceive a risk of loss.

So what am I asking? I'm not sure, honestly. Obviously I'm not requesting any preferential treatment or any specific ruling in any given case. I guess I hoped that judges such as yourself, whose opinions are respected and whose advice would be followed, would realize that if they want mediation to work then these foreclosure cases cannot be a one-way street. Judges can't always enter judgments for banks, 100% of the time, and expect banks to want to settle. Judges must listen to foreclosure defense attorneys (not just me, the many other quality attorneys throughout the state) and rule for homeowners in appropriate cases. Homeowners and banks will probably never be on a level playing field, but if we can get closer to level, perhaps we can start resolving these cases in a way that would be satisfactory for everyone involved.

As always, thank you for your attention to this matter.

Respectfully,
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