Consensus of Judges on Multnomah County Court Foreclosure Panel

The judges who serve on the Multnomah County Court's Foreclosure Panel have been presented with the following recurring issues, which over time have resulted in a consensus of rulings by panel members in past cases. Each case presents its own facts and legal theories. The rulings set forth below are intended to provide guidance to counsel and self-represented parties. They do not have the force of law or court rule and the statements are not binding on any judge.

A consensus statement is not a pre-determination of any question presented on the merits in an action. In every proceeding, members of the Foreclosure Panel will exercise independent judicial discretion in deciding the questions presented by the parties.

1. Special instructions for submitting motions, proposed orders and judgments to the assigned Foreclosure Panel Judge and to the official court file.

Once a case has been assigned to a foreclosure panel judge, all documents filed in the case should be captioned in a manner that identifies the specially assigned judge. On the right hand side of the caption, immediately under the title of the document, in italics: *Specially Assigned to Judge* _____. Judges on the Foreclosure Panel expect the parties to provide a "bench copy" of whatever documents are submitted for filing in the official court file.

An original negotiable instrument tendered pursuant to UTCR 2.060 must be delivered directly to the assigned foreclosure panel judge's Judicial Assistant or Courtroom Clerk; these documents should <u>not</u> be filed in the manner described in Multnomah County Court SLR 1.161.

2. Effect of SB368 (2015) on Foreclosure Judgments on Residential Property

ORS 86.797 and ORS 88.010, and certain related statutes were amended by Oregon Laws 2015, c. 291, § 3, eff. June 8, 2015 (SB 368).Those amendments apply to pending cases, as well as new ones, and will require amendment and additional service of most residential foreclosure cases pending at the time of passage. Under (amended) ORS 86.797, "a judgment to foreclose a residential trust deed under ORS 88.010 may not include a money award for the amount of the debt against the grantor." Complaints filed prior to the effective date of the Act, were required to seek a money judgment under (former) ORS 88.010; but, after the amendment to the statutes, residential real property foreclosure judgments cannot grant the relief sought because the legislature has prohibited the inclusion of a money award in those judgments. As a result, the court would be obliged to decline to grant judgment on the complaint as failing to allege a claim for the relief sought.

Under the amended statute, the court is to render judgment, if in favor of the plaintiff, in the form of a declaration; however, few if any complaints currently filed in residential mortgage cases ask for such relief. Therefore, in order to support a judgment, the complaints that do not seek declaratory relief at present, must be amended.

> "A judgment for relief different in kind from or exceeding the mount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered." ORCP 67 C.

In the case of multiple defendants, such as junior lienors, the declaratory relief is sought against *all* defendants; hence all must be served with the amended complaint seeking different relief.) A party in default must be served with the amendment in the manner of for service of process under ORCP 9 A. It follows that no new judgments for foreclosure of residential trust deeds, based on complaints not seeking declaratory relief, can be granted, without amendment and re-service as directed by ORCP 9A.

As to foreclosure of trust deeds or mortgages where a money judgment is allowed under the amended provisions, the judgment must provide for a deficiency judgment "if (b) the plaintiff requests the provision in the complaint." ORS 86.797 (3) (b). (as amended, 2015). No deficiency judgment will therefore be allowed in any case, unless the plaintiff asks for one in the complaint.

In all cases the form of judgment must include a declaration of the amount the note is in default. ORS 88.010 (1) (a), and this raises the question whether such a declaration is additional or other relief, even in cases in which a money judgment is granted in cases other than residential trust deeds and mortgages. The resolution to this issue determines the availability of a judgment in such a case, based on a complaint which does not ask for a declaration (as well as a money judgment). The judges on the panel has have not yet been asked to consider this question.

The legislature has not altered the parties necessary for adjudication or method of service.

3. No *In Rem* Foreclosures.

The foreclosure of a mortgage or trust deed is, at bottom, a contract action. It is not a statutory forfeiture action. Unless the real property signed the note and mortgage or trust deed, the real property is not a proper party defendant and cannot be the debtor on a judgment.

The property itself should not be named as a party and no judgment, by default or otherwise, is entered against property on a trust deed or mortgage foreclosure.

4. Deceased Defendant

If a debtor or grantor dies during the pendency of the action, follow the procedure provided in ORCP 34. If the defendant is deceased at the time the action is commenced, follow the procedure for all other actions against a deceased defendant or, as provided in small estate to the extent of the value received, a person who received the property. See ORS 114.555, 114.540, 114.545, 114.550.

5. Naming "parties in possession" (or similar designation), or "all persons claiming interest" as parties.

The naming of parties designated as "parties in possession" is allowed by rule ORCP 21H, in an appropriate case in which the complaint alleges that the pleader is ignorant of the name of such defendants. This pleading can be amended when the true name is discovered. The assigned judge may require substitution of the true names of persons in possession (sometimes identified as "occupants of the premises" in the caption of the complaint), or may require a showing of reasonable but unsuccessful efforts to ascertain the true names, before a judgment is entered.

Multnomah County does not identify "occupants of the premises" as parties in the Oregon Judicial Information Network (OJIN); therefore, the Court will not enter a limited judgment dismissing "occupants of the premises" unless or until those persons are specifically identified by amendment of the complaint. Accordingly, counsel need not move to default or dismiss the unnamed occupants prior to submitting the general judgment. At that time, the plaintiff should either substitute the name of the occupant(s) or move to dismiss them.

ORCP 21J allows the designation as defendants of "all other persons or parties unknown claiming any right, title, lien, or interest in the property." However, if such parties are named, the claim against them must be resolved by a judgment of dismissal or default. (If some such person answers, that person is no longer "unknown.") In order to default "all other persons" the plaintiff is responsible for making effective service on them under ORCP 7. This can only be accomplished by publication under ORCP 7D(6) and, accordingly, by further order of the court approving publication by service.

6. Substitution of the party plaintiff.

The provisions for substitution of parties in the Oregon Rules of Civil Procedure appear at ORCP 34. They are exclusive. The court has denied a motion to substitute a party plaintiff based on a late discovery that the note in question was held by a party other than that which initiated the action. In such a case, the appropriate procedure is a dismissal of a case initiated by the party with no present interest in the note; and refiling by the party with the right to commence the action.

Motions for substitution of parties are <u>not</u> appropriate for presentation at *ex parte*, unless the motion is accompanied by a stipulation of all parties who have appeared or a declaration by counsel representing to the court that none of the active parties (as noted in OJIN) oppose the motion. In the absence of a signed stipulation or declaration of counsel, such motions must be submitted to a foreclosure panel judge for consideration after the time for responding to the motion has passed (UTCR 5.030); or, if a response opposing the motion has been filed, then the motion shall be set for hearing on a date no sooner than 30 days after the motion was filed.

7. No limited judgment of foreclosure as to some, but not all, junior lienors or junior interest holders.

A limited judgment is a final (appealable) judgment, which can be entered upon a judicial finding of no just reason to delay judgment on a separable claim. It is not available for the foreclosure of the interests of junior lienors (or other junior interest holders) as an attribute of the foreclosure of a trust deed by a first lien holder, because the first lien holder's right to foreclose is solely an attribute of a successful foreclosure of the interests of the property owner. Because it is not legally possible to complete a foreclosure against junior lienors without (or before) foreclosing the interests of the debtor, it is not possible to have a valid, limited judgment of foreclosure as a final judgment against a junior lienor; nor is it possible to enter a provisional judgment, subject to the entry of a final judgment. (No provision is made in the Oregon Rules of Civil Procedure for a provisional judgment subject to later developments in a case.)

Therefore, the Foreclosure Panel judges have rejected and refused to sign limited judgments of foreclosure against junior lienors.

If a limited judgment against a junior lienor was entered, it would be (by definition) a final judgment as to that lienor. At least in form, it would terminate that junior lien, even if subsequently the plaintiff failed to complete the foreclosure against the debtor. There can be no 'good cause' (which must exist for a court to allow a 67B judgment) for permitting a practice that is not legally coherent and can cause mischief.

(The situation of an attempted limited judgment against junior lienors should be distinguished from the appropriate use, where justified, of a limited judgment to conclude cross-claims or counterclaims or causes of action in addition to foreclosure that are not dependent on the foreclosure claim. It is of course possible to seek a limited judgment as to the unrelated claim.)

8. Continuance and Abatement.

The judges on the foreclosure panel have not abated actions for foreclosure other than as required or permitted by a cited authority for abatement of an action. (A procedural provision, SLR 7.055 (7) in local rules, provides a procedure where there is a substantive authority for abatement.) Abatement prevents discovery, motions, hearings, or any other procedure until the abatement order is lifted. Specifically, foreclosure panel judges have refused to abate actions for the purposes of attempting settlement or attempting a trial workout of the debt. A plaintiff that initiates an action in court is responsible for its prompt resolution.

Judges on the foreclosure panel have usually denied extended continuances of trial, and have done so unless there is a good cause other than a desire to assess the possibility of settlement or loan modification, or for a trial period of a loan modification agreement. If the matter cannot be concluded within an ordinary period (within 12 months of filing unless good cause is shown based on special circumstances) the plaintiff should take a voluntary dismissal.

Modest continuances based on such matters as illness, preparation of documentation of a concluded final settlement, or other special circumstances ordinarily allowing continuance in other cases will be allowed based on their merits.

9. Motions to continue pursuant to UTCR 7.020 (3) and SLR 7.015.

Under UTCR 7.020 (3), if any defendant has not appeared by the 91st day from filing, notice is given to the plaintiff that the case will dismissed as against the non-appearing defendant after 28 days, unless an order of default has been filed and entry of judgment has been applied for, good cause to continue has been shown and supported by affidavit, or the defendant has appeared.

Under SLR 7.015, when a default order has been taken against a specific party, and the case will proceed to trial against other defendants, an attorney may move the Court to continue the case against the defaulted party pending the outcome of trial.

Litigants in foreclosure and mortgage cases will be expected to comply with these provisions. If junior lienors or other parties do not appear, then the plaintiff may seek an order of default against such parties and move to continue the case as to those parties pending judgment against the appearing parties. The rule does not require, much less permit, the entry of limited judgments against junior lienors (for the reasons stated above).

Under UTCR 7.020 continuance of a case under these circumstances can be ordered after proof of service has been filed against nonappearing defendants. A party makes an appearance by filing an answer or motion. An order under UTCR 7.020 does not provide a basis to extend the 63 day period within which service is to be completed (UTCR 7.020). The extension of the period of time to complete service on named defendants will be considered as in other cases, and the grant of an extension will be considered based on special difficulties encountered in completion of service after diligent efforts (i.e., defendant evading service, defendants in distant jurisdictions, etc.).

In cases in which a dismissal has been entered under UTCR 7.020, the judges on the foreclosure panel have not allowed an order of reinstatement except under the conditions provided in ORCP 71. Where relief is sought based on ORCP 71B for mistake, inadvertence, or excusable neglect, judges on the panel have required a showing of circumstances more excusable than mere attorney or attorney staff inattention to the notice of the court warning of impending dismissal and to rules of court requiring action after such notice.

10. Stipulated General Judgments of Foreclosure

The Court will generally reject stipulated general judgments of foreclosure that memorialize agreements to waive statutory or other rights (*e.g.* redemption) or incorporate post-judgment remedies that are not yet ripe (*e.g.* writ of assistance).

11. Original notes: production at motion for summary judgment or trial; endorsement.

Unless plaintiff alleges and proves the loss or accidental destruction of the note, the note (original note) should be produced when a judgment is sought. The litigants' attention is drawn to UTCR 2.060:

> (1) In all cases when a judgment is to be based on a negotiable instrument, the party with custody of the original instrument must tender such instrument to the court before the entry of judgment, and the court must enter a notation of the judgment on the face of the instrument.
>
> (2) The trial court administrator shall return the original instrument only after filing a certified copy of the instrument.

Some judges have required the production of the original note on motion for summary judgment, because without the original note, a judgment in favor of the party cannot be entered (absent appropriate proof of loss or destruction of the note). The court will not accept an original note tendered with a so called bailee agreement; however, the court will acknowledge receipt of the delivery of an original note just as it would any other documents submitted to a judge.

12. **Attorney Fee Petitions**

Statements of attorney fees that include cryptic abbreviations or that contain vague, incomplete or indecipherable descriptions of legal services provided by an attorney or legal assistant do not allow the court to determine if those fees are reasonable. If the court cannot determine if some or all of the fees requested are reasonable, the proposed money award will be reduced from the amount originally requested.

The court is disinclined to award fees for administrative tasks or clerical work that is traditionally included at no separate cost to the client and incorporated into the attorneys' hourly billing rates.

13. Recovery of "reasonable litigation costs."

Where trust deeds, notes, or mortgages provide for recovery of reasonable costs in case of default, judges on the panel have considered the award of such costs under ORCP 68. That rule specifies the recoverable costs and provides for recovery of specified costs of litigation and "any other expense specifically allowed by agreement." To be specifically allowed, the cost must be particularly mentioned in the agreement.

Some parties have requested the award of a foreclosure "litigation guarantee" or a *lis pendens* as a cost. Unless "specifically allowed" in the terms of the agreement between the parties, that cost has been disallowed. If the trust deed specifically allows award of title insurance or a *lis pendens* the party seeking those costs should reference the language in the agreement that provides for recovery of those costs.