

ILLINOIS MORTGAGE FORECLOSURE: DOES A DEFENDANT IN FORECLOSURE HAVE A RIGHT TO A JURY TRIAL?

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Unless a foreclosure defendant pleads certain defenses or counterclaims, he or she has no right to a jury trial in Illinois state court. There are numerous advantages to making a jury demand. A jury of one's peers could relate to the difficulty in keeping up mortgage payments in these tough economic times. A jury may feel the fear of losing a home where countless memories have taken place, compared to a judge focused on the rule of law. Even the added time commitment of a jury trial may influence the other side towards settlement. Unfortunately, a foreclosure defendant generally lacks the right to make a jury demand in Illinois courts.

In Illinois, claims in equity do not allow for a jury trial. The equity court, otherwise known as the chancery court, normally hears equitable claims. Equitable claims are generally claims where monetary damages are insufficient to make a party whole. The concept of "making a party whole" involves placing a party back to the position he or she would have been had they not entered into the transaction or experienced the injury. As such, the court may issue remedies or mandate performance in the interest of a fair and just result. Such remedies include specific performance, injunction, or as relevant to this discussion, foreclosure.

Foreclosure is a claim in equity because instead of seeking monetary damages it requests the sale of a specific property to pay off a debt. Property is considered unique, the value of which cannot be determined by a court of law. The equity court orders sale of the property for its value

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to the higher bidder. A court may order a monetary judgment after the sale if the property sells for less or more than the amount of the debt. Even so, the foreclosure remains a claim in equity.

By denying a right to a jury trial for equitable claims, the Illinois constitution does not violate the Seventh Amendment federal right to a jury trial. The Illinois Constitution states, “The right of trial by jury as heretofore enjoyed shall remain inviolate.”² This means that the Illinois constitution does not interfere with the federal right to a jury trial, which existed before the Illinois state constitution was enacted. Illinois recognizes a right to a jury trial in criminal proceedings, under English common law, and where afforded by statute.³ This provision of the state constitution does not disturb a litigant’s right to a jury trial in federal court.

A foreclosure defendant interested in a jury trial must plead certain defenses and counterclaims.⁴ Common law claims that the state legislature has not written into statutory law allow for a jury trial.⁵ Fraud, waiver, and estoppel all arise under common law and are defenses to foreclosure. Otherwise, if a party pleads only statutory claims, then the statute itself must allow for a jury trial.⁶ There are no traditional defenses to foreclosure arising under statute that confer a right to a jury trial. For instance, the Illinois Consumer Fraud Act⁷ is a statutory defense to foreclosure, but it does not allow for a jury trial in state court. However, the Seventh

² Ill. Const. 1970, art. I, § 13.

³ Ill. Const. 1970, art. VI, § 9. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 71 (1994).

⁴ “A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer. Otherwise, the party waives a jury. If an action is filed seeking equitable relief and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, the plaintiff, within 3 days from the entry of such order by the court, or the defendant, within 6 days from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court. If the plaintiff files a jury demand and thereafter waives a jury, any defendant and, in the case of multiple defendants, if the defendant who filed a jury demand thereafter waives a jury, any other defendant shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver and upon payment of the proper fees, if any, to the clerk.” 735 ILCS 5/2-1105(a).

⁵ *Fisher v. Burgiel*, 382 Ill. 42, 54-55 (1943); *Martin*, *supra* at n. 2.

⁶ *Id.*

⁷ 815 ILCS 505/1 *et seq.*

Amendment right to a jury on statutory claims is preserved in federal court.⁸ Therefore, the consumer wishing to bring an Illinois Consumer Fraud Act claim before a jury may prefer to sue first and file its complaint in federal court.

A party making a jury demand must do so prior to filing in its complaint or within the time for answering.⁹ If a jury trial demand is made, the demanding party need not follow through with the jury demand. The requesting party will have to pay a jury demand fee regardless of whether the matter is ultimately tried before a jury. If a party fails to make a timely jury demand he or she will be considered to have waived the right to do so.¹⁰ For the sake of discussion, claims that allow for a jury trial are generally called “legal claims.” Once a party sets forth legal claims in response to equitable claims, the court will decide how to hear each claim and in what order.

Where a case involves legal claims in addition the equitable claims, the action becomes one of multiple issues. The equity court may hear the legal claims along with the equitable claims, divided into claims at law and claims in equity.¹¹ The court will normally sever the legal claims from the equitable claims and decide them separately. With a proper jury demand, the legal claims are issued to a jury and decided before the equitable claims.¹² The court may take consider jury’s factual conclusions in deciding on the equitable claims, but is not required to do so.

⁸ See *Martin, supra* at n. 2.

⁹ *Id.*

¹⁰ See *id.*

¹¹ Once it is determined which claims are at law or chancery, Illinois Supreme Court Rule 135(b) provides that when a party pleads actions at law and actions at equity in a single complaint, the pleading party may separate the claims into distinct counts of “separate action at law” and “separate action at chancery.” Il. Sup. Ct. R. 135(b).

¹² If a single pleading contains both actions in equity and actions at law, Supreme Court Rule 232(a) requires the court to decide if the actions at law and equity are severable and, if so, whether they should be tried separately and in what order. Il. Sup. Ct. R. 232.

It should be noted that conferring jurisdiction over an issue in equity is not necessarily excluding a trial by jury. In the absence of legal claims, an equity court has the option to issue factual questions to a jury at its discretion. The court may weigh the jury's factual conclusions in deciding upon the equitable claims. To reiterate, even where a party brings legal claims or defenses to an equitable claim, it has no right to a jury on the equitable claims. For example, a court will continue to decide a foreclosure, but a party may assert a defense of fraud before a jury. The court has the option to take the jury's factual conclusions on the fraud under advisement in deciding the foreclosure.

There are many factors to consider in bringing claims or defenses to a foreclosure regardless of whether a jury trial is an option. A foreclosure defendant proceeding without an attorney must research and properly plead each claim or defense. Moreover, if a foreclosure defendant has valid defenses and claims to a foreclosure it is important to assert them. A foreclosure defendant should never feel discouraged from pursuing all available claims or defenses under the law. In the event that a defendant wishes to hire an attorney, he or she should do so at the onset of a case. At the very least, so that the attorney may file a timely jury demand if one is available.