

A FORECLOSURE LITIGANT HAS NO INHERENT RIGHT TO A JURY TRIAL

**A defendant to foreclosure must
take affirmative steps to confer a right to a trial by jury.**

By Mara A. Baltabols, Esq.¹

Many defendants involved in foreclosure immediately consider the option of trying their case before a jury, and the potential benefits of doing so: How it would be advantageous for a jury of peers to hear the trials and tribulations of keeping up with mortgage payments in these tough economic times; that the jury members will sympathize with the potential loss of a home where countless memories have taken place; in addition to how the onerous amount of time and money involved in a jury trial may influence the other side into settling the matter with a loan modification or consent foreclosure. Unfortunately, absent the right legal strategy and certain defenses or counterclaims, a foreclosure defendant in Illinois state court does not have a right to a jury trial.

Under Illinois law, a foreclosure defendant does not have a right to have his or her case heard before a jury. There is no inherent right to a jury trial in a foreclosure case because a foreclosure action is typically one in equity. An action in equity does not afford a right to jury. Therefore, a Defendant in a foreclosure cannot demand a right to a jury trial unless it can provide grounds at common law or under statute where the Illinois legislature has provided the option of a jury trial.²

A foreclosure case in Illinois state court is tried in a chancery court, which is a court of equity. An equity court decides issues of fairness and what represents a justiciable result. Cases

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² *Fisher v. Burgiel*, 382 Ill. 42, 54-55 (1943).

in equity are those where monetary damages will not suffice to make a party whole. Foreclosure falls in this category because a foreclosure action requests the sale of a specific property to satisfy payment on a debt.

Although a right to a jury trial exists at federal law, the Illinois Constitution of 1970 only recognizes a right to a jury trial in a criminal or civil proceeding and, generally, where such right existed at common law prior to the adoption of the state constitution.³ What the Illinois Constitution says is: “The right of trial by jury as heretofore enjoyed shall remain inviolate.”⁴ This provision translates to say that our state constitution preserves the Seventh Amendment right to a jury trial as it existed at the time that the Illinois constitution was enacted. Therefore, by restricting the right to a jury trial in state courts, the Illinois does not withhold a citizen’s federal right to a jury.

Although, conferring jurisdiction over an issue to a chancery court is not necessarily excluding trial by jury. For example, court at equity may, at its discretion, direct issues of fact to a jury to decide. Where the court submits issues of fact to a jury, the court continues to determine issues of law. Furthermore, the jury’s conclusions of fact are only advisory upon the court. The equity court is not bound by the jury’s conclusions of fact, but may weigh the jury’s considerations in her or her own analysis of the factual issues in a case. Therefore, even if a foreclosure court issues factual questions to a jury, there is no guarantee that the court will come to the same conclusions.

In order to confer a right to a jury, a foreclosure litigant must either bring claims at common law where a right to a jury trial is guaranteed or under a statute that includes a right to a

³ Ill. Const. 1970, art. VI, § 9.

⁴ Ill. Const. 1970, art. I, § 13.

jury trial. A litigant has an absolute right to send a cause of action under common law that has yet to be codified under Illinois law, to a jury. Examples include include fraud, waiver, and estoppel, all of which are defenses to foreclosure. Where a party poses such defenses, the foreclosure action becomes one of multiple issues, which the court may hear separately at its discretion.

It is possible for a chancery court to hear multiple issues in one action, divided into claims at law, and claims in equity.⁵ In those cases, it is best for the court to decide legal claims before equitable claims.⁶ Although, the court must decide equitable claims prior to legal claims where the factual issues overlap one another and the factual findings involved in the equitable claims may have a collateral estoppel effect on the legal claims.⁷ Otherwise, where a court of equity hears a legal claim, the jury's conclusions on the factual issues involved in those claims extend to the equitable claims, such that the court may consider the jury's factual conclusions in deciding the equitable claims. Again, the factual conclusions are only advisory upon the equity court in ruling on the equitable claims.

Overall, if a foreclosure defendant wishes to have a jury hear its case it must carefully consider its defenses under statutes that afford the option of a jury trial, or those defenses under common law, and do so very early on.⁸ This is because a party who seeks to make a jury demand

⁵ 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).

⁶ 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.

⁷ If the actions are properly severable, the issues at law should be tried before a jury if one is properly demanded and by the court alone where a jury is not properly made. Il. Sup. Ct. R. 232.

⁸ "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

must do so prior to filing in its complaint or within the time for answering.⁹ If a party fails to make a jury demand within the time allowed, it loses the option to do so.¹⁰ Therefore, a party must make the request and pay a jury demand fee regardless of whether it is set on sending a question to a jury.

If a foreclosure defendant is considering a jury trial, it is advantageous for him or her to hire an attorney at the very onset of the case. The attorney can thoroughly consider a party's legal defenses or claims, whether those claims afford the litigant a jury trial, then take the necessary steps to make a timely jury demand.

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).

⁹ *Id.*

¹⁰ *See id.*