

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 98- 9074

FINAL APPROVAL OF CERTAIN REVISIONS TO THE TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

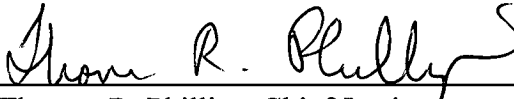
1. Rules 735 and 736 of the Rules of Civil Procedure, promulgated by Order of January 27, 1998, in Misc. Docket No. 98-9011, pursuant to Article XVI, Section 50(r) of the Texas Constitution, for expedited foreclosure proceedings related to the foreclosure of liens under Article XVI, Section 50(a)(6) of the Texas Constitution, these rules having been unanimously recommended by a task force appointed by the Court to advise regarding the promulgation of such rules, and now changed after public comments, are as follows.

2. The sections of Part VII of the Rules of Civil Procedure are renumbered as follows.

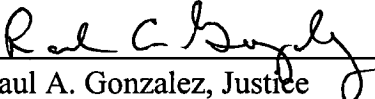
3. These rules take effect May 15, 1998.

4. The Clerk is directed to file a copy of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

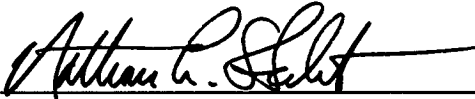
SIGNED AND ENTERED this 15th day of May, 1998.



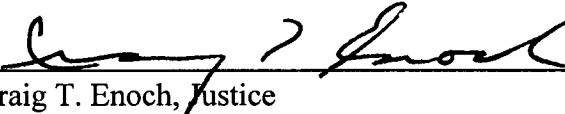
Thomas R. Phillips, Chief Justice



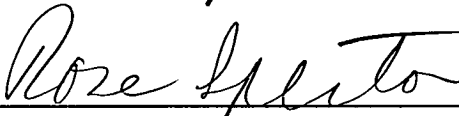
Raul A. Gonzalez, Justice



Nathan L. Hecht, Justice



Craig T. Enoch, Justice



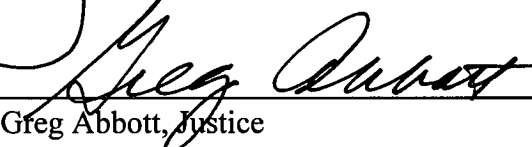
Rose Spector, Justice



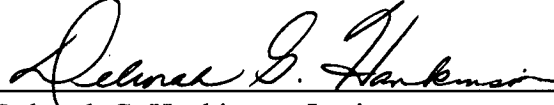
Priscilla R. Owen, Justice



James A. Baker, Justice



Greg Abbott, Justice



Deborah G. Hankinson, Justice

PART VII. RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 1. PROCEDURES RELATED TO HOME EQUITY LOAN FORECLOSURE

RULE 735. PROCEDURES

A party seeking to foreclose a lien created under TEX. CONST. art. XVI, § 50(a)(6) may file: (1) a suit seeking judicial foreclosure; (2) a suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and TEX. PROP. CODE § 51.002; or (3) an application under Rule 736 for an order allowing foreclosure.

RULE 736. EXPEDITED FORECLOSURE PROCEEDING

1. Application. A party filing an application under Rule 736 seeking a court order allowing the foreclosure of a lien under TEX. CONST. art. XVI, § 50(a)(6)(D) shall initiate such in rem proceeding by filing a verified application in the district court in any county where all or any part of the real property encumbered by the lien sought to be foreclosed (the "property") is located. The application shall:

- (A) be styled: "In re: Order for Foreclosure Concerning _____ (*Name of person to receive notice of foreclosure*) _____ and _____ (*Property Mailing Address*) _____";
- (B) identify by name the party who, according to the records of the holder of the debt, is obligated to pay the debt secured by the property;
- (C) identify the property by mailing address and legal description;
- (D) identify the security instrument encumbering the property by reference to volume and page, clerk's file number or other identifying recording information found in the official real property records of the county where all or any part of the property is located or attach a legible copy of the security instrument;
- (E) allege that:
 - (1) a debt exists;

- (2) the debt is secured by a lien created under TEX. CONST. art. XVI, § 50(a)(6) that encumbers the property;
 - (3) a default under the security instrument exists;
 - (4) the applicant has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, TEX. PROP. CODE § 51.002, and applicable law;
- (F) describe facts which establish the existence of a default under the security instrument; and
- (G) state that the applicant seeks a court order required by TEX. CONST. art. XVI, § 50(a)(6)(D) to sell the property under the security instrument and TEX. PROP. CODE § 51.002.

The verified application and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

2. Notice.

- (A) *Service.* Every application filed with the clerk of the court shall be served by the party filing the application. Service of the application and notice shall be by delivery of a copy to the party to be served by certified and first class mail addressed to each party who, according to the records of the holder of the debt, is obligated to pay the debt. Service shall be complete upon the deposit of the application and notice, enclosed in a postage prepaid and properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. If the respondent is represented by an attorney and the applicant's attorney has knowledge of the name and address of the attorney, an additional copy of the application and notice shall be sent to respondent's attorney.
- (B) *Certificate of Service.* The applicant or applicant's attorney shall certify to the court compliance with the service requirements of Rule 736. The applicant shall file a copy of the notice and the certificate of service with the clerk of the court. The certificate of service shall be prima facie evidence of the fact of service.

(C) *Form of Notice.* The notice shall be sufficient if it is in substantially the following form in at least ten point type:

=====
Cause No. _____

In re: Order for Foreclosure
Concerning
_____*(1)
and
_____*(2)

In the District Court
Of _____ County
____ Judicial District

NOTICE TO _____*(3)

An application has been filed by _____, as Applicant, on _____*(4),
in a proceeding described as:

"In re: Order for Foreclosure Concerning _____*(1) and
_____*(2).

The attached application alleges that you, the Respondent, are in default under a security instrument creating a lien on your homestead under TEX. CONST. art. XVI, § 50(a)(6). This application is now pending in this court.

Applicant seeks a court order, as required by TEX. CONST. art. XVI, § 50(a)(6)(D), to allow it to sell at public auction the property described in the attached application under the security instrument and TEX. PROP. CODE § 51.002.

You may employ an attorney. If you or your attorney do not file a written response with the clerk of the court at _____*(5) on or before 10:00 a.m. on _____*(6) an order authorizing a foreclosure sale may be signed. If the court grants the application, the foreclosure sale will be conducted under the security instrument and TEX. PROP. CODE § 51.002.

You may file a response setting out as many matters, whether of law or fact, as you consider may be necessary and pertinent to contest the application. If a response is filed, the court will hold a hearing at the request of the applicant or respondent.

In your response to this application, you must provide your mailing address. In addition, you must send a copy of your response to _____*(7)_____.

ISSUED

By _____
(Applicant or Applicant's Attorney)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this notice with a copy of the application was sent certified and regular mail to _____*(3)_____ on the ___ day of _____, 19__.

(signature)
(Applicant or Attorney for Applicant)

- | | |
|---|---------------------------------|
| * (1) name of respondent | * (4) date application filed |
| * (2) mailing address of property | * (5) address of clerk of court |
| * (3) name and address of respondent | * (6) response due date |
| * (7) name and address of applicant or applicant's attorney | |

(D) The applicant shall state in the notice the date the response is due in accordance with Rule 736(3).

(E) The application and notice may be accompanied by any other notice required by state or federal law.

3. Response Due Date. A response is due on or before 10:00 a.m. on the first Monday after the expiration of thirty-eight (38) days after the date of mailing of the application and notice to respondent, exclusive of the date of mailing, as set forth in the certificate of service.

4. Response.

- (A) The respondent may file a response setting out as many matters, whether of law or fact, as respondent deems necessary or pertinent to contest the application. Such response and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.
- (B) The response shall state the respondent's mailing address.
- (C) The response shall be filed with the clerk of the court. The respondent shall also send a copy of the response to the applicant or the applicant's attorney at the address set out in the notice.

5. Default. At any time after a response is due, the court shall grant the application without further notice or hearing if:

- (A) the application complies with Rule 736(1);
- (B) the respondent has not previously filed a response; and
- (C) a copy of the notice and the certificate of service shall have been on file with the clerk of the court for at least ten days exclusive of the date of filing.

6. Hearing When Response Filed. On the filing of a response, the application shall be promptly heard after reasonable notice to the applicant and the respondent. No discovery of any kind shall be permitted in a proceeding under Rule 736. Unless the parties agree to an extension of time, the issue shall be determined by the court not later than ten business days after a request for hearing by either party. At the hearing, the applicant shall have the burden to prove by affidavits on file or evidence presented the grounds for the granting of the order sought in the application.

7. Only Issue.

- (A) The only issue to be determined under Rule 736 shall be the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and TEX. PROP. CODE § 51.002. No order or determination of fact or law under Rule 736 shall be res judicata or constitute collateral estoppel or estoppel by judgment in any other proceeding or suit.

- (B) The granting of an application under these rules shall be without prejudice to the right of the respondent to seek relief at law or in equity in any court of competent jurisdiction. The denial of an application under these rules shall be without prejudice to the right of the applicant to re-file the application or seek other relief at law or in equity in any court of competent jurisdiction.

8. Order to Proceed with Notice of Sale and Sale.

- (A) *Grant or denial.* The court shall grant the application if the court finds applicant has proved the elements of Rule 736(1)(E). Otherwise, the court shall deny the application. The granting or denial of the application is not an appealable order.
- (B) *Form of order.* The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security instrument and TEX. PROP. CODE § 51.002, provide that a copy of the order shall be sent to respondent with the notice of sale, provide that applicant may communicate with the respondent and all third parties reasonably necessary to conduct the foreclosure sale, and, if respondent is represented by counsel, direct that notice of the foreclosure sale date shall also be mailed to counsel by certified mail.
- (C) *Filing of order.* The applicant is to file a certified copy of the order in the real property records of the county where the property is located within ten business days of the entry of the order. Failure to timely record the order shall not affect the validity of the foreclosure or defeat the presumption of TEX. CONST. art. XVI, § 50(i).

9. Abatement and Dismissal. A proceeding under Rule 736 is automatically abated if, before the signing of the order, notice is filed with the clerk of the court in which the application is pending that respondent has filed a petition contesting the right to foreclose in a district court in the county where the application is pending. A proceeding that has been abated shall be dismissed.

SECTION 2. BILL OF DISCOVERY

[No change to Rule 737.]

SECTION 3. FORCIBLE ENTRY AND DETAINER

[No change to Rules 738-755.]

SECTION 4. PARTITION OF REAL ESTATE

[No change to Rules 756-771.]

SECTION 5. PARTITION OF PERSONAL PROPERTY

[No change to Rules 772-775.]

SECTION 6. PARTITION: MISCELLANEOUS PROVISIONS

[No change to Rules 776-778.]

SECTION 7. QUO WARRANTO

[No change to Rules 779-782.]

SECTION 8. TRESPASS TO TRY TITLE

[No change to Rules 783-809.]

SECTION 9. SUITS AGAINST NON-RESIDENTS

[No change to Rules 810-813.]



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

TEL: (512) 463-1312

FAX: (512) 463-1365

CLERK
JOHN T. ADAMS

JUSTICES
RAUL A. GONZALEZ
NATHAN L. HECHT
CRAIG T. ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
DEBORAH G. HANKINSON

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

May 20, 1998

Mr. Antonio Alvarado
Executive Director
State Bar of Texas
1414 Colorado Street
Austin, Texas 78701

RE: Order of the Supreme Court of Texas of May 15, 1998.

The enclosed order granting final approval of certain revisions to the Texas Rules of Civil Procedure is forwarded for publishing in the next available issue of the *Texas Bar Journal*.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc: Ms. Kelley King



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

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GREG ABBOTT
DEBORAH G. HANKINSON

May 20, 1998

Office of the Secretary
of State
Statutory Filings Division
1019 Brazos Street
Austin, Texas 78701

RE: Order of the Supreme Court of Texas of May 15, 1998.

The enclosed order granting final approval of certain revisions to the Texas Rules of Civil Procedure is forwarded for filing as appropriate.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.