



Banks Attempting to Prevent Debtors from Defending Foreclosure

<https://melandbudwick.com/2016/04/05/banks-attempting-to-prevent-debtors-from-defending-foreclosure/>

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In a relatively recent trend, mortgage lenders are attempting to reopen long-closed bankruptcy cases to prevent debtors who have already received discharge from defending against foreclosure proceedings in state court. Bank of America has attempted this maneuver against Genny Rodriguez. Bank of America appealed Judge A. Jay Cristol's order denying its motion to reopen Ms. Rodriguez's bankruptcy case.

Under section 521 of the Bankruptcy Code, a debtor has 30 days to reach a reaffirmation agreement with its mortgage lender after the debtor declares her intent to reaffirm the debt secured by the mortgage. The other options under section 521 are to surrender the property or redeem the debt by repaying the outstanding balance in full. In cases where no reaffirmation agreement is reached during those 30 days, but the bankruptcy case runs its full course through entry of a final discharge, lenders are attempting to reopen cases to receive an injunction prohibiting debtors from defending foreclosure actions. Many times, this strategy is employed when the lenders face serious challenges in their foreclosure cases years after the debtor's discharge.

Lenders face two serious hurdles in achieving this goal: (1) bankruptcy courts have a great deal of discretion when it comes to reopening cases; and, (2) prohibiting a debtor from defending against any court proceeding implicates the fundamental right of due process guaranteed by both the United States and Florida Constitutions. We represented Ms. Rodriguez in her appeal to the District Court, supporting her right to raise defenses and protect her due process rights in the foreclosure action. A decision is still pending.