

Senate Bill 499

Sponsored by COMMITTEE ON RULES (at the request of Oregon Law Commission)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Changes terminology for motion for summary judgment to motion for summary determination.

A BILL FOR AN ACT

1
2 Relating to determination of claims in civil actions; amending ORS 86.742 and ORCP 47 A, 47 B, 47
3 C, 47 D, 47 E, 47 F and 47 H.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORCP 47 A is amended to read:

6 A For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to
7 obtain a declaratory judgment may, at any time after the expiration of 20 days from the com-
8 mencement of the action or after service of a motion for summary *[judgment]* **determination** by the
9 adverse party, move, with or without supporting affidavits or declarations, for a summary
10 *[judgment]* **determination** in that party's favor upon all or any part thereof.

11 **SECTION 2.** ORCP 47 B is amended to read:

12 B For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted
13 or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits
14 or declarations, for a summary *[judgment]* **determination** in that party's favor as to all or any part
15 thereof.

16 **SECTION 3.** ORCP 47 C is amended to read:

17 C Motion and proceedings thereon. The motion and all supporting documents shall be served
18 and filed at least 60 days before the date set for trial. The adverse party shall have 20 days in which
19 to serve and file opposing affidavits or declarations and supporting documents. The moving party
20 shall have five days to reply. The court shall have discretion to modify these stated times. The court
21 shall *[enter judgment for the moving party]* **grant the motion** if the pleadings, depositions, affidavits,
22 declarations and admissions on file show that there is no genuine issue as to any material fact and
23 that the moving party is entitled to *[a judgment]* **prevail** as a matter of law. No genuine issue as to
24 a material fact exists if, based upon the record before the court viewed in a manner most favorable
25 to the adverse party, no objectively reasonable juror could return a verdict for the adverse party
26 on the matter that is the subject of the motion for summary *[judgment]* **determination**. The adverse
27 party has the burden of producing evidence on any issue raised in the motion as to which the ad-
28 verse party would have the burden of persuasion at trial. The adverse party may satisfy the burden
29 of producing evidence with an affidavit or a declaration under section E of this rule. A summary
30 *[judgment]* **determination**, interlocutory in character, may be rendered on the issue of liability
31 alone although there is a genuine issue as to the amount of damages.

32 **SECTION 4.** ORCP 47 D is amended to read:

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 D Form of affidavits and declarations; defense required. Except as provided by section E of this
 2 rule, supporting and opposing affidavits and declarations shall be made on personal knowledge, shall
 3 set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant
 4 or declarant is competent to testify to the matters stated therein. Sworn or certified copies of all
 5 papers or parts thereof referred to in an affidavit or a declaration shall be attached thereto or
 6 served therewith. The court may permit affidavits or declarations to be supplemented or opposed
 7 by depositions or further affidavits or declarations. When a motion for summary *[judgment]* **deter-**
 8 **mination** is made and supported as provided in this rule an adverse party may not rest upon the
 9 mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits,
 10 declarations or as otherwise provided in this section, must set forth specific facts showing that there
 11 is a genuine issue as to any material fact for trial. If the adverse party does not so respond, *[sum-*
 12 *mary judgment, if appropriate, shall be entered against such party]* **the court shall grant the motion**
 13 **if appropriate.**

14 **SECTION 5.** ORCP 47 E is amended to read:

15 E Affidavit or declaration of attorney when expert opinion required. Motions under this rule are
 16 not designed to be used as discovery devices to obtain the names of potential expert witnesses or
 17 to obtain their facts or opinions. If a party, in opposing a motion for summary *[judgment]* **determi-**
 18 **nation**, is required to provide the opinion of an expert to establish a genuine issue of material fact,
 19 an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has
 20 been retained who is available and willing to testify to admissible facts or opinions creating a
 21 question of fact, will be deemed sufficient to controvert the allegations of the moving party and an
 22 adequate basis for the court to deny the motion. The affidavit or declaration shall be made in good
 23 faith based on admissible facts or opinions obtained from a qualified expert who has actually been
 24 retained by the attorney who is available and willing to testify and who has actually rendered an
 25 opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis
 26 for denying the motion for summary *[judgment]* **determination.**

27 **SECTION 6.** ORCP 47 F is amended to read:

28 F When affidavits or declarations are unavailable. Should it appear from the affidavits or dec-
 29 larations of a party opposing the motion that such party cannot, for reasons stated, present by af-
 30 fidavit or declaration facts essential to justify the opposition of that party, the court may *[refuse the*
 31 *application for judgment,]* **deny the motion** or may order a continuance to permit affidavits or dec-
 32 larations to be obtained or depositions to be taken or discovery to be had, or may make such other
 33 order as is just.

34 **SECTION 7.** ORCP 47 H is amended to read:

35 H Multiple parties or claims; limited judgment. If the court grants **a motion for** summary
 36 *[judgment]* **determination** for less than all parties and claims in an action, a limited judgment may
 37 be entered if the court makes the determination required by Rule 67 B.

38 **SECTION 8.** ORS 86.742 is amended to read:

39 86.742. (1) If the trustee fails to give notice of the sale to any person entitled to notice under
 40 ORS 86.740 (1)(c), and such person did not have actual notice of the sale at least 25 days prior to
 41 the date the trustee conducted the sale, such omitted person shall have the same rights possessed
 42 by the holder of a junior lien or interest who was omitted as a party defendant in a judicial fore-
 43 closure proceeding, and the purchaser at the trustee's sale or the purchaser's heirs, assigns or
 44 transferees, shall have the same rights possessed by a purchaser at a sheriff's sale following a ju-
 45 dicial foreclosure.

1 (2) The omitted person may also commence an action against the trustee in the circuit court in
2 the county where the real property is located. In an action against the trustee, the omitted person
3 shall be entitled to damages upon proof that:

4 (a) The trustee did not give notice of the sale to the omitted person in the manner required by
5 ORS 86.740 (1)(c) and 86.750;

6 (b) A search of the record under the name of the grantor as it appears on the trust deed, or the
7 name of the grantor's successor in interest, would have revealed the omitted person's interest;

8 (c) The omitted person could and would have cured the default under ORS 86.753; and

9 (d) The omitted person sustained actual damages as a result of such person's loss of the oppor-
10 tunity to cure the default under ORS 86.753 (1).

11 (3) In an action against the trustee under subsection (2) of this section, any defendant or third
12 party defendant may move for dismissal on the ground that the omitted person would not or could
13 not have cured the default and reinstated the trust deed if the omitted person had received the no-
14 tice required by ORS 86.740 (1)(c). The court shall hold a hearing on such motion prior to any
15 hearing on any motion for summary *[judgment]* **determination**, and prior to trial of the action. The
16 court shall deny the motion only if the omitted person produces affidavits or other evidence suffi-
17 cient for a reasonable jury to find, applying a standard of clear and convincing evidence, that the
18 omitted person had the financial ability to cure the default under ORS 86.753 prior to the date of
19 the trustee's sale, and that the omitted person would have done so had the omitted person received
20 the notice required by ORS 86.740 (1)(c). If the court grants the motion to dismiss it shall award
21 attorney fees pursuant to subsection (5) of this section.

22 (4) In any action against the trustee or any other party under this section the omitted person
23 shall plead that the omitted person did not have actual knowledge of the sale at least 25 days prior
24 to the date the trustee conducted the sale, but thereafter the defendant shall have the burden of
25 proving that the omitted person did have such notice.

26 (5) In all suits brought under this section, the applicable court may, upon entering judgment,
27 allow to the prevailing party as a part of the costs a reasonable amount for attorney fees at trial
28 and on appeal.

29 (6) The remedies described in subsections (1) to (5) of this section shall be the sole remedies
30 available to a person entitled to notice of foreclosure by advertisement and sale under ORS 86.740
31 (1)(c), who failed to receive such notice. Such a person's failure to redeem or to commence an action
32 against the trustee within five years of the date of a trustee's sale under ORS 86.755 shall bar any
33 action under this section or any other applicable law.

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