

Opinion issued May 26, 2011



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-10-00287-CV

KAVIN JOHNSON, Appellant

V.

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, Appellee

**On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2009-65907**

MEMORANDUM OPINION

Appellant Kavin Johnson filed this restricted appeal complaining of the trial court's granting Appellee Residential Funding Real Estate Holdings, LLC's "Application for Expedited Foreclosure Proceeding Pursuant to Rule 736 of the

Texas Rules of Civil Procedure” (“Rule 736 Application”). We dismiss the appeal for lack of jurisdiction.

Residential Funding is the noteholder of a Texas Home Equity Security Debt secured by real property owned by Johnson. Alleging that Johnson is in default on that note, Residential Funding filed its Rule 736 Application on October 13, 2009 requesting that the court “enter an order allowing Applicant to proceed with foreclosure and sell the Subject Property.” On December 23, 2009, Johnson filed an answer containing a general denial. On December 30, 2009, the trial court signed an “Order to Proceed with Notice of Foreclosure Sale and Foreclosure Sale” authorizing Residential Funding to proceed with foreclosure.

Johnson argues that, under Rule 736(5), it was improper for the court to render a default judgment because he had an answer on file. TEX. R. CIV. P. 736(5)(B) (“Default. At any time after a response is due, the court shall grant the application without further notice or hearing if . . . the respondent has not previously filed a response”). In response, Residential Funding seeks dismissal of Johnson’s appeal because Rule 736(8)(A) provides that “the granting or denial of [a Rule 736] application is not an appealable order.” In his reply brief, Johnson does not disagree with Residential Funding’s interpretation of Rule 736(8)(A), but argues that because he is not appealing the merits of the order, but

instead the trial court's alleged failure to follow proper procedures, we should decline to dismiss the appeal.

Johnson cites no authority in support of his argument, and we have located none. Because he appeals a Rule 736 order, we have no discretion to do anything but dismiss the appeal. *E.g.*, *Grant-Brooks v. FV-1, Inc.*, 176 S.W.3d 933, 933 (Tex. App.—Dallas 2005, pet. denied) (“Because the [Rule 736] order appellant seeks to appeal is not appealable, we lack jurisdiction over this appeal.”); *Kelso v. Cit Group/Consumer Fin. Inc.*, No. 01-05-00671-CV, 2005 WL 3118182, at *1 (Tex. App.—Houston [1st Dist.] Nov. 23, 2005, no pet.) (mem. op.) (dismissing, for want of appellate jurisdiction, appeal of Rule 736 order complaining of trial court's granting application almost a month before the date on the court's notice of submission); *Barriere v. Am. Serv. Mortg. Co.*, No. 14-10-00617-CV, 2010 WL 3504755, at *1 (Tex. App.—Houston [14th Dist.] Sept. 9, 2010, no pet.) (mem. op.) (dismissing appeal of Rule 736 order for lack of jurisdiction).

We accordingly dismiss the appeal for lack of jurisdiction.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.