

# REAL ESTATE Connection

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## *A Lawyer's Perspective*

# How foreclosure works

BY DENNIS SCARDILLI

As I wrote last week's article on Foreclosure Mediation, it occurred to me that a more thorough understanding of foreclosure could be obtained from an article on the process itself. So, this week we will review the foreclosure process, with greatly appreciated factual input from the Director of the New Jersey Office of Foreclosure, Kevin Woolfe, Esq. To his factual input, I have added my own commentary.

In New Jersey, foreclosure is done through the courts because the borrower gives the lender a mortgage on the property at closing. In some other states, the lender receives a deed of trust at closing and a non-judicial foreclosure can take place. Such non-judicial foreclosures are permitted under federal law in all states for properties insured, or subsidized, by HUD. Here, we will only discuss the New Jersey judicial foreclosure process.

All foreclosure complaints in New Jersey must be filed with the Clerk of the Superior Court in Trenton. The Clerk of the Superior Court then transmits the complaint to the Office of Foreclosure in the Civil Practice Division of the Administrative Office of the Courts. The Office of Foreclosure reviews the documents filed, retains and administers uncontested cases. Cases involving judicial discretion are considered contested cases and are referred to the Chancery Court in the county of venue, where the foreclosed property is located.

Upon receiving a foreclosure complaint, it is my personal belief that a borrower should obtain legal assistance immediately because the foreclosure process is replete with technical requirements. Among these are both the substantive and procedural technicalities of an answer to the complaint, including the requirement that the answer must be filed within 35 days of service.

The answer requires specific information that addresses the complaint and sets forth any reasons the borrower is, or is not, responsible

for losses suffered by the lender-plaintiff. Failure to file an answer acts as an admission of the assertions in the complaint.

An original answer from a borrower-defendant is filed with the court and a copy is served on the lender's attorney. An answer is best filed by a knowledgeable attorney. If that borrower-defendant is a corporation, LLC or a partnership, the answer must be filed by an attorney. Borrowers must recognize that court staff is prohibited from assisting in the preparation of an answer.

Most foreclosure actions are uncontested, meaning that no answer was filed, and/or that the answer did not contest the lender's right to foreclose. A contested answer challenges the lender's right to foreclose. As noted above, a contested action is referred to the county Chancery Court, because an answer requires judicial discretion. If the court subsequently determines that the complaint was not properly contested, the case is referred back to the Office of Foreclosure.

The foreclosure proceeding is resolved, as applicable, by the Office of Foreclosure, or a Chancery Court judge, either by issuance of a judgment or dismissal of the complaint for lack of prosecution. Typically issuance of a judgment is accompanied by a writ of execution authorizing the county sheriff to sell the property in foreclosure in order to reimburse the lender the amount of the debt due, or to award title to the lender. The writ of execution also ends the borrower's right to retain title to the property by paying off the mortgage and any applicable fees.

It typically takes a minimum of four months for a lender to obtain a foreclosure judgment. Then, the sheriff must advertise the property once a week for four consecutive weeks in a local newspaper. After that time, a sheriff's sale of the property can take place.

The Chancery Court and the Office of Foreclosure are also empowered to issue writs

of possession which provide the county sheriff with the legal authority to remove an occupant from a foreclosed property. The sheriff sale purchaser must provide the sheriff with a copy of the sheriff sale deed, a proposed writ and names of those to be dispossessed, along with applicability of the anti-eviction statute.

A legitimate tenant has the right to remain in a foreclosed property. When a lender does not know the names of a tenant, they are referred to as Tenant No. 1, etc, in the complaint. When a lender doesn't know that there are tenants, they may not learn of the foreclosure until the sheriff shows up with the writ of possession.

A lender may sue on the mortgage note to collect any debt not recovered by the sale of the property. This can result in a deficiency judgment. For residential mortgage foreclosures in New Jersey, that deficiency judgment is limited to the difference between the fair market value of the property and the total amount due, including principal, interest, penalties and fees.

When there is money left over after the foreclosing lender is paid, that "surplus money" goes into a trust fund in the Superior Court Clerk's office. The surplus money can be distributed among other lien holders or given back to the borrower, if there are any funds remaining after all liens are satisfied.

Next week, we'll look at foreclosure defenses. In the meantime, please accept my wishes for a Merry Christmas, Happy Hanukah, joyous Kwanza, or how ever you will celebrate this holiday season.

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*Dennis Scardilli practices as an attorney-at-law in the Atlantic City area. The information in this article has been provided only for informational and educational purposes and is not intended to provide legal advice. For legal advice on this, or any other, topic contact a qualified attorney.*