

REAL ESTATE Connection

IT'S ALL ABOUT HAVING THE RIGHT CONNECTIONS

FRIDAY, DECEMBER 26, 2008

THE PRESS OF ATLANTIC CITY



A Lawyer's Perspective

Foreclosure bottom line

BY DENNIS SCARDILLI

Let's wrap up this series on foreclosure by talking about the bottom line of the foreclosure crisis. To do that, I spoke to two attorneys who grew up in South Jersey and are now taking a major role in representing the opposite sides in the mortgage foreclosures.

Kristina Murtha of Goldbeck McCafferty & McKeever of Philadelphia is a member of the largest law firm representing lenders in Pennsylvania and one of the largest in New Jersey. She grew up in Linwood and her family owns a bicycle shop in Somers Point. Peggy Jurow is a Senior Attorney with Legal Services of New Jersey and she directs their Anti-Predatory Lending Project. Peggy grew up in Runnemede and her father worked at the Salem Nuclear Plant for many years. Both ladies are New Jersey Civil Courts foreclosure mediator trainers. Both have a high degree of respect for each other and are highly respected by their colleagues for their knowledge of foreclosure issues.

Ms. Murtha points out that foreclosure today does not involve the traditional "bring down the hammer" approach to the process. Rather, the current economic climate calls for an individualized approach to each case based on the borrower's financial circumstances and the lender's representative's ability to fashion a solution that works for both sides. Sometimes that may mean a mortgage modification and the borrower stays in the home. Sometimes the borrower must be allowed to make a "graceful exit" and loses the property.

These borrower and lender attorneys agreed that both sides should do everything possible to avert a foreclosure. Both attorneys also agree that a borrower's first step in addressing their objective is to face up to the problem.

The court system's greatest difficulty is getting borrowers to respond. A recent analysis of foreclosure complaints has indicated that a significant majority of such complaints are ignored. A significant majority of homes go to sheriff sale without the borrower responding to the numerous notices required by law. Borrowers should not wait for a foreclosure

notice to address the problem. They should contact the loan servicer as soon as they start to fall behind in payments and request to speak to the lender's foreclosure mitigation staff.

Where these two experts respectfully differ is in their approach to a borrower's potential defenses. Ms. Jurow believes that if there is any appearance of predatory lending, a borrower should seek legal counsel and pursue such claims, as part of the mortgage modification process. Ms. Murtha takes the approach that the borrower and lender should jointly focus on their mutual objective of avoiding foreclosure and collaboratively develop a mortgage modification, if that is possible.

In any foreclosure negotiations, it is likely that a "pro se" (representing oneself) borrower will be up against a highly skilled attorney representing a major lender. In such instances Ms. Jurow believes that foreclosure defenses and predatory lending issues need to be examined carefully.

The Appellate Division of the Superior Court has defined predatory lending, in part, as when: "...the terms of a loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan."

If a borrower has any belief that they were the victim of predatory lending, then they should contact an attorney, and if they do not have the resources to hire an attorney, then they should contact Legal Services at 888-989-5277. This is also the number for the mediation program and for referral to an approved housing counselor. A borrower ineligible for free legal services may be provided with contact information for attorneys who have been trained to spot predatory lending and who accept private clients.

In addition to predatory lending there may be other defenses available to a borrower in a foreclosure action. These may include whether the foreclosure conforms to relevant state statutes such as the Fair Foreclosure, Consumer Fraud and Home Ownership Security Acts. There may also be defenses

available under the federal Truth in Lending, Fair Debt Collection Practices and Equal Credit Opportunity Acts.

Most foreclosures do not involve an attorney for the borrower but almost every lender is represented by an attorney. While appearing to initially benefit the lender, a subsequent attorney for the borrower may argue that legitimate defenses were waived by an unknowing borrower. Both Ms. Murtha and Ms. Jurow agree that a waiver must be done knowingly, must exactly state the claims waived and that borrowers should seek legal representation if they have any questions or concerns about a requested waiver.

In foreclosure mediation training, the attorney-mediators were reminded that we cannot function as an advocate for a pro se borrower. This is why it is so important for a borrower to seek legal advice as early as possible. The best settlements are achieved when both sides know their strengths and their weaknesses.

We should all be grateful that this important issue has the support of the entire legal system in New Jersey including Supreme Court Chief Justice Stuart Rabner, the Chancery Judges throughout the state, the Civil Courts Administrative Office and the State and County Bar Associations. We should also be grateful that principled and knowledgeable attorneys like Ms. Murtha and Ms. Jurow have set a high standard for us all to follow.

That's it, for now, on foreclosure. We'll talk more about 2009 next week. Meanwhile, let's all pray that our work contributes to economic and individual healing in the New Year and thank God for the blessings we received in 2008.

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.