



THE FORECLOSURE PROCESS



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Foreclosure in the State of Florida requires a judicial proceeding to foreclose a lien on real property and establish the amount of indebtedness due from the mortgagor. Below is a summary of the foreclosure process, which typically begins when you miss 3-4 mortgage payments:

Complaint

A preliminary title report is pulled by the foreclosing lender's attorney, and discloses all parties having a record interest in the subject property and any title defect that may exist. The Complaint is drafted, naming all parties with an interest in the property as party defendant. The complaint sets forth the plaintiff's claim for relief of foreclosure and must include the mortgagor and/or owner of the property as well as all other parties having junior liens on the real property. The Complaint is filed in the county in which the property is located and a summons issued to each defendant. After the Complaint is filed, a Lis Pendens is recorded against the property. The Lis Pendens serves as constructive notice to the world that a foreclosure has been filed and that any interest acquired after the date of recording is expressly subject to the foreclosure action. Any interest in the property arising or recorded after the filing of the notice of lis pendens is cut-off by operation of law. These individuals need not be made parties to the action to have their claim foreclosed.

Service of Process

Service of Process may be perfected in person by the sheriff or special process server. If service is not perfected on any party defendant after due diligence, service may be obtained by publication. The Court does not obtain personal jurisdiction over any defendant served by publication. In addition to publication, an attorney ad litem is appointed to represent the interest of any absent defendant. This may cause some delays in the proceedings, because this attorney ad litem must be served. Diligent search for a defendant includes a skip trace, a credit report check and a military check. Service by publication is acceptable only after all other efforts are exhausted. Publication may also cause a slight delay, because notice of the foreclosure action must be published twice over a period of not less than 20 days.

Judgment

Once the defendant(s) have been served, they have 20 days to file an answer and defenses or counterclaims. If the defendants fail to file responsive pleadings within the 20 days, the Court will enter an Order of Default. This Order of Default admits the plaintiff's case and allows summary proceedings to continue. The attorney submits a judgment for foreclosure, proof in the form of all original mortgage documents and an affidavit of indebtedness. In many jurisdictions, the default judgment may be submitted by mail without a formal hearing. In those cases in which the defendants have filed responsive pleadings, the matter is scheduled for hearing on the plaintiff's motion for summary judgment. In the majority of contested cases, judgment will be entered in summary proceedings based on proofs by affidavit. Only in rare instances will a full trial on the merits be necessary.

Sale

After entry of the Final Judgment of Foreclosure, a clerk's sale is scheduled. In most cases, the sale is scheduled for 30 – 45 days from entry of judgment. It is possible to ask the judge for put the sale date further out (120 days) if the borrower is attempting a short sale. Notice of the sale must be published for two consecutive weeks in a newspaper of general circulation in the county in which the property is located. The Clerk of the Circuit Court conducts the sale. The attorney for the plaintiff submits a bid on behalf of the lender in the full amount of the judgment or in any lesser specified amount.

Redemption

Florida statutes provide that a mortgagor and the other defendants in a foreclosure proceeding have until the foreclosure sale is completed to redeem property by paying off the entire amount of the indebtedness. A foreclosure sale is complete when the Clerk announces the identity of the successful bidder and issues a Certificate of Sale. Typically, this happens the same day that the foreclosure sale is held. The Florida statutes further provide that there is a 10-day period following the foreclosure sale during which objections to the sale can be filed. If no objections are filed within this 10-day period, the Clerk will issue a Certificate of Title to the successful bidder.

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Conveyance and Final Title

Once the 10-day period after sale to object or redeem has expired, the county clerk will issue a Certificate of Title, vesting title in the plaintiff. If the property is to be conveyed to a governmental agency, a special warranty deed conveying from plaintiff to the Secretary of Housing and Urban Development or Secretary of Veterans Affairs is sent to the client prior to the sale.

After receipt of the deed and recording instructions, the deed is sent for recording. The client is advised on the day of recording, and a final policy of title insurance is ordered. Final title evidence and the recorded deed are forwarded to the client, HUD, VA or grantee upon receipt.

Reinstatement

The right of the mortgagor to reinstate is a contractual right governed by the terms of the note and mortgage. Where provided for, a mortgagor with a conventional loan may reinstate at any time before final judgment; reinstatement is generally permitted up to the time of foreclosure sale in the case of FHA and VA loans. Reinstatement must be tendered in the amount of all payments due to the lender, late charges, attorney fees, costs of suit and any other charges incidental to the default.

Eviction

A foreclosing mortgagee takes actual possession of the real property foreclosed by asking the Clerk to issue a Writ of Possession. The Writ of Possession is actually a remedy built directly into the foreclosure proceeding itself and it is not usually necessary to file an independent action for possession. The final judgment of foreclosure incorporates judicial authorization for a state court clerk to issue a Writ of Possession. This procedure eliminates the necessity of seeking a separate order for issuance of a Writ. If the property remains occupied after sale, eviction proceedings are initiated by mailing a demand letter to the occupants. If the property remains occupied after issuance of the Certificate of Title, a Writ of Possession is presented to the court clerk for issuance and then hand delivered to the sheriff's office for execution. The time between the issuance of the Writ and the actual eviction varies, depending on the volume in a particular county. The client must provide movers and securing personnel at the time of the eviction. The entire procedure is usually completed within one month.

A problem may arise when the sheriff finds the property occupied by someone who is not the person named on the Writ. Under Florida law, such a person may file a simple affidavit that prevents the sheriff from completing the eviction. This usually necessitates a further hearing, during which the judgment may extend the time allotted for the occupant to vacate the property. The judge has much discretion in a foreclosure action and unusual circumstances or conditions relating to an occupant, such as age, or infirmity, may also be considered in permitting the occupant additional time to move from the property.

Deficiency Judgments

A deficiency judgment may be obtained as part of a foreclosure proceeding, either in the Complaint or by a Motion for Deficiency Judgment filed after the sale. If successful, a deficiency judgment entered in the foreclosure action awards an equitable figure, as determined by the court, to the plaintiff and against the mortgagor. The amount of the deficiency is generally the amount of the total indebtedness as of the date of foreclosure sale, minus the value of the property. In order to obtain a deficiency judgment, three things are necessary. First, the plaintiff must include the deficiency as part of the complaint or make a separate motion for deficiency. Second, the defendants must be personally served. Finally, at the foreclosure sale, the plaintiff must bid an amount equal to or less than the value of the property.

If the Complaint contains a request for a deficiency and the mortgagor is personally served, the deficiency judgment may be entered without further notice and hearing. If the mortgagor files a response to the complaint, he may respond to the plaintiff's request for a deficiency. The plaintiff may then file a Motion for Deficiency Judgment after the foreclosure sale. This motion must be served within ten days after the Certificate of Title is issued.

If the deficiency is contested, the plaintiff must be able to provide evidence of the value of the property at the time of sale such as an appraisal before sale or the sale price if the plaintiff sells the property to a third party after sale. After the deficiency judgment is entered, it is recorded and may be executed upon by exercising all available collection remedies.