

RE28RC19: Foreclosures

Updated October 2019

I. CREDIT

- A. Credit Reports
- B. Credit Score
- C. Fair Credit Reporting Act (FCRA)
- D. Impact of foreclosure on personal credit

II. TYPES OF FINANCING INSTRUMENTS

- A. Mortgage
- B. Note - Promise to pay - IOU,
- C. Installment sales contract/Contract for Deed/Land Contract

III. THE MORTGAGE

A. Who gives the mortgage?

B. Types of mortgages

- 1. Non-Recourse and Full Recourse
- 2. Conventional
- 3. Conforming
- 4. Adjustable Rate Mortgage (ARM)
- 5. Option Arm
- 6. Interest Only Mortgage/100% Plus
- 7. Piggyback Mortgage
- 8. Fixed/Adjustable
- 9. Balloon Mortgage
- 10. Negative Amortization Loan

C. Mortgage covenants

- 1. Principal and interest
- 2. Taxes
- 3. Insurance
- 4. Not to commit waste or remove improvements

D. Mortgage provisions

- 1. Power of Sale - Clause in a mortgage or Deed of Trust granting the Lender or Trustee the right to sell the property upon default.
- 2. Acceleration Clause - Loan provision that gives the lender the right to declare the entire loan balance immediately due and payable upon violation of certain loan provisions (such as making payments on time).
- 3. Due on Sale Clause or Alienation or Non-Alienation clause

4. Mortgagee in Possession - Situation when lender takes possession and control of a property upon notice foreclosure of loan. Purpose is to prevent damage and collect any income produced.
5. Defeasance Clause
6. Assignment of Rents

F. Mortgage Payments - (*not law but typical practices*)

1. Payments generally due first of month
2. Interest generally paid in arrears
3. Generally a 15-day grace period
4. 3% late charge after 15-day grace period
5. Payment is considered delinquent until all monies are paid to date

G. Breach of Mortgage Covenants

1. *Day 30 - Could receive letters, calls official 30 day notice to cure*
2. *Day 60 - Bank sends 90 day notice to cure (MGL c 35A)*
Bank sends Right to Modify if it's a mortgage that qualifies.
3. *Day 90 - Homeowner makes the request for modification and can expect a response within 30 days. (We are now at day 120)*
4. *Day 150 - Bank refers the file to a foreclosure attorney*

H. Options include:

1. *loan modification*
2. *forbearance,*
3. *deed-in-Lieu of Foreclosure*
4. *Short Sale*
5. *pre-foreclosure sale*
6. *other.*

I. Things to consider:

1. PMI - If a residential loan contains PMI lender has obligation to attempt to work out a resolution.
2. Right of Redemption - No Statutory Right in Massachusetts
3. Equitable Right (until auctioneer's hammer comes down)
4. Tax consequences

J. What a Homeowner can Do!

1. *contact their lender*
2. *contact a Housing Counselor – Foreclosure Prevention*
3. *pay what is owed in full*
4. *request a modification or forbearance*
5. *request time for a short sale or pre foreclosure sale*
6. *request a Deed in Lieu of Foreclosure*

IV. FORECLOSURE PROCESS

A. Judicial vs. Non-Judicial foreclosures

1. Foreclosure by Power of Sale (Non-Judicial)
2. Foreclosure by Entry and Possession

B. 90-Day Advance Notice of Default – M.G.L. c. 244, § 35A (b)

1. *90-day cure period*
2. *Pinti v Emigrant Mortgage Company & . Thompson v JP Mortgage Chase*
3. Only once within 5 years
4. No extraordinary fees or charges
5. No attorney fees
6. Copy of notice to MA Division of Banks

C. Pre-Foreclosure – Non-Judicial Foreclosure

1. Complaint to Foreclose Mortgage

- a. Land Court or Superior Court - Most complaints are filed in Land Court. The complaint states the intent to foreclosure under the Power of Sale Clause in the Mortgage and that the defendant is not subject to relief under the Service Members Civil Relief Act.

2. Service Members Civil Relief Act of 1940 - Dec.19, 2003 (Formerly known as the Soldiers and Sailors Relief Act)

- a. History of SMCRA
- b. Protection for Service Members
- c. Legal Notices

3. Recording the Notice

- a. An Order of Notice of Foreclosure must be filed at the appropriate Registry of Deeds

4. Securing the Property

- a. Abandoned Property

D. Notice of Sale

1. Publication and Mailing Requirements Pursuant to MGL CH 244§14 Notice of Sale published in newspaper of general circulation in the city or town where property is located once a week, for 3 successive weeks, at least 21 days prior to scheduled sale date.

2. Mailing Requirements - A Copy of the foreclosure notice must be sent by either certified or registered mail at least 14 days before the sale to the owner of record.

E. The Auction

1. Postponements - If mortgagor found a buyer, obtained a P & S and a commitment or evidence of financing mortgagee is required to stop the foreclosure. -

Snowden v. Chase Manhattan

2. Required Deposit and Registration
3. Reading of Notices by Lenders Attorney
4. Municipal Lien Certificate/Priority Liens
5. Questions & Answers
6. Opening Bid
7. Bidding Against the Bank
8. Winning Bidder/Memorandum of Sale
9. Other Bidders
10. Lead Paint Notices

F. After the Auction

1. 30 Day Closing
2. Acquiring Financing
3. Appraisal Issues
4. Failure to Close
5. Property condition
6. Distribution of excess sale proceeds
7. Condominium assessments
8. Deficiency judgment
9. Notice of Accounting within 60 days – M.G.L. c. 183, § 27

V. TAX CONSEQUENCES OF FORECLOSURE – Mortgage Forgiveness Debt Relief Act of 2007 (expired 12/31/17)

VI. TENANTS AND OCCUPANTS OF FORECLOSED PROPERTY

- A. Tenant with lease term – M.G.L. c. 186, § 13A
- B. Month-to-Month tenant
- C. Subsidized or rent assistance tenant
- D. Mortgagor who remains in residence

VII. FINDING AND BUYING DISTRESSED PROPERTY

A. Sources of Information

1. Foreclosures or bank owned/REO's
 - a. Pros and cons
2. Newspapers/Banker & Tradesman
 - a. Online access for a fee/school discount
 - b. Best source
 - c. Free at the library

VII. FINDING AND BUYING DISTRESSED PROPERTY Continued

3. Federal Tax Liens - If a Federal Tax lien existed a notice of foreclosure must be sent to the Secretary of the Treasury by certified or registered mail not less than 25 days before the sale.
4. Junior Lien Holders - A Copy of the foreclosure notice must be sent by either certified or registered mail at least 30 days before the sale to all junior lien-holders.
5. Internet
 - a. For Sale foreclosure lists
 - b. Lenders website
 - c. pre foreclosure lists through Zillow or RPR as an example
6. Registry of Deeds
 - a. Online access free

B. Listing a property that is Pre Foreclosure or Short Sale

1. Doing the research
 - a. Amount owed to lender
 - b. Junior lien-holders
 - c. Registry of Deeds
 - d. Letter from owner giving permission to speak to lender
2. Valuing the property
 - a. Upside-down
 - b. Other available inventory
 - c. Marketplace demand
3. Contacting owner/mortgagor
 - a. Short Sale or Pre Foreclosure
 - b. REO- bank owed.
4. Arrange for financing
 - a. Lender requirements
5. Use professionals
 - a. Lawyers
 - b. Appraisers
 - c. Consultants

C. Risks of buying Distressed Property

1. Pre-foreclosure/ Short Sale
 - a. homes may not close
 - b. can take an extended period of time
2. Foreclosure Auction property-
 - a. No access to property
 - b. No access to appraiser
 - c. No access to fire department

- d. Limited inspection ability
- e. No extensions for financing - could result in lost deposits
- f. Property could be distressed – deferred maintenance
- g. Eviction of occupant

** Not all auctions are foreclosure auctions. Auction.com and Hubzu are examples of companies that auction distressed property for lenders. These properties have different challenges & regulations. Stay informed.*

3. Foreclosures

- a. Can have significant deferred maintenance
- b. Sold “As Is”
- c. Buyer may have to assume some of the Sellers responsibilities
- d. Paperwork requirements & sale restrictions
- e. Potential Title Concerns

Examples of cases:

OLD

i. Ruebeck v. Attleboro Savings Bank, 55 B.R. 163, 167-68 (Bkrcty.D.Mass.1985)

*ii. Snowden v. Chase Manhattan Mortg. Corp., 17 Mass.L.Rptr. 667, 2004 WL 1194656, *3 n.5 (Mass. Super. 4/27/04)*

UPDATED

IBANEZ- January 2011. The issue in the case when it was reviewed by the SJC was whether or not a lender who does not possess an assignment of a mortgage in recordable form can proceed with a valid foreclosure. The SJC ruled that the lender must have the assignment stating “...the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale.” Before the bank initiates the foreclosure proceeding, it must be able to prove that it owns the mortgage.

<http://blogs.reuters.com/christopher-whalen/2011/01/10/the-ibanez-decision-what-it-means-for-home-owners-and-investors/>

BEVILACQUA- October 2011. The court held that owners of properties that have questionable title due to the Ibanez decision could attempt to put their chains of title back together (like Humpty-Dumpty) and conduct new foreclosure sales to clear their titles. Unfortunately, the SJC did not provide the real estate community with any further guidance as to how best to resolve these complicated title defects.

<http://www.bloomberg.com/news/2011-10-18/buyer-can-t-bring-case-after-bad-foreclosure-sale-court-rules.html>

Pinti Affidavit- Plaintiffs granted a mortgage on their property to Emigrant Mortgage Company, Inc. Emigrant later foreclosed on the mortgage by exercise of the power of sale contained in the mortgage. Harold Wilion purchased the property at the foreclosure sale. Plaintiffs brought this action against Emigrant and Wilion, seeking a judgment declaring that the sale was void because Emigrant

failed to comply with paragraph 22 of the mortgage, which contains the mortgagees provision of notice to the mortgagor of default and the right to cure, as well as the remedies available to the mortgagee upon the mortgagors failure to cure the default. The superior court allowed Emigrants motion to dismiss and Wilion's motion for summary judgement, concluding that Emigrant was not required strictly to comply with the notice of default and right-to-cure provisions of paragraph 22 of the mortgage. The Supreme Judicial Court reversed, holding (1) strict compliance with the notice of default provisions in paragraph 22 was required as a condition of a valid foreclosure sale; and (2) Emigrant failed to meet the strict compliance requirement. Remanded.

Eaton v. Federal National Mortgage Association (June 22, 2012). Henrietta Eaton challenged the foreclosure of her property, contending that the entity that conducted the foreclosure did not hold the underlying promissory note at the time of foreclosure. The SJC held that only the actual note holder or its authorized agent could conduct the foreclosure. The court, however, did not apply this holding retroactively, stating that prior law on this issue was "not unambiguous." This was a great relief to the legal community since the practice of doing the foreclosure without holding the note was widespread.

HSBC Bank v. Matt (January 14, 2013). The SJC held that a party filing a complaint under the Servicemembers Civil Relief Act must be the holder of the mortgage that is to be foreclosed at the time the Servicemembers complaint is filed. Because this is an issue of subject matter jurisdiction, the trial judge is obligated to determine this whether or not it is raised by the defendant. The SJC also held that only a homeowner who is on active military service has standing to file an answer in a Servicemembers case and that such a case cannot be used as a forum for non-military defendants to raise and litigate other issues.

U.S. Bank v Schumacher (May 12, 2014). Homeowner (Schumacher) received a statutorily required notice of the right to cure a default before foreclosure from U.S. Bank even though U.S. Bank was not yet the holder of the mortgage. After the mortgage was properly assigned, U.S. Bank conducted the foreclosure. Schumacher challenged the validity of the foreclosure on the grounds that there was not "strict compliance" with the law regarding the pre-foreclosure notice. The SJC held for U.S. Bank, saying that only statutes directly connected to the exercise of the power of sale by a mortgage holder required strict compliance. The notice at issue here just dealt with the right to cure a default and so required only substantial compliance, which the lender did in this case.

Turra v Deutsche Bank (January 30, 2017). Turra challenged the foreclosure of his property on the grounds that Massachusetts law required a foreclosing lender to notify in writing the local assessor of the change of ownership within 30 days of a foreclosure. Since Deutsche Bank violated that law, Turra argued that the foreclosure was therefore invalid. The SJC disagreed, holding that this requirement was not directly related to the exercise of the power of sale so failure to comply did not void the foreclosure.

Thompson V JP Morgan Chase Paragraph 22 required that prior to accelerating payment by Plaintiffs, the mortgagee had to provide Plaintiffs with notice specifying certain elements. After Bank sent default and acceleration notices to Plaintiffs Plaintiff failed to cure the default, and Bank conducted a foreclosure sale. Plaintiffs then filed a complaint alleging that Bank failed to comply with the paragraph 22 notice requirements prior to foreclosing on their property. The district court granted Bank's motion to dismiss for failure to state a claim, concluding that Bank's default and acceleration notice strictly complied with paragraph 22. The First Circuit disagreed, holding (1) the mortgage terms for which Massachusetts courts demand strict compliance include the provisions in paragraph 22 requiring and prescribing the pre-foreclosure default notice; and (2) because the default letter omitted certain information that rendered the notice potentially deceptive the Bank violated the strict compliance requirement, thus invalidating the foreclosure

Throughout these cases, the Supreme Judicial Court has emphasized that because Massachusetts is a non-judicial foreclosure state – meaning that a lender does not need advance permission from a court to foreclose – there must be strict compliance with any law that is directly connected to the exercise of this power of sale. Laws that are only incidental to the power of sale, however, must only be substantially complied with.