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Legal Lines

FORECLOSURE & SHORT SALES, PART I

Unfortunately, there does not seem to be any geographic region within Michigan that is not awash in foreclosure sales. Unless a REALTOR® firm chooses not to list properties that are in the foreclosure process or that have been foreclosed, or chooses not to represent buyers who might have an interest in a property in the foreclosure process, a firm is going to have to at least have a basic understanding of the issues involved in the process in order to carry out their business.

Typically, REALTORS® run head on into the foreclosure process in one of two scenarios. First, they are contacted by a seller whose property is in the foreclosure process who requests that they attempt to list and sell the seller's property to rescue any equity in the property or at least save the seller's credit rating. Second, they are contacted by an out-of-state lender who requests that the REALTOR® provide services by taking control of a foreclosed property, preparing it for sale and ultimately listing the property for the lender. In either of these scenarios there are several basic issues that must be understood and handled by a REALTOR® in order to avoid liability and have a reasonable likelihood of success in marketing the property. This article will explore those issues. This article will not make the reader an expert on foreclosures.

At the outset, it is important to understand the foreclosure process being addressed in this article. This article only addresses foreclosures of residential property

not exceeding four units and not more than three acres in size, where the amount claimed to be due on the mortgage at the date of the notice of foreclosure is more than 66²/₃ percent of the original indebtedness secured by the mortgage. In other words, this article only addresses the foreclosure of a typical single-family residence located on a parcel of property fewer than three acres in size. This article does not address the foreclosure of commercial, industrial or multi-family properties. This is an important distinction for two reasons. First, single-family residential properties that are foreclosed in Michigan are almost always foreclosed through a foreclosure by advertisement, *i.e.*, not foreclosed in a circuit court proceeding. Second, unless the single-family residential property is deemed abandoned, the redemption period after the date of the foreclosure sale is six months. If a REALTOR® is dealing with a property in the foreclosure process that is not defined as a single-family residential property under the foreclosure statutes, they should consult with a lawyer to make certain that they know the applicable time of the redemption period for the property.

THE PROCESS

In order to understand the issues involved in handling foreclosed properties, there must be a basic understanding of the legal process. For purposes of this article, I have arbitrarily broken that process down into seven steps.

First, the seller has borrowed money from a lender, the repayment of

which is secured by a mortgage on the seller's property. The seller defaults on his obligations to the lender, and the lender accelerates the indebtedness, *i.e.*, declares all amounts secured by the mortgage to be presently due and owing.

Second, the lender hires an attorney to prepare a notice of foreclosure which meets certain requirements under Michigan law. The notice of foreclosure must be posted on the seller's property and published in a newspaper with county-wide circulation.

Third, the notice of foreclosure is published in a county-wide newspaper for a minimum of four weeks. The notice of foreclosure will, among other things, legally describe the seller's property; state the amount claimed owed by the lender; state the date the foreclosure sale will be held; and describe the length of the redemption period for the property.

Fourth, the foreclosure sale will be held by a deputy sheriff, typically on the steps of the county courthouse. While theoretically there is supposed to be an auction, 99.9 percent of the time there is only one bidder at the foreclosure sale – the lender who holds the mortgage on the property. This is typically the case, inasmuch as the lender only needs to "bid its debt" and does not have to write a check at the foreclosure sale. For example, if the lender is owed \$150,000, it may bid that amount at the foreclosure sale without writing a check.

Fifth, a sheriff's deed is provided at the foreclosure sale. The sheriff's deed will indicate, among other

things, the date the sale occurred, the amount that was bid for the property and the date of the redemption period. While Michigan law does not permit recording with the register of deeds until the expiration of the redemption period, sheriff's deeds are routinely recorded shortly after the foreclosure sale. Fortunately, this recording does not prevent the seller from exercising their redemption rights.

Sixth, assuming the seller is occupying the property, there will be a six-month redemption period. During this redemption period, the seller is fully entitled to complete possession and control of his property. Even though the lender was the winning bidder at the foreclosure sale, it has no rights to occupy or control the property until the expiration of the redemption period. If the seller is not occupying the property, there may be an issue regarding abandonment, which will be discussed below.

Finally, if the seller does not redeem the property within the six-month period, i.e., find a way to pay the foreclosing lender, then upon the expiration of the redemption period, the seller loses all his legal rights to the property.

ABANDONMENT

REALTORS®, when either working with a seller of a foreclosed property or a lender in the foreclosure process, should be aware that there is a procedure provided under Michigan law that can result in a dramatic shortening of the redemption period at any time during the seven-step process described above. During the final days of the 2006 session of the Michigan Legislature, the Legislature passed, and the Governor signed, Act No.579 of Public Acts of 2006. Under this legislation, a home is "conclusively presumed" to be abandoned if all of the following requirements are met prior to the end of the redemption period:

1. The lender or its agent has made a personal inspection of the property and the inspection does not reveal that the seller or persons claiming under the seller are presently occupying or will occupy the property;
2. The lender has posted a notice on the property at the time of the personal inspection and has mailed by certified mail, return receipt requested, a notice to the seller at the seller's last known address, advising the seller that the lender considers the property

to be abandoned and that the seller will lose all rights of ownership 30 days after the foreclosure sale or within 15 days after the notice was posted and mailed to the seller, whichever is greater; and

3. The seller, within 15 days after the notice by the lender was posted and mailed, does not give written notice by first class mail to the lender stating that the property is not abandoned.

When a REALTOR® is contacted by a seller whose property is in the foreclosure process, the REALTOR® should find out from the outset whether the seller still occupies the property. If the seller has moved out of the property and no one is living there, the REALTOR® must make certain that the lender has not already initiated the abandonment process. Obviously, it would be extremely difficult to list, market and close the property within 15 to 30 days, dependent upon the situation.

“How can a lender deem a property legally abandoned when it is obviously being listed and marketed on behalf of the seller?”

When discussing abandonment, it is necessary to discuss the practical side of the process as well as the legal rules. It has not been uncommon in Michigan for a REALTOR® to discover that the property they have listed has been deemed abandoned by the lender. The REALTOR® discovers that their sign and keybox has been removed and the locks have been changed on the property. The question commonly posed over the MAR Legal Hotline is, "How can a lender deem a property legally abandoned when it is obviously being listed and marketed on behalf of the seller?" The legal answer is that the lender arguably could not deem the property abandoned. However, as a practical matter, it simply makes no

difference. The seller's property is being foreclosed because the seller has no money. The seller cannot afford to hire a lawyer and spend several thousand dollars obtaining an injunction so that the seller may have the benefit of the entire six-month redemption period. If the seller had that kind of money, the property would not be in foreclosure.

THE INITIAL DECISION

Any REALTOR® considering listing and marketing a property in the foreclosure process needs to obtain and consider certain key information in determining their likelihood of success in marketing the property and being rewarded for their efforts.

First, the REALTOR® must determine the amount of time they will have to list, market and close the sale on the property, i.e., the remaining time of the redemption period. If a foreclosure sale has already occurred, it is highly unlikely that the seller will be able to accurately recite the date of the sale. Further, if the foreclosure sale has not yet occurred, it is highly unlikely that a seller will be able to tell the REALTOR® the future date of the sale. Obviously, the REALTOR® is seeking this information to determine how long they have to market the property, i.e., when did the foreclosure sale occur and how much of the six-month redemption period is left. There are two potential sources whereby the REALTOR® can accurately obtain this information. First, they can obtain a copy of the notice of foreclosure. The notice of foreclosure will set forth the date of the sale and the redemption period. Second, if the foreclosure sale has occurred, they can obtain a copy through their favorite title agency of the recorded sheriff's deed. Again, the sheriff's deed will recite the date of the sale and the length of the redemption period from the date of sale. Needless to say, a REALTOR® who discovers they have five-and-a-half months to list, market and sell a property may be more disposed to take the listing than one who discovers they have five weeks.

Second, in deciding whether to take the listing, the REALTOR® needs to know the amount of the sales price necessary to

redeem the property from foreclosure, *i.e.*, pay off the foreclosing lender. Again, if a REALTOR® can obtain a copy of the notice of foreclosure or the sheriff's deed, the amount owed the lender will be set forth in either of those documents. There is always a chance that a lender at the foreclosure sale would bid less than the amount owed it as set forth in the notice of foreclosure, but the likelihood is so small as to almost be meaningless. However, finding out how much must be paid to the foreclosing lender may not provide a complete picture of what the property must be sold for to permit redemption.

On many foreclosed properties, there are second and third mortgages. In order to redeem the property, *i.e.*, find a buyer who will pay enough to pay off the foreclosing lender, such a payoff would cause the second and third mortgages to be resurrected. In other words, if a sufficient amount must be raised to pay off the foreclosing lender, the other two lenders are also going to have to be paid off in order for the buyer to provide a

first mortgage to her lender. As an example, assume the foreclosing lender is owed \$150,000. Further, there is a second mortgage in the amount of \$30,000 and a

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home equity loan in the amount of \$20,000. On the face of these three loans, a sale price in excess of \$200,000 would be needed to redeem the property from

foreclosure. Thus, the only way the REALTOR® can determine how high a hill they have to climb is to have a title search or pre-commitment prepared by a title agency that will disclose how many loans and how much debt actually will need to be paid off to redeem the property.

Finally, once the REALTOR® knows how long they have to list, market and sell the property and the amount of proceeds which must be obtained at closing, the REALTOR® is then in a position to prepare a market analysis to determine the likelihood of how much the property will sell for in what predictable period of time. It is at this time that a REALTOR® should begin to form an opinion as to whether the property can be sold as a short sale.

The next installment of this article shall deal with short sales and the various problems that can arise in the course of selling properties in the foreclosure process or handling properties for lenders after the foreclosure process. 🏠

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