

DELAY OF GAME

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This article is the second part of a three-part series addressing foreclosures and short sales through the question and answer process. It is recommended that readers review Part I of this series prior to reading Part II.

Readers are also reminded that the foreclosures addressed in this series of articles are foreclosures by advertisement of single-family homes, i.e., residential properties of four units or less on less than three acres of land. A court is not involved in any part of this process. The answers described in this series may not be applicable to foreclosures of other types of properties.

FORECLOSURE & SHORT SALES: PART II

What is the concept of “abandonment”?

A lender may make a personal inspection of the Browns’ property and find that neither the Browns nor anyone claiming under the Browns are presently occupying the Browns’ property or will occupy the Browns’ property. If the lender makes that determination, it can post a notice on the Browns’ property at the time of the personal inspection and mail the notice by certified mail, return receipt requested, to the Browns at their last known address. The notice will tell the Browns that the lender considers the Browns’ property to be abandoned, and the Browns will lose all rights of ownership 30 days after the foreclosure sale. If a foreclosure sale has already occurred, the notice will provide that the Browns will lose all rights of ownership within 15 days after the lender mails the notice to the Browns unless, within the 15-day period, the Browns provide written notice to the lender by first class mail that the Browns have not abandoned their property. Salesperson Smith should advise the Browns that if they

receive a letter from any of their three lenders, they should open it immediately. If the letter is a notice of abandonment, then the Browns must respond to the lender within 15 days by first class mail and state that they have not abandoned their property.

Can a lender declare a property “abandoned” if there are tenants in the property?

No. The statute indicates that a property is not abandoned if there are persons in possession of it who are claiming under the owner. In our case, if the Browns rented the property, the tenants would be occupying the property under the Browns.

Can a lender declare a property “abandoned” after the foreclosure sale?

Yes. The lender can declare the property abandoned at any time during the foreclosure process.

When listing properties in the foreclosure process, should REALTORS® always inquire as to whether the sellers or

someone claiming under them is occupying the property?

Yes. If REALTORS® are going to list unoccupied property during the foreclosure process, they should make certain that the lender has not already deemed the property “abandoned.” Obviously, if the property has already been abandoned, there will be no time to list, market and close a sale of the property.

Salesperson Smith has listed the Browns’ property and is fairly certain there is going to be a short sale. What, if anything, should she do next?

Salesperson Smith should immediately contact representatives of the first, second and third lenders. Each of these lenders may have differing procedures and information they require to consider a short sale. Unfortunately, most lenders are not well-organized to respond to proposals for short sales. Salesperson Smith will need to gather the necessary information from the Browns as soon as possible and begin the process with each lender.

In most instances, a lender will not be in a position to immediately begin marketing a foreclosed property, regardless of how economically beneficial that may be to the lender...

Salesperson Smith contacts Ace Bank to determine what sale price for the Browns' property would be agreeable to Ace Bank (i.e., how much of a haircut Ace Bank is willing to take to get a portion of its indebtedness paid at a closing). Ace Bank will not give Salesperson Smith a straight answer. Instead, Ace Bank's representative says they will consider any offer at the time it is made. Salesperson Smith wants to know whether there is any law that requires Ace Bank to agree in advance to a short sales price.

There is no law that requires any lender to agree in advance to how much debt they will forgive on a short sale. As a practical matter, most lenders will not commit in advance to a specific price for a short sale, inasmuch as they wish the REALTOR® to use her best efforts to obtain the maximum amount for the property.

On July 25, 2007, Salesperson Smith receives an offer on the property for \$165,000. The Browns accept this offer contingent upon approval of the sale by their three (3) lenders. While Salesperson Smith gets affirmative responses from Risk Bank and FBN Mortgage, she cannot seem

to get a response from Ace Bank for five (5) weeks. Is there any law requiring Ace Bank to respond to the offer in a reasonable period of time?

No. There is no law or regulatory requirement that Ace Bank respond to the offer made on the Browns' property in a reasonable period of time. Legally, Ace Bank could choose NEVER to respond.

After five weeks of waiting, Salesperson Smith is advised by the buyers' agent that unless Ace Bank approves their offer within seven (7) days, the buyers are going to revoke their offer and look at other properties. If Salesperson Smith puts Ace Bank on notice that its failure to approve the offer will cost the Browns a buyer for their property, could the Browns then make a claim against the bank for damages suffered by them?

No. Again, Ace Bank has no legal obligation to timely consider the offer on the Browns' property.

On August 25, 2007, Salesperson Smith now has all of the stars in alignment and all of the lenders have signed off on the offer to sell the Browns' property. However, it

appears to Salesperson Smith that a closing may not be completed by October 1, 2007, the end date for the redemption period. Is there a legal mechanism by which the Browns can obtain an extension of the redemption period?

Absolutely not. There is no statutory mechanism for extending a redemption period.

If Salesperson Smith cannot get the sale of the property closed by October 1, 2007, can the Sellers still sell the property to the buyers?

No. Upon expiration of the redemption period, the Browns have no legal title or other rights in the property. They simply have nothing to sell.

Upon expiration of the redemption period, can the buyers of the Browns' property make the bank sell the property to them pursuant to the terms of their agreement with the Browns?

Absolutely not. After the redemption period expires, the buyers will have no agreement with the then legal titleholder of the property, i.e., Ace Bank.



In most instances, the lender will take weeks or months to undertake control of the property and prepare it for sale. In the meantime, the interested buyers will go elsewhere.

Assume that at the time of the end of the redemption period, Salesperson Smith has no pending purchase agreement for the Browns' property, but has three buyers who have expressed substantial interest in purchasing the property. Can Salesperson Smith require Ace Bank to pay her firm in the event one of these three buyers purchases the former Browns' property?

No. Ace Bank has no legal obligation to pay any commission to Salesperson Smith. (In most instances, a lender will not be in a position to immediately begin marketing a foreclosed property, regardless of how economically beneficial that may be to the lender. In most instances, the lender will take weeks or months to undertake control of the property and prepare it for sale. In the meantime, the interested buyers will go elsewhere.)

Assume that Salesperson Smith has the Browns' property listed with four months to go on the redemption period. An agent of the lender approaches the Browns and offers to pay them cash if they will give up the keys to the property and grant a deed in lieu of foreclosure. Are

the Browns contractually bound to Salesperson Smith under the listing agreement, or can they give up the keys for the cash from the lender?

Legally, the Browns are obligated to Salesperson Smith and her firm under the terms of the listing agreement. However, as a practical matter, there is little Salesperson Smith or her firm could do to stop the Browns from making this deal with the bank. While technically, there would be a breach of the listing agreement, it is highly unlikely that the Browns would be worth pursuing — they are, of course, losing their home in foreclosure.

Assume that Salesperson Smith has listed the Browns' property and has three months remaining in the redemption period. A REALTOR® who represents the lender approaches the Browns and offers them cash in return for the keys to the property and a deed in lieu of foreclosure. Can the REALTOR® for the lender approach the Browns without going through Salesperson Smith?

The actions of the REALTOR® representing the lender could easily be construed as a violation of

Article 16 of NAR's Code of Ethics. The REALTOR® acting on behalf of the lender is, as a practical matter, seeking to cause the Browns to breach their listing agreement with Salesperson Smith. This action would be inconsistent with Salesperson Smith and her firm's exclusive representation of the Browns.

Assume that Salesperson Smith has listed the Browns' property and has three months to go until the end of the redemption period. The Browns are contacted by an agent of the lender, who offers them a payment of money in consideration for the Browns providing them with a deed in lieu of foreclosure and the keys to the property. The Browns ask Salesperson Smith, "What is a deed in lieu of foreclosure?"

A deed in lieu of foreclosure is an instrument by which the Browns would convey their interest in their property to the lender without the need for a foreclosure proceeding. Typically, in consideration for giving up their redemption rights and possession of the property during the redemption period, the Browns are discharged from their indebtedness to the bank. **MAR**