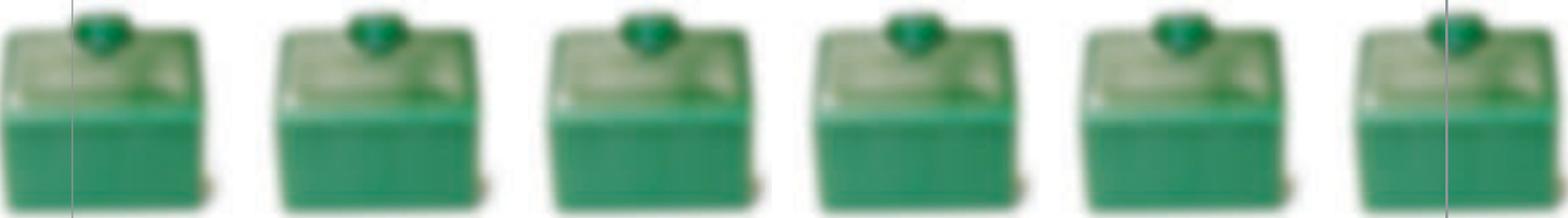




FOCUS ON WINNING

By Gregory McClelland, Esq.
MAR Legal Counsel, McClelland & Anderson, LLP

This article is the third and final part of a series addressing foreclosures and short sales through the question and answer process. It is recommended that readers review Parts I and II of this series prior to reading Part III. The questions and answers will only make complete sense if the reader understands the hypothetical situation that begins Part I of the series.



Again, this article only addresses foreclosures by advertisement of single family homes, i.e., residential properties of four units or less on less than three acres of land. There is no court involvement in these types of foreclosure proceedings. The answers described in this series may not apply to foreclosures of other types of properties.

FORECLOSURE & SHORT SALES: PART III

What happens to the second and third mortgages in the event of a deed in lieu of foreclosure?

Unless the banks holding the second and third mortgages voluntarily agree to discharge their mortgages, even with a deed in lieu of foreclosure, Ace Bank, the holder of the first mortgage, will need to proceed with foreclosure proceedings in order to eliminate the second and third mortgages.

Assume that Salesperson Smith has listed the Browns' property and has four months to go in the redemption period. An agent of the lender has approached the Browns offering a cash payment in consideration for a deed in lieu of foreclosure and the keys to the property. The Browns ask Salesperson Smith whether they should take the offer from the bank or whether Salesperson Smith can successfully close the sale of the property prior to the end of the redemption period at a sales price that will result in some cash payment to the Browns.

Salesperson Smith would have to be very careful in responding to this

question. She would need to provide the Browns with any underlying information upon which she would base any response (i.e., on average, homes in the Browns' price range are selling within "X" number of days on the market). However, Salesperson Smith will have to be very careful to make certain that she makes no guarantees. In all events, Salesperson Smith should direct the Browns to an attorney for legal advice.

On September 3, 2007, Salesperson Green receives a call from Ace Bank advising her that the Browns' property had been through foreclosure and requesting her to secure the Browns' property and prepare it for relisting and marketing. Salesperson Green travels to the Browns' property and sees Salesperson Smith's sign in the yard and a keybox. Salesperson Green carefully removes Salesperson Smith's sign and keybox and has the locks changed on the Browns' property. Are Salesperson Green's actions legally appropriate?

Salesperson Green's actions are legally inappropriate and could have

onerous consequences for herself and Ace Bank. The redemption period on the Browns property does not end until October 1, 2007. Neither Ace Bank nor its agent, Salesperson Green, had any right to be on the Browns' property, let alone change the locks. Salesperson Green engaged in what is normally known as breaking and entering.

If Salesperson Green simply changed the locks when she entered onto the Browns' property on September 3, 2007, other than a technical violation of the law, what damages could be claimed against Salesperson Green?

Salesperson Green has opened herself up to a claim by the Browns that items of property which were in the home on the date Salesperson Green had the locks changed were no longer in the home when they regained possession of their house. The Browns could claim that jewelry, furs, appliances, big screen televisions and other items disappeared when Salesperson Green wrongfully entered their property.

Unfortunately, it would appear that REALTORS® are going to be dealing with foreclosures and short sales for the foreseeable future. Hopefully, this series of articles has provided helpful information to REALTORS® dealing with the process.

What should Salesperson Green have done when she received the call from Ace Bank on September 3, 2007, in order to avoid any problems with the Browns?

When contacted by Ace Bank, Salesperson Green should have requested some evidence from Ace Bank or their agent in Michigan (i.e., their foreclosure attorneys) that the redemption period had expired on the property. This evidence could be provided in the form of a copy of the sheriff's deed. In all events, Salesperson Green should have retreated from the Browns' property when she saw Salesperson Smith's sign and keybox, until she could determine whether the redemption period had ended. Remember that foreclosure sales can be, and often are, extended from week to week.

On October 2, 2007, Salesperson Green, on behalf of Ace Bank, travels to the Browns' property to secure it by changing the locks and begin preparation for marketing. When Salesperson Green arrives at the Browns' property on October 2, 2007, there are two cars in the driveway and at least two adults in the Brown house. What can or should Salesperson Green do?

Salesperson Green can do nothing to forcibly require the persons in the Browns' house to vacate the property. She can politely ask them to leave. If they refuse to do so, her only recourse is to return to her office and contact Ace Bank. If the persons within the Browns' house continue to refuse to

voluntarily leave the property, Ace Bank will have to initiate proceedings to evict them. Under no circumstances should Salesperson Green use self-help to remove any persons or property from the Browns' house.

Salesperson Green has listed the Browns' house for Ace Bank. Does Ace Bank have to do any type of seller's disclosure?

Ace Bank is exempted from providing a seller's disclosure statement both at the time of the foreclosure sale and upon resale of the property to a third party. Ace Bank is also exempted from lead-based paint disclosure at the time of the foreclosure sale. However, HUD regulations do not exempt Ace Bank from lead-based paint disclosure upon resale to a third party. Many banks mistakenly believe that they are exempt from lead-based paint disclosure upon resale of the property to a third party.

Salesperson Black is acting as a buyer's agent for the Passicks. Salesperson Black prepares an offer on behalf of the Passicks to purchase a property owned by Ace Bank. The offer is submitted to Ace Bank is accepted subject to the Passicks signing an addendum provided by the bank. Salesperson Black advises the Passicks that the bank's addendum contains the "usual terms" and does not require detailed review. Is this advice appropriate?

Salesperson Black's advice to the Passicks would be inappropriate in any situation, but particularly so

in the case of the terms contained within addendums used by some lenders in conjunction with their sale of foreclosed properties. In some of these addendums, the risk of damage to the property is shifted to the buyers at the time they enter into the purchase agreement with the lender. In other words, if a purchase agreement is entered into on May 15, and between that date and the date of closing, July 15, the property is stripped by strangers of all valuable building materials, the Passicks would still be obligated to purchase the property at the agreed-upon purchase price. In this case, if the Passicks agree to accept the risk of any damage to the property between the date of the purchase agreement and the date of closing, they should make inquiry of their insurance agent to determine whether they have an insurable interest in the property and whether such insurance would cover the property in its vacant condition.

Salesperson Black prepares an offer for the Passicks to purchase a property that Ace Bank has obtained through foreclosure. Salesperson Black submits the offer to the listing broker. Salesperson Black then receives an addendum to the proposed purchase agreement from the listing broker. The addendum would require the Passicks to pay the listing broker \$250 as an REO compliance fee and as a condition of submission of the offer to Ace Bank. Can the listing broker impose the REO



compliance fee on the Passicks as a condition for presenting the offer?

It depends. If Ace Bank is requiring the listing broker to collect a REO compliance fee as a condition to its entertaining offers from buyers, then the REO compliance fee would be a lawful condition imposed by a seller with respect to the sale of the seller's property. If, on the other hand, Ace Bank is not requiring the REO compliance fee and has not imposed it as a condition of receiving offers from buyers, then the listing broker's failure to present the Passicks' offer to Ace Bank within a reasonable period of time could be construed as a violation of Michigan license law.

Under the terms of the purchase agreement between the Passicks and Ace Bank, Ace Bank is to provide proof that it has legal title to the property. Prior to closing, the Passicks are provided with a title search from the date of the foreclosure sale by Ace Bank, which appears to indicate that Ace Bank has legal title to the property. Are the Passicks properly insured with respect to the title to the property?

The title search provided to the Passicks provides no insurance of any kind to them with respect to the title to the property. For example, assume that the mortgage foreclosed by Ace Bank was actually a second mortgage. Acme Mortgage holds the first mortgage on the property. The title search would not disclose the existence of the Acme Bank mortgage, as it pre-

dates the date of the foreclosure sale. In this instance, the Passicks would actually be buying the property subject to the Acme mortgage, i.e., they would have to take care of the Acme mortgage or risk losing the property.

Upon receiving the title search provided by Acme Mortgage, the Passicks become aware of the fact that the title search provides them with no title insurance. They demand and receive a document provided by Ace Bank which has a title indicating it is a commitment for title insurance in the amount of the purchase price being paid by the Passicks for the property. Are they now safe to move forward with closing?

It would not be safe for the Passicks to simply assume that the title commitment is going to provide them with adequate title insurance for the purchase price of the property. The author is aware of instances where title commitments have been issued which contained exceptions to coverage which, essentially, result in little or no title insurance coverage. The title commitment should be reviewed by a knowledgeable attorney prior to the Passicks' closing to assure that they are obtaining title insurance coverage desired by them.

The Passicks' deal with Ace Bank ultimately falls through. Salesperson Black finds another property for the Passicks which is in the foreclosure process. The Passicks make an offer which will only succeed if the transaction can be completed

as a short sale. Fortunately for the Passicks, all lenders involved in the short sale agree to terms which permit the transaction to close. On the day prior to closing, Salesperson Black is advised by the listing broker that the lender holding the first mortgage has reviewed the HUD-1 and will not proceed with the transaction unless the listing broker agrees to a substantial reduction in the commission specified in the listing agreement. Can Acme Bank lawfully require the listing broker and, ultimately, Salesperson Black to accept a lesser commission?

Acme Bank has absolutely no power to modify the financial obligations set forth in the listing agreement between the seller and the listing broker. Further, Acme Bank has no legal right to cause a modification of the amount of compensation offered to Salesperson Black's firm through the MLS. However, Acme Bank can lawfully exercise its leverage (i.e., its approval or disapproval of the transaction) to cause the listing broker and Salesperson Black to be paid less at closing.

Unfortunately, it would appear that REALTORS® are going to be dealing with foreclosures and short sales for the foreseeable future. Hopefully, this series of articles has provided helpful information to REALTORS® dealing with the process. Rest assured, there will be a time in the near future when we can all congratulate each other for surviving the process. **MAR**

Rest assured, there will be a time in the near future when we can all congratulate each other for surviving the process.