



Foreclosure 101: Reviewing the issues when considering an investment in a foreclosed property

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More and more we are seeing possibilities on the horizon for clients to purchase properties either in various stages of foreclosure or vested in the bank.

When a mortgagor is behind in the monthly payments of their mortgage, the mortgagee files a Notice of Pendency. This Notice of Pendency is indexed against the real property. The action is taken in the Supreme Court in the county where the property is located. Eventually all of the parties must be served with the Notice of Pendency and complaint, but at least one party must be served within 30 days of the filing of the Notice of Pendency.

The Supreme Court records are public. They are filed and can be viewed at the office of the registrar or the county clerk.

All of the parties served in the action are listed in the caption and the Affidavits of Service filed contain the addresses where the parties were served. The amount of the mortgage being foreclosed is listed in the complaint. If there are any mortgages on the property subordinate to the mortgage contained in the action, that mortgagee must be listed in the caption and must be served. If a mortgage is superior to the mortgage being foreclosed, it need not be listed in the caption and the mortgagee need not be served.

Service should be personal. Statute allows that in cases where personal service is not possible and due diligence has been taken, substitute service may be made and a copy "nailed and mailed." This type of service can be troublesome, especially in cases where the person who was supposed to be served has occupancy of the property subsequent to the sale. This opens some defenses to the foreclosed owner.

The Judgment of Foreclosure and Sale appoints a referee to conduct the sale, orders him/her to compute the amount due and lists the terms of the sale as well as the requirements for publication. The terms of sale will state to what conditions the sale may subject. If it states that the sale is subject to prior liens, a title search must be made to check what liens, if any, are superior to the lien being foreclosed. The sale can take place 20 days after the filing of this judgment.

Affidavits of Publication are also filed. On occasion, they are not filed until after the sale. The foreclosing attorney will be held to proper practice in publication and service, and the title company will review all this when issuing title.

Many investors are now buying the paper of the mortgage in arrears and either continuing the foreclosure or renegotiating with the fee owner. If this is the case, it is prudent to have the lender assign the foreclosure proceeding to you as well as the mortgage so you are able to continue with the existing counsel. This will save time and money.

Reviewing the file on your own can prove to be very helpful, but if your client is considering purchasing the property on the block, before the sale or from the mortgagee, make sure that you

order a title search from a reputable title company. This should be done prior to negotiating the transfer and a title policy purchased at the time of closing. A title policy can even be purchased for an assignment of mortgage.

Please feel free to contact me with any specific questions or concerns.

Best wishes for a happy, healthy and professionally rewarding new year.

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