



The Foreclosure Process-What Should and Shouldn't a Homeowner Do?

By: Maureen Aughton, Esq, Collier County Foreclosure Task Force Member

This article has been written as part of an initiative of the Collier County Foreclosure Task Force, which is a pro bono collaborative response to the foreclosure problem in Collier County.

You are relaxing after dinner and the doorbell rings. You answer the door and are met by a Sheriff or other process server who hands you a summons and a foreclosure complaint. This can be very intimidating and scary. It is important though that decisions about how to proceed are not made by a gut feeling of fear and the desire to "run away" from the problem. A homeowner needs to examine all the options before making choices that might result in limiting options available in the future.

A foreclosure is begun when the lender (plaintiff) files a lis pendens, complaint and summons with the court. The lis pendens (meaning that a court case has been filed and is pending) is also filed in the official land records in the county where the property is located. The summons and complaint are served by the sheriff or private process server.

The borrower/homeowner has 20 calendar days from the date served to file an answer or response to the complaint. If the seller does nothing, then the lender can obtain a clerk's default as soon as 21 days after the summons is served. A summary default judgment can then easily be obtained, a sale date set and the property sold at a foreclosure sale at the Courthouse. This can progress rapidly. This obviously limits options that might otherwise be available to the homeowner, such as: loan modification or short sale.

If the seller hires an attorney (legal aid; bar association referral or private attorney are all options) to handle the foreclosure, the attorney will be able to file a legal "answer" or other pleading with the court. By doing so, the lender will not be able to obtain a default judgment against the seller. The attorney may also file other "discovery" motions with the court that will likely give the homeowner more time to live in the home, more time to attempt a loan modification, or more time to try to short sell the home. At a minimum, if the borrower cannot obtain an attorney, he should file a response to the complaint within the 20 day period to avoid the entry of a clerk's default and to preserve certain notice rights.

Some homeowners who have been served with a foreclosure feel they should quickly move out before the sheriff shows up at their door to throw them out". This is not a good option if the property is the homeowner's primary/principal residence/homesteaded property unless the homeowner has to move to find employment elsewhere. Even in this case, it is still beneficial to maintain the property being foreclosed as their legal principal residence.

To maintain the status of the property as the homeowner's primary/principal home, the homeowner should continue to use this address when filing income and other tax returns, and should continue to vote using such address. The more actual evidence that the property remains as the homeowner's principal residence, the better.

If the property is the homeowner's principal residence, there may be more options available (and with more beneficial terms) for a possible loan modification than are available for a second vacation home or investment property. The homeowner might qualify for the federal HAMP program allowing the lender to decrease the interest rate, extend the loan term and defer payment of part of the principal balance. [See other article in series on this subject for more information.]

If the homeowner is able to short sell the property and is able to get the lender to agree to write off a portion of the debt, the lender should issue a 1099 for the amount of the forgiven debt. The IRS considers forgiven debt as "income" that must be added to any other income and reported in the year that it is written off. The homeowner would then have to pay taxes on this additional "phantom income". However, the Mortgage Debt Relief Act of 2007 generally allows taxpayer/homeowners to exclude income from the discharge of debt on their principal residence. In order to obtain this treatment, the debt forgiven must be on a homeowner's "principal residence". This beneficial tax treatment would not be available if a homeowner has moved out of the home and now has another "principal residence". Visit the following IRS link to learn more specifics and limitations regarding this Act: <http://www.irs.gov/individuals/article/0,,id=179414,00.html>

In addition, the borrower may qualify for a "Cash for Keys" or other similar program if they are living in the home and agree to maintain the home and turn over the keys and the property in good condition. This program gives the borrower some extra funds to assist in moving expenses and gives the lender the home in better condition. This would not be available if the borrower has abandoned the home and it has fallen into disrepair, accrued code enforcement liens, or has been the subject of vandalism.

If the borrower or his attorney had filed an answer with the court, he should be aware of the status of the case and would have notice of any motion for summary judgment and pending foreclosure sale. The borrower can also check the clerk's website intermittently to check on the status of the foreclosure case:

Collier County Courts: http://apps.collierclerk.com/public_inquiry/

Lee County Courts: http://apps.leeclerk.org/Civil_defendant_name_sel.asp

Once a judgment has been obtained, a sale can take place any time after 20 days from the date of the judgment. The lender has to publish the sale once a week for two consecutive weeks. Following the sale, the clerk will file a certificate of sale and if no objections to the sale are filed within 10 days after the sale, the clerk will issue a certificate of title to the successful bidder. At that time, if the borrower has not moved out of the property, a writ of possession can be obtained and the sheriff will come to the home to assist in the removal of the borrower or any tenant. Unless an agreement has been made with the lender for an earlier departure, such as cash for keys, the borrower is not required to vacate the property until the property is sold at the foreclosure sale.

This article is one of a series authored by members of the Collier County Foreclosure Task Force, a grass roots pro bono initiative launched in 2008 by Legal Aid Service of Collier County and the Collier County Bar Association. The Foreclosure Task Force (FTF) was formed to promote foreclosure prevention through education and intervention. The FTF has assisted local homeowners through free public workshops and legal clinics, and via a website it created - www.collierFTF.com.