

New York Foreclosure Proceedings

A summary of the procedures necessary to foreclose a mortgage in the State of New York.

THE COMMENCEMENT OF THE ACTION

Once your company has declared a default under

the terms of the note and mortgage and forwarded a file to our office, we immediately order a foreclosure search from either an abstract company or a title company. It usually takes two to three days to obtain such a search. We review the title search. After the search is received we prepare a Summons and Complaint naming all necessary party defendants who have an interest in the mortgaged premises, subordinate to the interest of the foreclosing mortgagee. A Notice of Pendency to be filed with the Summons and Complaint is additionally prepared.

The Complaint is then sent to the court for filing. After we receive the filed Complaint back from the court, a continuation search is done to see if any additional defendants need to be added from the time of the original search up until the actual date that the papers were filed.

If everything is in order and no defendants need to be added, we send the Summons and Complaint to our process server to serve. Generally, if we need only to serve the owners who are a husband and a wife and they are home when the service is attempted the action will proceed quicker. Unfortunately, however, our experience has been that it is usually not possible to personally serve both the husband and the wife at the same time.

Amendments in the New York Civil Practice Laws and Rules, the Affidavits of Service of the Summons and Complaint must be filed with the Court. Thereafter, a defendant, personally served with the Summons and Complaint, has twenty (20) days to answer or appear. If service upon a party is made by substituted service; i.e., serving a wife on behalf of her husband, then the time to answer or appear is extended as follows: once a party is served by substituted service, the Affidavit of Service must be filed with the County Clerk's Office and service becomes complete ten (10) days after the Affidavit of Service is filed with the County Clerk. Thereafter, a defendant has thirty (30) days to answer or appear before the next step in the foreclosure may be taken.

Although substituted service is a proper form of service of the Summons and Complaint, it extends the time to complete a foreclosure action. Generally, the main defendants/mortgagors will default and the judgment creditors and/or the subordinate mortgagees will serve Notices of Appearance and Waiver making it easier for the foreclosure to proceed ex parte or without notice.

A second mortgagee has the right to set its lien in the judgment of the first mortgagee. Therefore, a second mortgagee will serve a Notice of Appearance so that he can have his lien reported and arrangements can be made so that such an application will not delay the first mortgagee's action.

REFERENCE

Once all the defendants have either appeared or their time to answer or otherwise appear has expired, the next step in the foreclosure process is an application for an Order of Reference, to have a Referee appointed by the Court to ascertain and compute the amount due and owing on the mortgage and to determine if a property can be sold in one parcel.

We submit the Order of Reference to the Court together with supporting papers and exhibits, and await the Court to review the papers and execute

the Order, therein appointing a Referee. Once we get the signed Order of Reference back, the next step is the Referee's Computation, which again, if uncontested, is done by mail and the figures must be verified by your office, executed by an officer and mailed back to our office for final preparation and submission to the Referee.

In the event that the foreclosure proceeds as contested, a Referee's Hearing will be necessary unless all of the parties agree to waive same. At a Referee's Hearing, the Referee will receive testimony and documentary evidence before a stenographer. At this quasi-judicial hearing, the Defendants have the right to cross-examination of Plaintiff's witness and vice-versa. The Referee will usually render a determination at the conclusion of the Referee's Hearing.

JUDGMENT OF FORECLOSURE AND SALE

After the Referee's Computation is signed, our next step is to submit an application for a Judgment of Foreclosure and Sale. Again, this is done without notice and requires this firm to prepare the Judgment and supporting papers, submit same to the Court for the Court's review and we then await the Court to sign the Judgment so that we can proceed to the next step.

Where we are representing your company as a Defendant in a foreclosure action by virtue of a second mortgage it owns, upon our receipt of notice from the Plaintiff of its application for a Judgment of Foreclosure and Sale, we make an application by cross-motion to have your company's mortgage debt fixed in the Judgment of Foreclosure and Sale, thereby directing the Referee to pay your company the sum due on its junior mortgage from any surplus arising from the sale of the mortgaged premises.

THE FORECLOSURE SALE AND DELIVERY OF THE DEED

Once the Judgment of Foreclosure and Sale is signed, we contact the Referee to schedule a public sale of the mortgaged premises. Thereafter, we are required to publish the Notice of Sale in the newspaper set forth in the Judgment of Foreclosure and Sale. Publication requirements in the State of New York can generally be summarized as follows: (i) outside the City of New York we must publish once a week for four (4) weeks and the sale must take place between the 28th and the 35th day after the first day of publication; (ii) in the city of New York once a week for three (3) weeks and the sale must take place between the 21st and 28th day after the first day of publication.

Prior to the scheduled sale, we will contact your office for bidding instructions. In the event that your company is a Defendant in an action as second mortgagee, we will be required to tender 10% of our bid to the Referee in certified funds upon the acceptance of the your company's bid for the property.

Prior to the date of the sale we prepare the Terms of Sale and a Memorandum of Sale to be read and executed by the Referee. If the property is sold to an outside bidder, then the bidder must take title to the property within thirty (30) days after the date of sale. If your company purchases the property as foreclosing mortgagee, the "closing" takes place by mail, and we are able to deliver the Referee's Deed, Referee's Report of Sale and all closing documents to the Referee within a few days after the sale, for the Referee's execution and return to our office. The Deed is then recorded.

If your company as a Defendant second Mortgagee, purchases the property at the foreclosure sale, it will be necessary to attend a Referee's closing which similarly is to take place within thirty (30) days of the foreclosure sale.

Insights about recovering
your money
– without giving up time.

CONCLUSION

A "normal" uncontested foreclosure action with only several defendants can be completed in the State of New York between six (6) and nine (9) months after the filing of the Summons and Complaint with the cooperation of the client, Court officials and the Referee appointed in the action. We make every effort to expedite the proceedings.

FACTORS THAT DELAY THE FORECLOSURE ACTION

There are several factors which will delay the aforementioned timetable.

(a) An Answer

If the defendants interpose an Answer and thereby make this a contested action the timetable will be delayed. All applications to the Court must be made on at least seventeen (17) days notice to the answering Defendant. If instead of interposing an Answer, a party merely demands notice of all proceedings, we are likewise obligated to follow motions practice rules in New York. The motion must be made on at least seventeen (17) days notice to a party entitled to notice and then we must await a Court's determination on each motion. By statute, a Judge has up to sixty (60) days to render a decision on any motion. Unfortunately, this rule is seldom adhered to in the 1st and 2nd Appellate Divisions which encompass amongst others, the 5 counties of New York City, Nassau, Suffolk and Westchester.

(b) Bankruptcy

If any defendant to the foreclosure action files bankruptcy, we are automatically stayed from proceeding with the foreclosure action and have to either await the discharge of the bankrupt Defendant, or make application to the Bankruptcy Court for relief from the Automatic Stay. The Bankruptcy Courts, in view of the increase in the number of bankruptcies, have imposed a Rule that an application to vacate a stay in a Chapter 13 Bankruptcy will not be granted until the debtor is three (3) or more months in arrears in post-petition payments due outside the proposed Plan of Reorganization. In the case of Chapter 7 Liquidation, we may make an application at any time provided we can show that the debtor (1) has no equity in the mortgaged property, and (2) the property is not necessary for any reorganization by the debtor. To do so, we must provide the Bankruptcy Court with a current appraisal of the mortgaged premises in support of our application.

It has been my experience that most Chapter 13 filings are without merit, and serve no purpose other than to buy the debtor an additional four (4) months. Please note that an individual has the right under the Bankruptcy Code to re-file in the event of a dismissal of their Petition by the Court. It is unfortunate that most of the Judges of the Southern and Eastern Districts of New York (which encompass everything from Poughkeepsie and South) tend to give the debtor the benefit of the doubt when it comes to making post-petition payments and in repeat filings.

Once we have obtained relief from the Automatic Stay in Bankruptcy, we are able to proceed with our foreclosure action from the point at which the mortgagor filed their Bankruptcy Petition.

(c) Hard To Find Defendants

If a defendant is hard to serve or if we have to publish the Summons against a defendant and have a guardian appointed, that will also delay the foreclosure matter. An Order of Publication will not be granted by the court unless we establish that we have made diligent efforts to locate the defendant. Once the Order is signed, we are required to publish notices once a week for four (4) weeks in two (2) newspapers. Service becomes complete twenty-eight (28) days after the first date of publication and defendant has thirty (30) days to answer. The Court also requires a guardian to be appointed in such a matter, thereby extending the time to complete the foreclosure action.

(d) Torrens Title

Torrens is an antiquated method of recording deeds, mortgages and other liens against real property, which has only recently been abolished. We occasionally still encounter Torrens issues in certain sections of Suffolk County. In the event that the property is registered in Torrens, a Referee's Deed cannot be delivered until an official examiner is appointed by the court and the examiner's report is filed. Thereafter an additional Order of the court is needed directing the issuance of a new Owner's Duplicate Certificate.

(e) Individual Assignment System

In an attempt to create an efficient court system, the Courts have adopted the Individual Assignment System. Formerly, each time an application was submitted requiring judicial determination, the application together with the Court's entire file was given to the next available Judge. This system required the Judge who was assigned to adjudicate the newest application, to review and familiarize themselves with the facts and prior proceedings of the case, prior to making a determination on the pending application. This system was inefficient and unduly time consuming, and therefore the Individual Assignment System, known as "IAS", was born.

IAS was designed whereby at the first request for judicial intervention by any party, a Judge is assigned, who will see the case through to resolution or to the point of trial. In theory, IAS is ideal because the same judge will know the case and its attendant facts, which to a certain degree holds true.

A major flaw which was probably not considered during the design of IAS was that the individual Judges are given the opportunity to set their own rules regarding the administration of their IAS Part and the administration of the cases assigned to them. This has created somewhat of an adversarial relationship between the bar and the court.

The Supreme Courts of Nassau, Suffolk, Queens, Kings and Bronx Counties are the most egregious perpetrators of judicially created delay. The reasons are inexplicable; however one can only surmise that it may be attributed to the often cited reason of overburdensome case loads imposed upon the IAS Judges, their lack of support staff, the shortage of staff in the Court System or quite simply, the individual Judge's lack of initiative or enthusiasm in moving his case.

In Suffolk County for example, in a foreclosure case that we were handling, an unopposed application for an Order of Reference was submitted to the IAS Judge to whom the case was assigned, on October 21, 1993. The Order of Reference was not signed until March 21, 1994.

As previously set forth, statutorily, a Judge has sixty (60) days from the submission of an application to render a determination. The Civil Practice Laws and Rules provide a remedy if a Judge fails to provide a determination within the sixty days, which is known as the Writ of Mandamus. To acquire a Writ of Mandamus, a Special Proceedings must be commenced by the aggrieved party pursuant to Article 78 of the Civil Practice Laws and Rules, which in actuality requires the movant in the Article 78 Proceeding to sue the Judge who has failed to act before the Appellate Division. Obviously, it would be absurd to undertake an Article 78 Proceeding by virtue of the costs included as well as the resultant hostility the IAS Judge would thereafter have towards the movant and their attorney.



Call us today at 914.395.0055 ext. 315 or email jkosterich@kosterichlaw.com and discover how Jeffrey A. Kosterich & Associates can help you recover your money in an efficient and professional manner.