

Arizona Foreclosure Law

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In Arizona, why should a lender foreclose non-judicially vs. judicially?

- Timing:
 - Non-judicial trustee's foreclosure sales are much faster than judicial foreclosures
- Less expensive
- No post-foreclosure sale redemption rights
- Foreclosure sales precipitate reinstatements
- A foreclosure sale is presumed valid upon completion
- Reasons for pursuing a judicial foreclosure:
 - Lender holds a mortgage and not a deed of trust
 - Obtain a deficiency judgment
 - Stop serial reinstatements

Pre-foreclosure matters

- SCRA and Bankruptcy Pacer searches:
 - Upon receipt of referral and at subsequent milestone stages of the foreclosure sale process
- Demand letter:
 - Not statutorily required
 - Must fulfill any contractual notice requirements of the loan documents
- Statutory 90-day notice period:
 - A foreclosure sale cannot occur earlier than 91st day after recordation of the notice of trustee's sale with the county recorder
- Trustee's Sale Guaranty:
 - A TSG is required for each foreclosure sale; this allows the foreclosure trustee to satisfy the notice and mailing requirements of the foreclosure sale statute
 - The TSG is not an owner's policy

Required foreclosure sale documents

- Substitution of Trustee:
 - Lender/deed of trust beneficiary (hereinafter, the “beneficiary”) signs to appoint Folks as the substitute foreclosure trustee under the deed of trust (the “foreclosure trustee”)
- Statement of Breach:
 - Signed by beneficiary or the foreclosure trustee if duly authorized in writing
 - Lists amount in default, loan balance due
 - Directs the foreclosure trustee to exercise the power of sale
 - Gives notice to trustor and junior lienholders of effect of foreclosure sale

Milestone events during the 90-day pre-foreclosure sale notice period

- 5 business-day mailings:
 - Substitution of Trustee, Statement of Breach, and Notice of Trustee's Sale
 - Sent by certified mail to the addresses listed on the Deed of Trust
 - Sent within 5 business days after recording the Notice of Trustee's Sale with the county recorder
- 30 calendar-day mailings:
 - The same documents as enclosed in the 5-day mailings are mailed by certified mail to any party with a recorded interest in the property
 - Within 30 calendar days after recording the Notice of Trustee's Sale with the county recorder
 - The TSG provides the foreclosure trustee with the names and notice addresses of the parties who must receive the 30-day mailings ...

Milestone events during the 90-day pre-foreclosure sale notice period

- Posting:
 - The Notice of Trustee's Sale must be posted:
 - On the bulletin board of the county courthouse of the county in which the property being foreclosed upon is located
 - At a conspicuous place on the property
 - This requirement is waived if it would cause a breach of the peace to post the Notice of Trustee's Sale on the property
 - Posting of the notice of trustee's sale must be completed at least 20 days prior to the foreclosure sale date
 - Posting of the notice of trustee's sale is deemed complete on the day of the first of the 2 required postings ...

Milestone events during the 90-day pre-foreclosure sale notice period

- Publication:
 - The notice of trustee's sale must be published for 4 consecutive weeks in a newspaper of general circulation in the county where the property being foreclosed upon is located
 - The last date of publication must occur not less than 10 days prior to the date of the foreclosure sale
 - Publication of the notice of trustee's sale is deemed complete on the first date of publication ...

Milestone events during the 90-day pre-foreclosure sale notice period

- Notice to beneficiary of duty to disclose private mortgage insurance payments received:
 - The foreclosure trustee must provide a statutory notice to the beneficiary in advance of the foreclosure sale regarding disclosing payments received from private mortgage insurance
- TSG “bring down” endorsements:
 - The foreclosure trustee orders a “bring down” endorsement to TSG if TSG was obtained prior to recording the Notice of Sale
 - The foreclosure trustee always obtains the following “bring down” endorsements to the TSG during the foreclosure sale process:
 - 30-day TSG “bring down” endorsement
 - 60-day IRS lien “bring down” endorsement
 - Day of sale “bring down” endorsement

Conducting the foreclosure sale

- Actual bid or credit bid information:
 - Beginning at 9:00 AM and continuing until 5:00 PM on the last business day preceding the day of sale, and continuing until the time of sale on the day of sale, the foreclosure trustee must provide to any person who requests it the actual bid or credit bid that the beneficiary is entitled to make
 - The sale must be postponed if this information is not available
 - The foreclosure trustee or the foreclosure trustee's agent can conduct the foreclosure sale at the property, at the county courthouse steps, or at the foreclosure trustee's place of business if it is located in the same county as the property being foreclosed upon by the foreclosure sale
 - Maricopa County foreclosure sales are all held at our law office
 - Out-of-county sales are held at the county courthouse steps where the property being foreclosed upon is located ...

Conducting the foreclosure sale

- The foreclosure sale is a public auction
- A third-party bidder must give the foreclosure trustee a \$10,000 advance deposit to participate in the foreclosure sale bidding process:
 - If they are the successful bidder, the residual balance of the purchase price must be paid to the foreclosure trustee in cash (cashier's check) before 5:00 PM of the next business day
 - If they are not the successful bidder, then the trustee returns the \$10,000 bid check to the third-party bidder
 - If they fail to pay the residual bid amount, the \$10,000.00 deposit is forfeited
- The foreclosing beneficiary does not have to give the trustee a \$10,000 deposit and can “credit bid” up to the full amount of its debt
- If the beneficiary is the successful bidder, it doesn't have to pay any funds to the trustee

Miscellaneous foreclosure sale matters

- Voluntary postponement of the foreclosure sale:
 - The foreclosure sale may be postponed by the foreclosure trustee simply by orally announcing a continued new date, time and location of the sale on each scheduled sale date
 - The foreclosure sale may be postponed an indefinite number of times for periods as short as several minutes and up to 90 days; no other notice is required
 - There is no fee to postpone foreclosure sales that are scheduled to take place in our law office in Maricopa County. A nominal fee applies to postpone foreclosure sales scheduled in other counties ...

Miscellaneous foreclosure sale matters

- The foreclosure sale is automatically postponed by operation of law for 28 days if it is conducted in violation of the bankruptcy automatic stay
- The sale is valid and can be postponed during the bankruptcy proceeding and completed upon receiving relief from the bankruptcy automatic stay, if:
 - The Notice of Trustee's Sale was recorded
 - The 5-day and 30-day mailings were sent
 - Posting and publication were completed prior to a borrower's bankruptcy filing ...

Miscellaneous foreclosure sale matters

- The foreclosure trustee must give a second notice to the beneficiary of its duty to disclose private mortgage insurance payments received
- Conveyance of the trustee's deed upon sale:
 - The foreclosure trustee must record the trustee's deed, to convey title to the property foreclosed upon to the successful bidder, within 7 business days after receive of payment
 - Recordation of the trustee's deed creates a presumption of validity of the foreclosure sale
 - There is no right of redemption following a foreclosure sale, except for the 120-day right of redemption held by the IRS ...

Miscellaneous foreclosure sale matters

- Obtain an owner's title policy for the beneficiary if it obtains title to the property:
 - The TSG only insures the validity of the sale
 - It is not title insurance
- The statute of limitations applicable to foreclosing upon a loan is 6 years

How can a borrower stop a pending non-judicial trustee's foreclosure sale?

- Reinstatement:
 - The borrower, the borrower's successor-in-interest, any person having a junior lien or encumbrance of record, or any beneficiary under a junior deed of trust has the absolute right to reinstate the loan and force a cancellation of the foreclosure sale until 5:00 PM on the last business day prior to the date of the foreclosure sale
 - Fully matured notes cannot be reinstated; they must be paid off in full to force a cancellation of the foreclosure sale
 - Reinstatement is accomplished by paying:
 - all sums due under the note (except for principal)
 - the foreclosure trustee's statutory reinstatement fee (the greater of \$600 or one-half of 1% of the unpaid principal balance)
 - any expenses and reasonable attorneys' fees incurred by the beneficiary in addition to the foreclosure trustee's statutory reinstatement fee ...

How can a borrower stop a pending non-judicial trustee's foreclosure sale?

- Temporary restraining order or preliminary injunction:
 - Must be obtained by 5:00 PM the last business day prior to the foreclosure sale date
 - If not, and the foreclosure sale is completed, the borrower will have statutorily waived many to defenses to the foreclosure sale that was conducted if a subsequent lawsuit challenging the foreclosure sale is filed
- Pay off the loan in full:
 - The borrower or junior lienholders can pay off the loan in full to force a cancellation of the pending foreclosure sale
- Bankruptcy filing:
 - The foreclosure sale will be stayed immediately by the bankruptcy automatic stay if the borrower/owner of the property files for bankruptcy protection prior to the foreclosure sale date

Risks that the beneficiary's lien is extinguished by a third-party before the foreclosure sale is conducted

- Homeowners association liens:
 - First-priority deeds of trust are senior to HOA liens under Arizona law
 - Junior priority deeds of trust are subordinate to HOA liens and can be extinguished if the HOA conducts a judicial foreclosure of its lien
 - Beneficiary will be served with a judicial foreclosure complaint by the HOA
 - Lis pendens is typically recorded with the county recorder against the property ...

Risks that the beneficiary's lien is extinguished by a third-party before the foreclosure sale is conducted

- Real property Tax Certificates of Purchase:
 - Investors can purchase Tax CPs concerning delinquent real property taxes owed on real property
 - Real property tax liens are superior to all consensual liens, including deeds of trust, regardless of their priority
 - Holder of the Tax CP can sue to judicially foreclose a Tax CP three years after the sale of the lien at a county tax lien auction
 - The beneficiary will be served with a judicial foreclosure complaint by the Tax CP holder:
 - Lis pendens is typically recorded against the property

How does the beneficiary as a junior lien creditor protect its position when a senior lienholder forecloses?

- The beneficiary of a junior lien deed of trust must bid at the senior lien foreclosure sale to protect its position or payoff the senior lienholder:
 - If a senior lienholder to the beneficiary has a foreclosure sale set and the borrower does not resolve the matter by reinstating or paying off the loan, the lender must participate like any other third-party bidder at the foreclosure sale

What are “excess foreclosure sale proceeds,” and how does a beneficiary recover them?

- “Excess foreclosure sale proceeds” are the sums remaining after all costs of the foreclosure sale and the loan balance due under the deed of trust foreclosed are paid in full ...

What are “excess foreclosure sale proceeds,” and how does a beneficiary recover them?

- Recovery of “excess sale foreclosure sale” proceeds:
 - Within 90 days after completion of a foreclosure sale, the foreclosure trustee typically deposits any “excess sale proceeds” with the county treasurer of the county in which the property foreclosed upon is located
 - Trustee:
 - files a lawsuit against the treasurer
 - deposits the “excess foreclosure sale proceeds” with the treasurer
 - sends notice of the deposit to all interested parties required by the “excess foreclosure sale proceeds” statute ...

What are “excess foreclosure sale proceeds,” and how does a beneficiary recover them?

- “Excess foreclosure sale proceeds” are to be distributed by the court pursuant to the order of priority set forth in the “excess foreclosure sale proceeds statute”
- Parties entitled to recover “excess foreclosure sale proceeds” file an application in the lawsuit filed by the foreclosure trustee against the county treasurer to obtain a court order authorizing the “excess foreclosure sale proceeds” to be distributed to them pursuant to the requirements of the “excess foreclosure sale proceeds” statute

Can a lienholder obtain a deficiency judgment against borrower and/or guarantor after non-judicial foreclosure sale?

- In most residential mortgage foreclosure cases:
 - No
 - Arizona has a broad “anti-deficiency” statute
- No deficiency may be obtained if:
 - loan being foreclosed is:
 - secured by a residential property
 - located on 2.5 acres or less
 - a single one-family or single two-family dwelling
 - beneficiary elects to complete a non-judicial foreclosure sale

Can a lienholder obtain a deficiency judgment against borrower and/or guarantor after non-judicial foreclosure sale?

- In vacant land or commercial property case:
 - Yes
 - If the loan involved is secured by vacant land or commercial real property, the “anti-deficiency” statute does not apply
- **Post-foreclosure sale mortgage deficiency lawsuits:**
 - Must be filed within 90 days after the date of the foreclosure sale or they are barred by the applicable statute of limitations.
 - This 90-day deadline is absolute



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