



HindmanSanchez

The Effect Of Public Trustee Foreclosure On Association Liens

HindmanSanchez P.C. Attorneys at Law • Denver & Fort Collins

5610 Ward Road., Suite 300, Arvada, Colorado 80002-1310 Tel 303.432.9999 Free 800.809.5242 Fax 303.432.0999 www.hindmansanchez.com



The Effect Of Public Trustee Foreclosure On Association Liens

Foreclosures through the Public Trustee's office tend to increase when the economy falters but even in strong economic times associations will be faced with the repercussions of public trustee foreclosures. These foreclosures are generally commenced by first mortgage holders and can have a significant impact on associations. To understand the impact it is necessary to first understand the public trustee foreclosure process.

Setting of a Sale

The first step in foreclosure through the public trustee is to file a written Notice of Election and Demand for Sale by Public Trustee ("NED") with the public trustee where the property is located and to whom the deed of trust was granted along with the original note and the original deed of trust to be foreclosed. The NED must include a description of the deed of trust being foreclosed, a description of the real property to be advertised for sale, and the terms of the deed of trust which have been violated. It demands that the public trustee give notice, advertise for sale, and sell the property. After receipt of the NED, the public trustee must cause one copy of the document to be recorded in the office of the county clerk and recorder of the county in which the real estate is located, and keep the NED on file.

A Notice of Sale is also filed and the public trustee sets a sale date. The sale date must not be less than 110-125 days after the date of recording of the NED by the public trustee. Once the sale date is set, the Notice of Sale is then published in some newspaper of general circulation, for generally at least once a week for five successive weeks. The Notice of Sale is also mailed as printed in the newspaper to the grantor of the deed of trust at the address given in the trust deed within twenty days after the date of the first publication of the notice and to each person who appears to have acquired a record interest in the real estate subsequent to the recording of the trust deed, whether by deed, mortgage, judgment, or any other instrument of record, in other words, anyone having cure or redemption rights. The printed Notice of Sale must be mailed to those persons at the addresses given in the recorded instruments. The foreclosing party or its attorney prepares the list of names and addresses of all persons having an interest in the property, and the public trustee is required to send all notices to the persons on that list. This means that the Notice of Sale will be mailed to the address appearing on the association's recorded notice of lien. If the lien was prepared by a prior attorney, prior management company or prior board member and their respective addresses are listed on the lien – they will receive the Notice of Sale. Therefore, it may be prudent for an association to record an amended notice of assessment lien or notice of change of address, if there is a change in the appropriate address for mailing of notices. In the event there is no lien recorded, the Association may be able to rely on the statutory lien provided for in the Colorado Common Interest Ownership Act.

The public trustee is also required to send a Notice of Cure Rights to the grantor of the deed of trust being foreclosed and to the owners of the property being foreclosed.

Before sale by the public trustee, it is necessary to obtain an Order Authorizing Sale from a court with proper jurisdiction. Rule 120 of the Colorado Rules of Civil Procedure sets forth the procedures to be followed to obtain this Order Authorizing Sale. A Motion is filed in the Rule 120 proceeding and is mailed to all interested parties who may dispute the moving party's right to an Order Authorizing Sale. If a response disputing the Motion is filed, a hearing will be held only if the dispute relates to the existence of a default, the existence of other facts and circumstances authorizing the exercise of the power of sale, the

HindmanSanchez P.C. Attorneys at Law • Denver & Fort Collins

5610 Ward Road., Suite 300, Arvada, Colorado 80002-1310 Tel 303.432.9999 Free 800.809.5242 Fax 303.432.0999 www.hindmansanchez.com

debtor's defenses of estoppel and waiver, inquiry whether the moving party is the real party in interest, and any other issues required to be considered by the Service Members' Civil Relief Act.

Cure

The owner of the property being foreclosed or parties liable on the note have the right to cure the default. The person curing must give written notice to the public trustee of the intention to cure the default at least fifteen days prior to the date of the foreclosure sale. On or before noon of the day before the day on which the sale is set, the party who is curing must pay to the public trustee the amounts set forth in the statute. Once the debtor files his notice of intent to cure, the public trustee will request from the foreclosing party or its attorney, a statement of all amounts which would be due from the debtor to cure as of noon on the day before the sale. If the default is cured, the foreclosure sale is withdrawn and the association's lien remains intact against the property.

Sale

At the exact time and place fixed in the printed Notice of Sale, the sale is held by the public trustee. At the sale the public trustee reads the printed Notice of Sale aloud and then calls for bids. In practice the only bidder at the sale is usually the holder of the note secured by the deed of trust. This bid is usually the amount which is secured by the deed of trust plus all fees and expenses of the foreclosure. The foreclosing party's bid is on paper only and no cash is necessary. This written bid of the foreclosing party is due by noon on the day prior to the date and time of the scheduled sale.

The public trustee reads the bid of the foreclosing party first, then asks for other bids. When it is apparent that there will be no more bidding, the public trustee strikes off the property to the highest bidder. The public trustee then declares that he has sold the property described in the Notice of Sale to that person at the price which he bid, naming the price. If the highest bidder is not the holder of the indebtedness secured, the full amount of the bid must be paid in cash or certified funds.

Certificate of Purchase and Redemption

Upon completion of the sale, the public trustee issues a Certificate of Purchase. The original Certificate of Purchase is delivered to the purchaser within ten days from the date of the sale and the public trustee records a copy in the office of the county recorder. The Certificate of Purchase provides "that the purchaser will be entitled to a deed for such property at the expiration of the redemption periods provided by law unless a redemption is made.

The owner of the property has no right to redeem the property. Lienholders may redeem by paying back to the holder of the Certificate of Purchase the bid price plus interest and some subsequent costs defined by statute.

In order to redeem, lienors whose liens appear recorded, such as an association, must also file a Notice of Intent to Redeem with the public trustee within 10 days after the sale. The recorded instrument evidencing the junior lienor's lien must be attached to the Notice of Intent to Redeem. The Notice must also contain an affidavit setting forth the amount required to redeem such junior lien. If Notices of Intent to Redeem are filed, the lienor who is first in priority has ten days after the expiration of the 10 day period following the sale within which to redeem. Each subsequent lien or in succession has a five-day period thereafter to redeem according to the priority of his/her lien or encumbrance. Each lienor in succession may redeem by paying the amount last paid to redeem, with interest. For more information on redemption by your association, please contact one of our attorneys.

All monies payable to a public trustee at any foreclosure sale as fees to the public trustee, or for redemption or cure, must be in the form of cash or a certified or cashier's check made payable to the public trustee.

Effect on Association Lien

Now that you understand the public trustee process, let's now turn to the impact of the process on an association. The purpose of a foreclosure is to sell a piece of property to satisfy a debt that is owed and has not been paid. So, in the case of an owner's failure to pay their mortgage, the mortgage company chooses to sell the collateral (the unit) to recover the money that is loaned to the owner.

The foreclosure process entitles the ultimate purchaser to receive title to the property free and clear of all encumbrances recorded against the property after the date of the deed of trust which is being foreclosed. Therefore, since the association's lien is always recorded after a first deed of trust, if the first mortgage is being foreclosed on, the association's lien against the property will be wiped out or removed as an encumbrance if the association does not redeem. Conversely, if the deed of trust being foreclosed on is a second or subsequent deed of trust, then the association's lien is not wiped out and remains a valid encumbrance against the property. In addition, the association should be aware and understand its super lien rights provided by C.R.S. § 38-33.3-316 which exist any time a foreclosure action is commenced.

If an association's lien is wiped out as a result of a foreclosure, then the association may no longer look to the property to recover moneys due. However, the owner of the property remains personally liable for the debt even if they lose their property. However, because a foreclosure is often a sign of significant financial problems, the owner may file bankruptcy or have insufficient funds to satisfy the debt. Therefore, it is essential that associations thoroughly evaluate the impact of a foreclosure and the options it presents to make an informed decision in the best interests of the association.