



FINANCIAL RESTRUCTURING & BANKRUPTCY DEPARTMENT

# ALERT

## NOTICE TO COMMERCIAL LENDERS ENFORCEMENT OF TRADITIONAL MORTGAGE INSTRUMENTS REQUIRES PATIENCE AND UNDERSTANDING OF MANY PROCEDURAL REQUIREMENTS

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The current economic environment has resulted in a need for commercial banks and other lending vehicles to look to collateral for recovery on defaulted loans. Enforcement of mortgages through legal foreclosure is again becoming a necessity as evidenced by the large number of foreclosure law suits under consideration by the courts in our region. The foreclosure process, even if uncontested, is already time-consuming, in some instances taking as much as 18 to 24 months just to process the paper work. It can even take longer when the commercial lender has the residence of the borrower's principal as collateral, which is not uncommon for a loan or other financial accommodation to a small business. This alert will address the legal and procedural requirements for the commencement of a mortgage foreclosure action on residential properties in New Jersey even when held as security for a commercial loan.

### **Fair Foreclosure Act**

The New Jersey Fair Foreclosure Act (the "Act") imposes certain requirements on lenders in connection with the foreclosure of residential mortgage loans. N.J.S.A. 2A:50-53. The Act applies to the foreclosure of all mortgages securing residential property located in New Jersey. The fact that the secured loan is a

commercial loan is not dispositive of whether the Act applies. Selected provisions of the Act also apply to non-residential foreclosure actions.

### **Notice of Intention to Accelerate and Foreclose**

The Act requires that notice of intention to accelerate and foreclose must be effected at least 30 days prior to acceleration or the commencement of a foreclosure action. N.J.S.A. 2A:50-56(a). The default forming the basis of a notice of intention to accelerate and foreclose may be monetary or non-monetary; however, the nature of the default must be specified in the notice. Notice is not required if the debtor has voluntarily surrendered the property. The notice must be in writing and contain a number of items, including a statement providing the debtor the right to cure the default. Notice must be sent by registered or certified mail to the mortgagor's last known address, or to the address that is subject to the residential property.

### **Right To Cure**

The Act specifies that the mortgagor has the right to cure independent to the right of redemption. N.J.S.A. 2A:50-57(a). The right to cure cannot be waived by the mortgagor, except after default in a written workout agreement signed by the mortgagor. N.J.S.A. 2A:50-61.

The right to cure accrues when notice of intention is required to be given, not when a notice of intention is sent or received. If the mortgagor cures the default within the date specified in the notice of intention, the mortgagor has the right to cure any subsequent default. However, if a mortgagor exercises the right to cure after the date specified in the notice, the mortgagor has no right to cure another default occurring within 18 months. To properly cure, the mortgagor must pay or tender all sums due in the absence of default, court costs and attorneys fees, and all late charges. Upon cure of default, the mortgagor's loan is reinstated to the same position had the default not occurred.

### **Optional Foreclosure Procedure**

The Act provides an optional foreclosure procedure to be used in lieu of a public sheriff's sale on the mortgaged property. N.J.S.A. 2A:50-63(a). The optional procedure eliminates the need for the lender to hold a sheriff's sale and obtain a sheriff's deed. The optional procedure is permitted only when:

- (1) the debtor has abandoned the property that is the subject of the residential mortgage;
- (2) the debtor has voluntarily surrendered the property by signing a deed in lieu of foreclosure in favor of the lender; or
- (3) there is no equity in the property that is subject to the mortgage (where the total unpaid balance of all liens and encumbrances against the property is equal to or greater than 92 percent of the fair market value of the property).

To utilize this procedure, the mortgagee must apply for an order fixing the amount, time and place for redemption (known as "an order for redemption"). Before applying for the order, the mortgagee must serve notice upon the mortgagor at least 14 calendar days before filing the application, advising that the mortgagee intends to apply for a redemption order and that the mortgagor will lose his right to cure any defaults upon entry of the order. No later than 10 days after receiving the notice, the mortgagor may mail the lender a responsive statement certifying there is a reasonable likelihood that the mortgagor can cure within 45 days of the mortgagee's notice of intention. If the mortgagee receives the statement, the mortgagee may not file an application for an order for redemption before 46 days after the notice of intention became effective.

The lender must file an affidavit or certification setting forth facts that indicate that the mortgagee is entitled to proceed under the redemption procedure, together with any necessary proofs. The mortgagor still retains the right to cure a default through the date of entry of an order for redemption, and retains the right to redeem the property through the date of any ensuing judgment.

### **Traditional Foreclosure Procedure**

An action to foreclose a mortgage is commenced by filing a complaint in the Chancery Court in the county in which the real estate is located. The lender must demonstrate:

- (1) the validity of the mortgage documents;
- (2) the existence of default; and
- (3) the right to foreclose.

Any defendant who wishes to challenge the allegations of a foreclosure complaint must file an answer within 60 days after service. If no defendant contests the relief sought therein, the action is deemed uncontested, and the lender can proceed to enter final judgment through the Office of Foreclosure. Where, however, one of the actions is contested, the lender should consider filing a motion for summary judgment. In the event summary judgment is granted, the court will refer the action back to the Office of Foreclosure for entry of final judgment.

The lender may seek entry of final judgment once the action is deemed uncontested. An action is deemed uncontested if, as to all defendants:

- (1) default has been entered for failure to plead or otherwise defend the action;
- (2) none of the defendants' responsive pleadings either contest the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's rights to foreclose it; or
- (3) any contesting pleadings have been stricken or rendered noncontesting.

The Act also requires the foreclosing mortgagee to mail to each debtor at least 14 calendar days before submission of the final judgment application, a notice that the mortgagee intends to submit the proper proofs to court for entry of final judgment and that once the final judgment is entered, the debtor loses his right to cure the default by paying the amount past due. Once final judgment has been entered, the final step for the foreclosing mortgagee is the sheriff's sale.

### **Uniform Procedures for Public Sales**

The Act sets forth uniform procedures for public sales of mortgaged property. N.J.S.A. 2A:50-64. A sheriff must schedule a sale date within 120 days of the receipt of the writ of execution for such sale. At least 10 days prior to the sale, the foreclosing mortgagee must provide notice of the sale to the record owner of the property when the action was commenced, and to all parties who have appeared in the foreclosure action. The mortgagor has the statutory right to two adjournments (of 14 days each) of the sheriff's sale date.

The mortgagor has a period of 10 days following the date of the foreclosure to redeem the property following the date of the sheriff's sale. If the property is not redeemed within the time period, the sheriff will deliver a deed of conveyance for the foreclosed property to the successful bidder at the sheriff's sale.

### **Deficiency Action Statute**

The New Jersey deficiency action statute has a "foreclosure first" requirement, before an action on the bond or note for any deficiency can be pursued. N.J.S.A. 2A:50-2. Once the foreclosure proceedings have been completed and the sale conducted, the deficiency action must be commenced within three months of the foreclosure sale. If a deficiency action is pursued, the mortgagor has a statutory right to obtain a fair market value credit of the mortgaged premises against the amount due on the mortgage note. N.J.S.A. 2A:50-3.

The deficiency action statute applies to all mortgage loans, except where:

- (1) the loan is for a business or commercial purpose;
- (2) the mortgaged property is a residence in which the owner or his immediate family do not reside at the time of the foreclosure suit is filed;
- (3) the mortgaged property is not the primary security for the debt; or
- (4) the mortgage is a second or subsequent lien.

If the statute does not apply, the lender is free to bring a direct action on the note or bond secured by the mortgage without first foreclosing. The remedies of foreclosure of the mortgage and a direct action on the secured obligation are cumulative and concurrent and may be pursued in any order.

Where foreclosure first does not apply, the court still has the authority to invoke the rule to allow a non-

statutory credit for the fair market value of the mortgaged premises against the unpaid balance of the loan for which the lender is seeking a judgment.

### **Right of Redemption**

Until the foreclosure is completed, the mortgagor retains the right to redeem the mortgaged premises upon payment in full of the mortgaged debt. N.J.S.A. 2A:50-4. Equitable redemption may be had at any time prior to the sale of the mortgaged premises while statutory redemption occurs only after a sale takes place; however, the Supreme Court of New Jersey held that a mortgagor may still exercise his right to redeem the mortgaged premises for an additional 10 days following the sale. The only statutory right of redemption in New Jersey is provided for persons against whom a deficiency judgment has been entered, who are then given six months following entry of the deficiency judgment to redeem. Anyone who has an interest in the mortgaged premises has a right to redeem.

### **Fair Debt Collections Practices Act**

The Fair Debt Collections Practices Act ("FDCPA") prohibits debt collectors from making false or misleading representations and from engaging in abusive and unfair practices with respect to consumer debts. For an obligation to constitute a debt under the FDCPA, it must involve a transaction whose subject is primarily for personal, family or household purposes. 15 U.S.C. § 1692a(5). Moreover, an attorney is not deemed to be a debt collector where less than 10 percent of an attorney's fees are generated through debt collection.

### **Helping Families Save Their Homes Act**

President Obama signed the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act into law in May 2009. This legislation established protections for renters living in foreclosed homes. It requires that in the event of foreclosure, existing leases for renters are honored, except in the case of month-to-month leases or owner occupants foreclosing in which cases a minimum of 90 days notice is required.

### **New Jersey Foreclosure Mediation Program**

The New Jersey Judiciary Foreclosure Mediation Program requires that a lender who serves a summons and complaint of foreclosure on a high-risk mortgage loan must grant the borrower a six-month period of forbearance, upon written request of the borrower, to pursue a loan workout, loan modification, refinancing or

other alternative through the program. N.J.S.A. 46:10B-50. The program applies to high risk mortgage loans with the following characteristics:

- (1) interest only mortgage with a future interest reset rate;
- (2) reset mortgage interest rate that increases the initial interest rate by two or more percentage points;
- (3) contains a payment option plan or a “pick a payment” plan;
- (4) contains a negative amortization schedule;
- (5) subprime mortgage;
- (6) contains an enforceable prepayment penalty; or
- (7) high cost home loan.

Application may be made at any time after a foreclosure complaint has been filed up to the time of the

sheriff’s sale by homeowners who have filed an answer and are contesting the foreclosure, as well as by homeowners who failed to appear and whose cases are currently uncontested. A request for mediation does not prevent the lender from continuing to seek a foreclosure judgment and writ, but it will stay the sheriff’s sale while mediation is pending if the homeowner files a successful motion in state court seeking a stay.

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