

Foreclosure Guidebook



A helpful guide for individuals who may be facing foreclosure and reside in the Hudson Valley area of New York State. If you are struggling to make your mortgage payments or are already behind, and the word “foreclosure” has come up, you may be looking for ways to better understand what foreclosure means and what your options are.



158 Orange Avenue, Walden, NY 12586 | www.jacobowitz.com | 845.778.2121

Introduction

Foreclosures are not in the news much anymore, but ten years on from the financial crisis and housing market crash, many Hudson Valley homeowners are still facing the loss of their homes through foreclosure.

According to RealtyTrac.com, the June 2018 rates of active foreclosure rates for local counties are as follows: 1 in 1,825 homes in Sullivan County are in foreclosure, 1 in 1,332 homes in Dutchess County are in foreclosure, 1 in 1,247 homes in Ulster County are in foreclosure, and 1 in 706 homes in Orange County are in foreclosure.

It's nice for a borrower to know they are not statistically alone, but what a distressed borrower really wants to know is "What can I do?"

Foreclosures can be complicated, frustrating, and stressful. An attorney can help a borrower evaluate their options, and provide guidance and advice throughout the process.

Mortgage and Foreclosure Overview

Here, we discuss some fundamental mortgage and foreclosure terms, and procedures a borrower should understand:

The Note and Mortgage

A promissory note is a document that evidences a loan from a lender to a borrower. The promissory note is a contract that obligates a borrower to repay money to a lender, and sets forth the terms, including the principal (amount borrowed), interest rate, repayment terms, and so forth.

A mortgage creates a lien against property – it is security for the loan obligation. The borrower is the mortgagor. The lender is the mortgagee. If and when the debt is paid the mortgage lien is terminated by the filing of a satisfaction of mortgage. If the loan is not repaid in accordance with the terms of the promissory note, the lender may enforce the mortgage by commencing a foreclosure action.

Service and Assignments

Lenders often use loan servicing companies to manage their loans. The servicer can prepare statements, collect payments, and commence and prosecute foreclosures. Lenders also often sell and assign loans to other lenders. Loan servicers and assignments are common and legal when the lender follows proper legal procedure. Borrowers may still find the transitions between lenders and servicers confusing and frustrating. If there is any question as to where payment should be remitted, a borrower should seek clarification from the lender directly to avoid a missed or delayed payment. While we

refer to a lender/mortgagee in this Guidebook, typically a servicer can do on lender's behalf whatever that lender is obligated to do.

Foreclosure – Procedural Overview

Foreclosure is the legal process for lender/mortgagee to recover the home or property for sale at auction to satisfy the mortgage loan when the borrower has defaulted in payment. Default is a borrower's failure to abide by any of their obligations as set forth in the mortgage loan documents, but in the context of foreclosure, the default is a failure to pay sums due to their lender.

This process for a lender/mortgagee to enforce its security interest in real property (foreclosure) is governed generally by New York State law (Real Property Actions and Proceedings Law and Civil Practice Law and Rules).

There are many procedural steps within the foreclosure action that a lender needs to take. The lender cannot just "take" a borrower's house. The lender must follow strict procedures and take many steps to ultimately obtain a judgment of foreclosure and sale in order to hold a foreclosure auction of the borrower's house. In cases where a lender is aggressively moving the foreclosure forward, it can still take approximately a year. Many cases take much longer, sometimes years, even where the borrower is not defending against the foreclosure.

Required Notices

The lender/mortgagee is required to provide certain notices to the borrower prior to commencing a foreclosure action. The lender must provide any notices that are required by the loan documents, the promissory note and the mortgage.

The lender/mortgagee is also required by statute (Real Property) to provide a ninety (90) day notice to the borrower that the borrower is at risk of losing their home, providing a list of government approved housing counseling agencies, and advising the borrower of some of their rights and options.

Summons and Complaint

A lender starts a foreclosure action by serving and filing the Summons and Complaint. The Complaint can be served personally, by being handed to the borrower, or it can be handed to a person of suitable age and discretion that lives with the borrower or it can be left at the borrower's residence and mailed to the borrower. The complaint will set forth the lender's allegation concerning the note, mortgage, and default.

Answer

The Answer is a response to the Complaint that includes any applicable defenses. The Answer is served upon (sent to) the lender's attorneys and then filed with the Court. The homeowner/borrower must Answer the Complaint in order to participate in the foreclosure action and make issue of any procedural missteps or lender's failure to negotiate in good faith (discussed below).

Potential Defenses

There are many potential defenses for borrowers, including procedural deficiencies – the lender failed to serve a notice of default or the 90 day notice. The lender may have improperly served the borrower, or not served the borrower at all. The lender may have named the wrong parties. Substantive defenses include instances where the foreclosing lender is not the holder of the note and/or mortgage, perhaps due to issues with mortgage assignments. Of course, the defenses will depend on the facts of each case.

Mandatory Foreclosure Settlement Conferences

In New York State settlement conferences before the Court are mandatory in residential foreclosure cases. While the foreclosure case is in settlement, the lender cannot procedurally move the foreclosure case forward. There may be one conference, or there may be many conferences depending on what resolution or issues the parties are addressing.

The foreclosure settlement conference provides an opportunity for the parties to resolve the matter, usually with a workout option, such as a mortgage modification, short sale, sale, or deed in lieu of foreclosure, which are discussed in further detail below.

Further, the lender has a statutory duty to negotiate in good faith to resolve the matter. (So does the borrower, but they rarely need reminding by the Courts and legislature?) Where a lender causes undue delays, fails to obey court directives and rules, is unprepared for conferences, or engages in other conduct deemed to be a failure to negotiate in good faith, the Court can cancel interest and fees, award damages, and impose a civil penalty payable to the state.

If a workout is agreed upon, the case can be settled and discontinued.

If the case is not settled, it will be released from the settlement conference, and the lender will then be able to proceed with the legal process of foreclosure before the Court.

Motion for Summary Judgment and Appointment of a Referee

Now, lender is off to the races, procedurally. The next step to move the action forward is lender's motion for summary judgment and appointment of a referee. A simplified explanation for the sake of brevity: The lender must prove its case by demonstrating with submission of the loan documents that it is the holder of the note and mortgage and that the borrower has defaulted in making payments. In order to defeat this motion, the borrower would have to raise a credible issue that the note and mortgage are not enforceable (i.e. lender does not hold the note or mortgage, or the statute of limitations has expired) or that borrower did not default (lender lost or misapplied payments, or induced the default). Procedurally, defects such as improper service or failure to provide the required notices and any other defenses that were asserted in borrower's Answer should be put forth to oppose the lender's motion.

If the lender is successful, the case moves forward and the court appoints a referee, an independent third party attorney to calculate how much the lender is entitled to from borrower under the loan documents.

If the lender is not successful, it must prove its case at trial where both lender and borrower provide evidence (documents, testimony) regarding the foreclosure and defenses.

Motion for Judgment of Foreclosure and Sale

The next step after the motion for summary judgment is granted to the lender is the lender's motion to confirm the referee's report and for a judgment of foreclosure and sale. If granted, the Court issues an order allowing the lender to auction the borrower's home.

Foreclosure Auction

The foreclosure auction must be advertised for at least 21 days. At the foreclosure auction, the Court-appointed Referee conducts the auction. The mortgagee/lender makes the first bid and then others may bid. The highest bidder will become the owner of the property after paying the lender the winning bid amount. If there are no outside bidders, the lender will obtain title to the property.

If property is auctioned for more than is required to pay off borrower's Judgment of Foreclosure, then the Referee sends the surplus monies to the County Commissioner of Finance and a surplus money proceeding will be held to determine who (other creditors or the mortgagee/borrowers) is entitled to the surplus monies.

Summary

An attorney can help a borrower through the procedural aspects of foreclosure. This simplified overview is meant to show borrowers the many procedural steps that a lender must take in order to get to the foreclosure auction. It can take months or sometimes years, and all the while, the borrower owns the home and is entitled to possession.

Borrowers' Options When Facing Impending Foreclosure

There are two sides to foreclosure defense – the procedural track before the Court discussed above, while at the same time dealing with the lender on workout options. Prior to or during and within the foreclosure action, a borrower can work out a resolution with the lender.

First and foremost, a borrower should not panic and move out with no plan. A borrower owns their home and is entitled to live there until the home is deeded to the successful bidder at the foreclosure auction. This can give a borrower breathing room to regain their financial footing. A prudent homeowner in this situation will set aside some money each month, ideally equivalent to a housing payment, so that they will be able to afford their next housing situation when the time comes.

In order to evaluate their options a borrower should first decide whether they want to keep their house. This is a decision a borrower needs to make based on many factors, such as the value of the home as compared to the loan, whether the monthly payments as modified will be affordable and/or lower than the housing payment on an alternate situation, as well as personal considerations - maybe borrower wants their kids to stay in this school district, maybe borrower has a job offer out of the area, maybe the house needs repairs in which borrower does not want to invest.

Trying to Keep the Home. Retention Options:

Reinstatement

If a borrower wants to keep a home, they can seek to reinstate the loan with a lump sum payment of arrears, or through a payment plan where the arrears are paid over a short period of time (several months). This is a good option if the hardship causing the default has passed and borrower can afford such payments.

Modification

Another retention option is a loan modification where the lender agrees to change the terms of the loan in order to lower the monthly payments. Lenders modify loans by reducing the interest rate and/or extending the life of the loan, rather than reducing the principal balance. The modified loan will typically be more expensive over the life of the loan, but if the monthly payments are affordable, this is a viable option for borrowers who want to stay put. A borrower will need to apply to their lender for a modification in a process that is similar to the original loan application process. A borrower will need to provide proof of income (i.e. tax returns, pay stubs, bank statements, statement of benefits etc.) to demonstrate the need for a modification and an ability to afford the modified payments. However, lenders are not required to modify loans and Courts cannot order lenders to modify loans. Also note that a borrower is not required to default in order to qualify for a loan modification.

Refinancing

Refinancing may be an option for borrowers who anticipate trouble affording the mortgage, but who still have strong enough credit to qualify for a new loan on better terms than their existing mortgage loan. Once borrowers have established a negative payment history, refinance will not be an option.

Leaving the Home. Non-Retention Options:

Short Sale

In a short sale, borrower finds a buyer and seeks approval from the bank to accept a payoff on the loan that is less than what is owed. Any other liens on the property need to be satisfied as well. The borrower will have to submit an application to the lender for approval, much like a modification application. The application and approval process can be time consuming. It is important to address in the short sale contract that the sale is subject to lender's approval.

Where the mortgaged property is worth more than is owed, this is an ordinary sale. Where borrowers can sell the house and satisfy all the liens (other mortgages and/or judgments) and closing costs (transfer taxes, broker commissions, attorney's fees, etc.) without asking the lender to accept less than is owed on the mortgage loan, borrower can sell the house without lender's approval.

Deed in Lieu of Foreclosure

In a deed-in-lieu, borrower deeds the house to the bank in satisfaction of the loan debt. Any other liens on the property need to be cleared up for a lender to accept a deed-in-lieu. The borrower will have to submit an application to the lender for approval, much like a modification application. The application and approval process can be surprisingly time consuming considering that borrower is seeking to transfer the property to the lender without going through the time and expense of a foreclosure action.

Walking Away Does Not Work

When faced with foreclosure, many an overwhelmed borrower has devised the following “plan”: Let’s just move out, let the bank have the house, and get this over with.

Moving out of the house does not do anything to move the foreclosure process along or transfer ownership of the house to the lender, and it can put financially strained borrowers in a worse position.

First, as discussed above, a mortgagee/lender cannot “just take the house”. Moving out of the house likely means a borrower taking on monthly rental payments. Remaining in the mortgaged home can save the borrower money because in New York, a borrower owns their home until the end of the foreclosure. As record owner, a borrower is entitled to use and possession of the home, and can remain in the home, even if not able to make the mortgage payments, until the house is deeded to the successful bidder at the foreclosure auction, which may or may not be the lender. This can give a borrower breathing room to regain their financial footing.

Ignoring a foreclosure action does not expedite it and it can also result in a deficiency judgment against the borrower. A deficiency judgment is a money judgment against the borrower for the difference between the amount owed to the lender and the higher of the market value or the sale price of the foreclosed property. Although it is unusual for a lender to enforce a deficiency judgment, a loan application is a road map to a borrower’s assets and income streams. What borrower wants to risk a wage garnishment and restrained bank accounts after losing their house?

If a borrower really wants to be done with the foreclosure, they should try to work out a deed in lieu of foreclosure with the lender, or consent to certain aspects of a foreclosure action which can help expedite the matter, in exchange for a waiver of the deficiency judgment.

Not Over Borrowing: A Strategy

One way to avoid a possible foreclosure is to not over borrow when initially taking out the mortgage loan. Borrowers should be able to afford the mortgage payments, as well as not only necessities, but other things that are important to them. Here is a sample budget worksheet to help borrowers evaluate how much they can and want to spend on a house.

<i>Monthly income</i>	
Total take-home pay (earnings, wages, tips)	\$ _____
Child Support	\$ _____
Spousal support	\$ _____
Investment income	\$ _____
Government benefits	\$ _____
Other sources	\$ _____
TOTAL:	\$ _____
<i>Monthly bills and expenses</i>	
Spousal support	\$ _____
Child support	
Housing payment (rent, mortgage, property tax)	\$ _____
Car payments	\$ _____
Student loan payments	\$ _____
Credit cards	\$ _____
Health insurance premiums	
Medical bills	\$ _____
Cell/internet	
Electricity	\$ _____
Gas (your heating/cooling bill)	\$ _____
Telephone service	\$ _____
Cable/satellite service	\$ _____
Water and sewer service	\$ _____
Renter's insurance (divide the yearly premium by 12)	\$ _____
Groceries and household supplies	\$ _____
Clothing	\$ _____
Health club dues	\$ _____

Other fees or dues	\$ _____
Fuel and repairs for your car Commuting – train, bus	\$ _____
Books, movies, video rentals, dining out, etc.	\$ _____
Incidental purchases Vacation Gifts Savings	\$ _____
TOTAL:	\$ _____
Enter your total monthly income from the calculation above	\$ _____
Enter your total monthly expenses calculated above	\$ _____
Subtract the second figure from the first	\$ _____
TOTAL:	\$ _____

Conclusion

If facing default or foreclosure, a borrower should remember that the lender is not on their side, but that time most likely is. Foreclosure is a relatively slow process, which may allow borrower time to work something out with the lender.

An attorney can help a borrower understand their options and protect their rights and interests. An attorney can assist a borrower in evaluating their retention options (modification, reinstatement) and non-retention options (short sale, deed in lieu of foreclosure). An attorney can also facilitate the workout process, which can be overwhelming and frustrating for borrowers, and ensure that the lender follows the proper procedure in the foreclosure action.

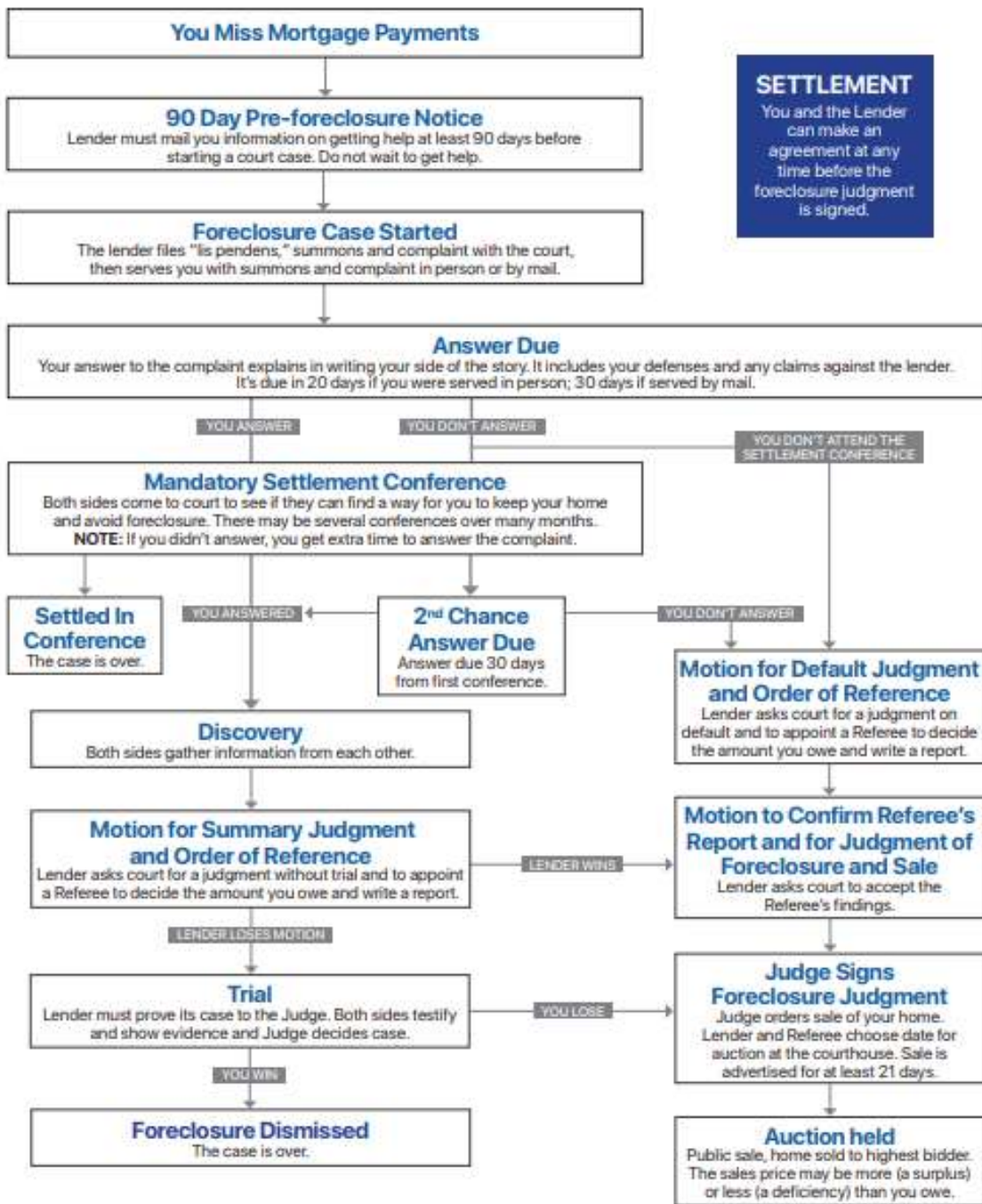
Foreclosure Resources

Following are New York State and local housing counseling agencies which provide free or very low-cost counseling:

- ✓ HOPP – Homeowners Protection Program # 855.Home.456 or at www.aghomehelp.com
- ✓ HUD – United States Department of Housing and Urban Development at www.hud.gov
- ✓ Orange County Rural Development Advisory Corporation in Walden # 845.713.4568
- ✓ Hudson River Housing in Poughkeepsie # 845.454.9288
- ✓ Putnam County Housing Corporation in Carmel # 845.225.8493
- ✓ RUPCO in Kingston # 845.331.9860
- ✓ Rural Sullivan Housing Corporation in Monticello # 845.794.0348
- ✓ Housing Action Council in Tarrytown # 914.332.4144
- ✓ Rockland Housing Action Coalition in New City # 845.708.5799
- ✓ Community Housing Innovations, Inc., in White Plains # 914.683.1010
- ✓ Housing Action Council in Tarrytown # 914.332.4144
- ✓ Human Development Services of Westchester, Inc., in Port Chester # 914.939.2005
- ✓ New York State Department of Financial Services Resource Center at https://www.dfs.ny.gov/consumer/home_resources.htm
- ✓ New York State Department of Financial Services Foreclosure Relief Unit at https://www.dfs.ny.gov/consumer/fore_relief_unit.htm

THE FORECLOSURE PROCESS IN NEW YORK STATE

For Residential Cases



SETTLEMENT
You and the Lender can make an agreement at any time before the foreclosure judgment is signed.

For more information visit: www.nycourts.gov/courthelp/homes/foreclosures.shtml
08/2018

<http://www.nycourts.gov/courthelp/pdfs/Foreclosureflowchart.pdf>

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866-993-7575 | 845-764-8828 | 158 Orange Avenue | Walden, NY 12586

Sullivan County Office: 548 Broadway, Monticello NY 12701



This is not intended to be legal advice. You should contact an attorney for advice regarding your specific situation.

This workbook is prepared by Jacobowitz and Gubits LLP, September 2018.