



Mortgage Foreclosure in Minnesota: Back to Basics

By Robert Q. Williams



With recent changes to Minnesota's mortgage foreclosure law and the looming implementation of new federal mortgage servicing rules, residential loan servicers and borrowers alike are working to find their footing on a shifting legal playing field. For attorneys representing clients on either side of a mortgage default, a practical understanding of Minnesota's basic mortgage foreclosure models is a necessary starting point to develop an effective foreclosure strategy or defense in the context of the new rules. This article provides a simple primer on the basics of foreclosure by advertisement, foreclosure by action, voluntary foreclosure and the pseudo foreclosure alternative, a deed in lieu of foreclosure.

Foreclosure By Advertisement

Nearly all mortgages executed in Minnesota contain a "power of sale" clause, allowing the mortgagee to elect, at its option, to foreclose the mortgage by advertisement upon a borrower's uncured default. Minn. Stat. § 580.01 requires the mortgage to contain a power of sale as a requisite for foreclosure by advertisement. Foreclosure by advertisement, or non-judicial foreclosure, is the most prevalent method of residential mortgage foreclosure in Minnesota.

A foreclosure by advertisement requires six weeks' published notice of the mortgage foreclosure sale (Minn. Stat. § 580.03), personal service of a notice of mortgage foreclosure on occupants of the property (*Id.*), and ultimately, a sheriff's sale of the property (Minn. Stat. § 580.06).

Important attributes of mortgage foreclosure by advertisement: (1) no lawsuit required; (2) mortgagee waives deficiency rights against mortgagor (Minn. Stat. § 582.30, Subd. 2); (3) mortgagor entitled to reinstate prior to sale (Minn. Stat. § 580.30, Subd. 1); (4) cheaper than foreclosure by action; (5) six-month redemption period with several exceptions (Minn. Stat. § 580.23, Subd. 2); (6) available for homestead, non-homestead and agricultural property; and (7) non-redeemed junior liens extinguished.

Foreclosure By Action

Frequently utilized in the commercial context, foreclosure by action is less common in residential applications. However, where a residential mortgagee desires to cure a title defect relating to its mortgage or the secured property, to retain deficiency rights against a mortgagor, to address service of process issues, or where the mortgage lacks a power of sale clause, foreclosure by action is an effective tool to

overcome these hurdles.

A foreclosure by action requires service of a summons and complaint naming all mortgagors and interest holders (Minn. Stat. § 581.01); a judgment against the mortgagor and decree of foreclosure ordering sale of the property (Minn. Stat. § 581.03); six weeks' publication and posting of the decree of foreclosure (Minn. Stat. §§ 550.18(2); 581.03); and a sheriff's sale (Minn. Stat. §§ 550.20; 581.03). Following the sheriff's sale, the mortgagee must obtain a court order to confirm the sale, determine the amount of deficiency remaining, and trigger the statutory redemption period to commence (Minn. Stat. §§ 581.08-.10).

Important attributes of mortgage foreclosure by action: (1) lawsuit required; (2) deficiency judgment available against mortgagor and guarantors (Minn. Stat. § 582.30, Subd. 1); (3) mortgagor entitled to reinstate prior to sale (Minn. Stat. § 580.30, Subd. 1); (4) most expensive and time consuming method (in effect, a full civil suit plus a foreclosure); (5) six-month redemption period with several exceptions (Minn. Stat. § 581.10); (6) available for homestead, non-homestead and agricultural property; (7) non-redeemed junior liens extinguished; and (8) allows for additional judicial relief – title curative, reduction of redemption period, appointment of receiver, enforcement of assignment of rents, etc.

Voluntary Foreclosure

When the defaulting mortgagor and mortgagee are willing to work together toward foreclosure of non-homestead property, a voluntary foreclosure can be an expedient alternative.

To effect a voluntary foreclosure, the parties must enter into and record with the county a written voluntary foreclosure agreement (Minn. Stat. § 582.32, Subd. 3(b-c)). After the date of the agreement, the sheriff's sale is held upon four weeks published notice and personal service upon occupants (Minn. Stat. § 582.32, Subd. 5).

Important attributes of a voluntary mortgage foreclosure: (1) no lawsuit required; (2) mortgagee waives deficiency rights against mortgagor, though statute provides flexibility for negotiated payment (Minn. Stat. §582.32, Subd. 3(b)(2)); (3) mortgagor waives reinstatement right; (4) two-month redemption period with several exceptions (Minn. Stat. §582.32, Subd. 3(b)(1)); (5) available for non-homestead property only (Minn. Stat. §582.32, Subds. 1, 2(e)); and (6) non-redeemed junior liens extinguished.

Deed In Lieu Of Foreclosure

As its name implies, this alternative to foreclosure provides fee title from the mortgagor to the mortgagee in lieu of invoking the foreclosure process. This can be an effective approach where there are no junior liens and the mortgaged property is unimproved or possession may be quickly turned over. So long as the deed contains anti-merger language to prevent the mortgagee's rights in its mortgage from merging with fee title, the mortgage can still be foreclosed in the event unanticipated lien interests arise that would otherwise cloud title.

Important attributes of a deed in lieu of foreclosure: (1) no lawsuit required; (2) deficiency rights subject to negotiation; (3) mortgagor waives reinstatement and redemption rights; (4) cost-effective and efficient relative to foreclosure; (5) available for homestead, non-homestead and agricultural property; (6) junior liens not extinguished; and (7) real estate taxes must be brought current as a prerequisite to recording.

In practice, each of the above methods is subject to numerous additional requirements, statutory and otherwise, with the list continuing to lengthen. However, an understanding of the characteristics – pro and con – of Minnesota's mortgage foreclosure regime will provide attorneys with a base from which to undertake further analysis and effectively advise clients regarding their rights, even as they ebb and flow seemingly in real time.

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