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HOME FORECLOSURE

By Henry Jacobs, Esq.

Most people who buy homes must borrow money in order to do so. In order to get the loan, the borrower must generally give a security interest (a "mortgage") against the possibility that the borrower fails to repay the loan as agreed. Most homes in Arizona are financed under "Deeds of Trust" or "Trust Deeds," which provide a convenient method for lenders to seize and sell the financed property if a borrower defaults on loan payments. This process is called "foreclosure".

Arizona law governs the process for foreclosure in the Arizona Revised Statutes (ARS) 33-801, et seq. When a lender decides to foreclose on a loan, the Trustee specified by the Deed of Trust is notified that the loan is in default, and is asked to sell the property. ARS 33-807. A Trustee must set a date of sale, and then provide certain notices in order to conduct a valid foreclosure sale:

1. File a Notice of Sale with the County Recorder at least 90 days before the sale date. ARS 33-808(A)(1).
2. Post a notice of sale on the property at least 20 days before the date of sale, unless it would result in a breach of peace, or if access to the property is denied. ARS 33-808(A)(3).
3. Publish notices of the sale in a newspaper in the county where the property is located. These must run once per week for 4 consecutive weeks prior to the date of sale. ARS 33-808(A)(4).
4. Mail a copy of the notice by certified or registered mail to each recorded owner of the property within 30 days of filing the notice of sale. ARS 33-809(B).

SHOULD I TRY TO STOP A FORECLOSURE SALE?

This basic question is too often overlooked by borrowers facing foreclosure on their homes. It is fact that many people in Arizona are living in homes that they cannot afford based on their current income and expenses. All effective efforts to stop foreclosure must be based on the ability to continue to pay for the home.

Life changes such as loss of a job, prolonged illness, divorce, or other financial changes of circumstance can make a home unaffordable on an ongoing basis. If this is the case, then efforts to stop foreclosure could serve only to delay the inevitable loss of the home, and it may be wise to simply permit the foreclosure to proceed. A borrower can consent to a "Deed in Lieu of Foreclosure", a voluntary surrender of the property to the lender which typically involves a forgiveness of any deficiency beyond the sale price of the home.

CAN I STOP A FORECLOSURE SALE?

Yes, but it requires a plan of action, prompt and persistent action by the borrower, as well as money to pay for the option selected. A borrower's options become more and more limited as the date of sale approaches, so it is important to take action promptly.

Prevent: The best way to avoid a foreclosure sale is to avoid a situation where a lender decides to initiate the foreclosure process in the first place. Borrowers in default situations should attempt to remain in close contact with their lenders, and should negotiate with them to seek workable solutions for both parties. Remember that a lender's threat to foreclose doesn't always mean they have initiated foreclosure proceedings, and a compromise may well be possible if a sale has not been noticed.

Cure: You may stop the foreclosure sale by paying all of the amount that is in default, as well as all expenses relating to the foreclosure, before 5:00 p.m. on the day before the sale. ARS 33-813(A). The Trustee must provide you with these amounts upon request. ARS 33-813(C) and (D). Lenders do not always calculate amounts due correctly, so you may wish to review their calculations and ask about any discrepancies.

Refinance: If you can obtain another mortgage loan on the property, you may stop the foreclosure sale by paying off the entire mortgage that is in foreclosure. This may be difficult however, since most borrowers lack sufficient equity and creditworthiness to qualify for replacement financing. Refinancing also generally takes longer than the foreclosure notice period, so a Forbearance or other arrangement with the Trustee will be needed.

Renegotiate: Mortgage lenders will often consider modifications to existing mortgage agreements, as long as the borrower can continue to make reasonable payments to keep the home. The Trustee in a foreclosure will frequently decline to become involved in negotiations to modify a mortgage and will refer the borrower directly to the lender, and many lenders use large call centers and automated telephone systems to handle the large number of calls that they receive. Therefore, a borrower should expect that this process may be time-consuming, and may require persistence to contact and work with someone with authority to negotiate.

Forbearance: Mortgage lenders will sometimes agree to delay a foreclosure sale in exchange for payment of some amount of fees. This will not stop the foreclosure forever, but it can provide a delay that may permit renegotiation, refinancing, or an increase in income. Forbearances should only be used in cases where there is good reason to believe that a long-term solution to the causes of the default will be available.

Bankruptcy: Filing a bankruptcy case in U.S. Bankruptcy Court will immediately stop foreclosure proceeding during the pendency of the bankruptcy proceedings, unless otherwise ordered by the bankruptcy court. ARS 33-810(C) and 11 USC 362(a). Eligibility for bankruptcy filing can be affected by current income of the debtor, as well as prior bankruptcy filings and other factors. A person considering bankruptcy protection should consult with a qualified attorney knowledgeable about current bankruptcy law.

WHAT HAPPENS AFTER A FORECLOSURE SALE?

Deficiencies: Following a foreclosure sale, the proceeds of the sale are distributed according to priority of secured creditors of the property sold, and then the balance if any is returned to the borrower. If the amount recovered in the sale is not enough to pay the full balance of the loan and any fees properly assessed by the lender, then the amount still owing is called a "deficiency". A lender seeking to recover this amount must file suit against the borrower for the deficiency within 90 days of the date of sale, and the lender can never recover it. ARS 33-814(D). A lender may not sue to recover a deficiency as to a home that is on two and one-half acres or less, and is used as a single one or two family dwelling. ARS 33-814(G).

Eviction: Following a Trustee sale, the borrower effectively becomes a tenant in someone else's home. If the borrower does not make some rental or other arrangement with the buyer of the property permitting him or her to remain in the home, then the borrower may be evicted.

Eviction ("Forcible Detainer") is a separate court process from foreclosure, and takes about 3 weeks to complete. In order to obtain an order of eviction, the new property owner must:

1. Present a written demand to quit the premises to the borrower at least five days prior to filing the Forcible Detainer action. ARS 12-1173.01(A)(1) and ARS 12-1173.
2. File a Forcible Detainer action in the local justice or municipal court and serve summons on the borrower at least two days before the trial. ARS 12-1175.
3. Attend a trial on whether or not the borrower should be evicted. ARS 12-1178. The borrower may request a jury trial in any Forcible Detainer action. ARS 12-1178. If the borrower is found guilty at the trial, then the court will issue a "writ of restitution" five calendar days after the judgment, which will permit the police to evict the borrower by force if necessary. ARS 12-1178(C).

Tax Consequences: If the lender does not recover the full balance of the loan from the foreclosure sale, and the deficiency is not collected or a judgment obtained for its payment, then the amount of the deficiency is taxable as income to the borrower for that tax year. IRC §108 and §1017. A deficiency or other debt is not taxable as income if it is discharged in a bankruptcy proceeding. IRC §108(a)(2)(A).

Re-purchase: Foreclosed homes will be purchased by corporations or individuals at the foreclosure sale. The purchaser becomes the new owner of the home. A borrower whose home has been sold through foreclosure may always re-purchase the home from the foreclosure sale buyer if terms can be negotiated. A borrower who wishes to attempt a re-purchase after a foreclosure sale must make arrangements with the new owner to remain in the home while the deal is arranged.

For immediate assistance with any home foreclosure, or any problem involving inability to pay bills, mortgage, business expenses, or any other finance related problems, contact the Law Offices of Henry Jacobs at 520-300-4113, e-mail us at gethelpnow@jacobsbklaw.com, or visit our website at www.jacobsbklaw.com.