

THE FORECLOSURE PROCESS IN PENNSYLVANIA

Prepared by:

Alexander Geiger, Esquire
GEIGER and ROTHENBERG, LLP
920 N. Broad Street, Suite 8
Lansdale, PA 19446
(215) 880-9439
ageiger@AlexanderGeiger.com

I. Preliminary Observations

The foreclosure process in Pennsylvania is largely a creature of statute. The first step for any practitioner embarking on a foreclosure case, whether for the first time or the hundredth time, is to take a look at the relevant statutes. The next step, in case of ambiguity or uncertainty, is to review the applicable case law. The final step, at least for the first dozen or so cases in a specific county, is to consult the local rules in that county and, if necessary, to check with the local prothonotary's office and sheriff's office. Every county in Pennsylvania does things a little differently from every other county.

Once upon a time, foreclosure in Pennsylvania was accomplished by a writ of *scire facias*. This is only important to know because a lot of the applicable cases law dates back to the good old days of the 19th and early 20th century. Since April 1, 1950, mortgage foreclosures in Pennsylvania have been governed by *Pa.R.C.P., Rule 1141 et seq.*, although a number of other rules and statutes also play a role, as we will see below.

II. Notice Requirements

There are several notice requirements, which may be applicable to a particular foreclosure action, and which must be strictly followed *before* a mortgage foreclosure action can be commenced.

First, there are occasionally contractual notice requirements contained either in the promissory note or in the mortgage securing the note, which constitute a condition precedent to the commencement of a foreclosure action. Needless to say, the practitioner must read the promissory note and the mortgage, and assure that there has been compliance with the contractual notice requirements, before proceeding with the mortgage foreclosure process.

Second, before a residential mortgage can be foreclosed in Pennsylvania, the lender must give a 30-day notice of intention to foreclose (also known as an Act 6 Notice), giving the borrower an opportunity to cure, and prohibiting the lender from collecting attorneys' fees incurred during the notice period.¹ See *Act. No. 6 of 1974, 41 P.S. § 403*. For a definition of a “residential mortgage,” see *41 P.S. § 101*.

¹ Act No. 6 of 1974, where applicable, requires foreclosing lenders to send defaulting borrowers a notification, containing the following information:

- (1) The particular obligation or real estate security interest;
- (2) The nature of the default claimed;
- (3) The right of the debtor to cure the default as provided in the Act and exactly what performance including what sum of money, if any, must be tendered to cure the default;
- (4) The time within which the debtor must cure the default;
- (5) The method or methods by which the debtor's ownership or possession of the real estate may be terminated; and
- (6) The right of the debtor, if any, to transfer the real estate to another person subject to the security interest or to refinance the obligation and of the transferee's right, if any, to cure the default.

In addition, a second notice, known as an Act 91 Notice, used to be required, pursuant to the Homeowner's Emergency Mortgage Assistance Program. See *Act No. 91 of 1983 (as amended)*, 35 P.S. §§ 1680 *et seq.* However, effective August 27, 2011, the Pennsylvania Housing Finance Agency ran out of funds for emergency mortgage assistance. As a result, the requirement for an Act 91 Notice has been suspended. Nevertheless, whether out of caution or inertia, many of our colleagues still routinely send out both an Act 6 and an Act 91 Notice when dealing with residential mortgages.

Finally, several counties in Pennsylvania have their own notice requirements. For example, in Philadelphia County, there is a Residential Mortgage Foreclosure Diversion Program, which requires conciliation before a judgment of foreclosure may be filed. See *Joint General Court Regulation No. 2008-01* of the Court of Common Pleas of Philadelphia County. The notice concerning this program is required to be served with the complaint.

As always, it is imperative to learn the local rules in the county in which you are practicing, and then comply with those rules.

III. Venue

In Pennsylvania, a mortgage foreclosure action must be brought in the county in which the real property is located. *Pa.R.C.P., Rule 1142.* (If foreclosing on real property located in more than one county, see *Pa.R.C.P., Rule 3131.*)

IV. Commencing a Mortgage Foreclosure Action

A. The Right to Foreclose

A mortgagee may bring a foreclosure action upon the breach of an obligation imposed upon the mortgagor by the promissory note secured by the mortgage. For example, absent a contractual provision to the contrary, a default in making a single monthly payment, beyond the expiration of the grace period, gives rise to the right to

foreclose. Similarly, breach of a contractual provision requiring payment of taxes, assessments, insurance premiums, or other required charges gives rise to the right to foreclose. (Of course, the lender must still comply with any applicable contractual or statutory notice requirements, as discussed above.)

It does not matter whether the mortgage has been properly recorded, or even recorded at all, and it does not matter if it appears to have been satisfied or discharged of record, if the record is in fact incorrect. It is the actual existence and state of the mortgage that matters, not the state of the record in the office of the Recorder of Deeds.

Acceleration clauses are enforceable in Pennsylvania. The death of the mortgagor does not affect the right to foreclose (although it does affect the identity of the defendant named in the complaint, and the service of process required to commence the action).

B. The Complaint

The plaintiff in the foreclosure action is typically the current holder of the mortgage, i.e. the original mortgagee or its current assignee. The defendants are the mortgagor(s) (or the personal representative, heir, or devisee of a deceased mortgagor) and the real owner of the property (or if he is unknown, the grantee in the last recorded deed).

The plaintiff must set forth the following in its complaint: (1) the name, address, and interest of the plaintiff; (2) the names, addresses, and interests of the defendants; (3) if the present real owner is unknown, a statement to that effect; (4) the identity of the parties to the original mortgage; (5) the date of the mortgage; (6) if the mortgage being foreclosed has been recorded, state the place of record of the mortgage, and incorporate the mortgage by reference (see *Pa.R.C.P., Rule 1019(g)*). If it has not been recorded, then attach a copy of the mortgage; (7) the date of any assignments; (8) if the assignments have been recorded, state the place of record of each assignment, and incorporate by reference. If they have not been recorded, then attach a copy of each assignment; (9) a description of the real property being foreclosed upon; (10) a specific averment of

default; (11) an itemized statement of the amount due; (12) an averment of compliance with any required notice provisions, such as compliance the provisions of Section 403 of Act No. 6; and (13) a demand for judgment for the amount due.² See *Pa.R.C.P., Rule 1147*.

It is impermissible to combine a foreclosure cause of action with any other cause of action in a single complaint. *Pa.R.C.P., Rule 1146*.

C. Service of Process

The usual procedural steps for commencing an action in Pennsylvania apply to foreclosure actions. The usual uniform cover sheet must be completed and filed with the prothonotary. The usual notice to defend must be filed and attached to the complaint. (Consult local rules for the name and address of the legal referral service or other provider required to be included in the notice to defend.) The complaint must be filed with the prothonotary and the usual filing fee paid.

The defendants must be served in accordance with the usual rules applicable to civil actions. *Pa.R.C.P., Rule 1141(b)*. Typically, defendants in Pennsylvania (outside of Philadelphia) must be served by the sheriff. *Pa.R.C.P., Rule 410(a)*. If personal service is not possible, defendants may be served by publication, posting³, registered mail, or other methods, as the court deems appropriate. See *Pa.R.C.P., Rule 410* generally.

² Ironically, there is no requirement that the complaint in a mortgage foreclosure action contain a prayer for the foreclosure of the mortgage and the sale of the mortgaged property.

³ *Pa.R.C.P., Rule 410(b)(3)* provides that if a defendant in a mortgage foreclosure action cannot be served under the applicable rule, the plaintiff may move the court for a special order directing the method of service, which may include service by posting a copy of the original process on the most public part of the property. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

In addition to the defendants, the complaint must also be served on any person found in possession of the property subject to the mortgage foreclosure action. *Pa.R.C.P., Rule 410(a)*.

IV. Responding to a Foreclosure Complaint

In response to a foreclosure complaint, the defendants may serve and file preliminary objections or serve and file an answer, responding paragraph by paragraph to the allegations of the complaint. The answer must admit or deny each averment of fact. *Pa.R.C.P., Rule 1029(a)*. A general denial or a demand for proof constitutes an admission. *Pa.R.C.P., Rule 1029(b)*. However, averments in a pleading to which no responsive pleading is required are deemed to be denied. *Pa.R.C.P., Rule 1029(d)*.

The answer may also include affirmative defenses (designated as “new matter”), see *Pa.R.C.P., Rule 1030*, and counterclaims, provided the counterclaims arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff’s cause of action arose. See *Pa.R.C.P., Rule 1148*.

Any shortcoming of the complaint, with respect to the formal requirements set forth above, can serve as a basis for preliminary objections or an affirmative defense in an answer. Failure to effect proper service is a jurisdictional defect. Failure to comply with applicable notice requirements (e.g., serving an Act 6 Notice) is a jurisdictional defect.

In addition, any defense which shows that the mortgagee is not entitled to foreclose may be set up as a defense against a foreclosure. For example, defendants may plead that they have made payment in full, that they were never indebted, that the mortgage or its assignment was induced by fraud, that the mortgage or any assignment is a forgery, that there is a want of consideration, there is a release or discharge, there exists a setoff, waiver, estoppel, discharge in bankruptcy, and so forth. (Fraud must be alleged with specificity. *Pa.R.C.P., Rule 1030*.)

A court has held that the Pennsylvania Unfair Trade Practices and Consumer Protection Law applies to unfair and deceptive debt collection practices on foreclosure of loans financing the purchases of goods or services for personal use, including real property. *Flores v. Shapiro & Kreisman*, 246 F. Supp. 2d 427 (E.D. Pa. 2002). However, in another case, the court sustained the plaintiff's preliminary objections to defendant's UTPCPL counterclaim in a mortgage foreclosure action, because assignor of the mortgage, not the plaintiff/assignee of the mortgage, was the alleged perpetrator of the deceptive practices alleged in the counterclaim. *WM Specialty Mortgage LLC v. Shuttleworth*, 82 Pa. D. & C.4th 129 (2007).

V. Judgment and Execution

In the event the plaintiff prevails in its mortgage foreclosure action, either because the defendant(s) default in responding to the complaint, or the court grants summary judgment upon plaintiff's motion, or there is a verdict in favor of the plaintiff following a plenary trial, the plaintiff becomes entitled to file a judgment against the defendant(s). The judgment is exclusively a money judgment for an amount representing the debt, interest, and other authorized costs and charges up to the time of the judgment. However, a judgment in mortgage foreclosure action is not a judgment for money damages. Its sole purpose is to effectuate a judicial sale of the property subject to the mortgage lien. *Reed v. S&T Bank (In re Reed)*, 274 B.R. 155 (Bankr. W.D. Pa. 2002).

The mortgage disappears, once a judgment is entered in a mortgage foreclosure action. Or, as the courts like to say, the mortgage is merged in a judgment entered in a mortgage foreclosure action. *Stendardo v. Federal Nat'l Mortgage Ass'n*, 991 F.2d 1089 (3d Cir. Pa. 1993). This means, among other things, that the mortgagee is entitled to post-judgment interest at the legal rate, rather than the rate specified in the mortgage. *Soto v. PNC Bank (In re Soto)*, 221 B.R. 343 (Bankr. E.D. Pa. 1998). The lien of a judgment founded on a mortgage relates back to the mortgage. *De Witt's Appeal*, 76 Pa. 283 (1874).

The judgment is enforced by a writ of execution. See *Pa.R.C.P., Rule 3180 et seq.* (For the form of the writ of execution, see *Pa.R.C.P., Rule 3257.*)

VI. Sheriff's Sale

Following the entry of a writ of execution, plaintiff's counsel must prepare and submit to the sheriff a "foreclosure package," containing, *inter alia*, the writ of execution, a deposit check for the sheriff's fees,⁴ a Notice of Sheriff's Sale, a Rule 3129.1 Affidavit, the text of the handbill, the text of the advertisement of sale to be published, a Verification of Non-Military Service, [possibly] an Affidavit as to Act No. 91, and a Rule 3129.2 Affidavit. (Needless to say, the precise requirements vary from county to county.)

The Rule 3129.1 Affidavit should set forth, to the best of the affiant's knowledge or information and belief, the date the praecipe for the writ of execution was filed, the name and address of: (1) the owner or reputed owner of the real property and of each defendant in the judgment; (2) every other person who has any record lien on that property; (3) every other person who has any record interest in that property which may be affected by the sale; and (4) every other person who has any interest in that property not of record which may be affected by the sale and of which the plaintiff has knowledge. If the name and address or whereabouts of the persons described above cannot be reasonably ascertained, the affidavit should so state. *Pa.R.C.P., Rule 3129.1(b).*

Notice of the sheriff's sale must be given by handbills, by publication, and by written notice to all persons whose names and addresses are listed in the Rule 3129.1 Affidavit. See *Pa.R.C.P., Rule 3129.2(a).* The required handbills must be posted by the sheriff in the sheriff's office and upon the property at least thirty days before the sale, and must include: (1) a brief description of the property to be sold, its location, any improvements, the judgment of the court on which the sale is being held, the name of the

⁴ The amount of the required deposit varies from county to county, and usually ranges between \$1,500 and \$3,000. Check online or call the sheriff's office in the county in question to determine the amount of the deposit check.

owner or reputed owner, and the time and place of sale; and (2) a notice directed to all parties in interests and claimants that a schedule of distribution will be filed by the sheriff on a date specified by the sheriff not later than thirty days after sale and that distribution will be made in accordance with the schedule unless exceptions are filed thereto within ten days after the filing of the schedule. *Pa.R.C.P., Rule 3129.2(b)*.

Notice containing the information required in the handbill must also be given by publication by the sheriff once a week for three successive weeks in a newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices, the first publication to be made not less than 21 days before the date of sale. *Pa.R.C.P., Rule 3129.2(d)*.

The required written Notice of Sheriff's Sale must be prepared by the plaintiff's counsel, and must contain the same information as the handbill, or may consist of the handbill, and such notice must be served at least 30 days before the sale on all persons whose names and addresses are set forth in the Rule 3129.1 Affidavit. *Pa.R.C.P., Rule 3129.2(c)*.

Service of the Notice of Sheriff's Sale must be served: (1) upon each defendant in the judgment who has not entered an appearance and upon the owner of the property, as provided by statute (i.e., normally by the sheriff); (2) upon each defendant in the judgment who has entered an appearance, by plaintiff's counsel; and (3) upon each other person named in the Rule 3129.1 Affidavit, by plaintiff's counsel, via ordinary mail at the address set forth in the Affidavit.⁵ Service is complete upon mailing. *Pa.R.C.P., Rule 3129.2(c)*.

⁵ When mailing the required Notice of Sheriff Sale, make sure that there is a return address on the envelope, in case it turns out that the mail is undeliverable. It is also a good idea either to mail these Notices by Certified Mail, Return Receipt Requested, or at least to obtain a Certificate of Mailing from the post office at the time of mailing.

After service is complete, plaintiff's counsel must prepare and file a Rule 3129.2 Affidavit, attesting to the completion of the required service upon all of the persons identified in the Rule 3129.1 Affidavit.

In the event the sale is stayed,⁶ continued, postponed, or adjourned to a date certain within 130 days of the originally scheduled sale date, and a public announcement of the new date is made to the bidders assembled at the time and place of the originally scheduled sale, no new Notice of Sheriff's Sale is required, but there may be only two such stays, continuances, postponements, or adjournments without new notice or court order. *Pa.R.C.P., Rule 3129.3.*

On the appointed day, and barring a stay, continuance, postponement, or adjournment, the property in question is sold to the highest bidder, in accordance with the rules of the local sheriff. Typically, as each property scheduled for sale is announced by the sheriff or his representative, the attorney on the writ opens the bidding, normally bidding either a nominal amount or "costs." At the same time, the attorney on the writ announces an upset price (not to exceed the amount of the judgment), and the bidding then proceeds, starting with the next permissible increment above the upset price.⁷ If there is no actual bidding, the property is knocked down to the attorney on the writ.

⁶ The sheriff's sale may be stayed: (1) upon written direction of the plaintiff to the sheriff; (2) upon a showing of exemption or immunity of property from execution; or (3) upon a showing of a right to a stay under the provisions of an Act of Congress (e.g. the Bankruptcy Code) or an Act of the Pennsylvania Assembly. See *Pa.R.C.P., Rule 3183(a)*. In addition, the sale may be stayed upon a showing of: (1) a defect in the writ or service; or (2) any other legal or equitable ground. *Pa.R.C.P., Rule 3183(b)*

⁷ Procedures vary. For example, in Philadelphia, the attorney on the writ does not announce an upset price. Instead, the attorney on the writ participates in the bidding process as any other bidder. The difference, of course, is that the attorney on the writ is not required to pay any actual cash (up to the amount of the judgment) if he or she is the successful bidder.

Within 30 days after the auction, the sheriff is required prepare and file a schedule of proposed distribution and a list of liens for each property sold at the auction. *Pa.R.C.P., Rule 3139(c)*. However, no schedule of distribution or list of liens need be filed when the property is sold to the attorney on the writ for costs only. *Pa.R.C.P., Rule 3136(a)*.

Ten days after the filing of the schedule of distribution, the sheriff must prepare, execute, and deliver to the Recorder of Deeds a deed to the property sold. *Pa.R.C.P., Rule 3135(a)*. In addition, ten days after the filing of the schedule of distribution, the sheriff must distribute the proceeds of sale in accordance with the proposed schedule of distribution, unless written exceptions are filed with the sheriff within ten days after the filing of the proposed schedule. *Pa.R.C.P., Rule 3136(d)*.

Of course, this timetable may be disrupted in the event a petition to set aside the sale is filed. Upon petition of any party in interest *before delivery of the sheriff's deed* to the real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances. *Pa.R.C.P., Rule 3132*. Some of the grounds cited in support of a petition to set aside a sale include defects in the proceedings prior to the sale, or defects in the course of the sheriff's auction itself, or gross inadequacy of the sale price, or fraud or collusion among the bidders. The applicable standard to determine whether a sale should be set aside is whether "proper cause" is shown. *Merrill Lynch Mortg. Capital v. Steele*, 859 A.2d 788 (*Pa. Super. Ct.* 2004).

VII. What Does the Successful Bidder Actually Obtain?

In general, the successful bidder at the sheriff's auction obtains title clear of all junior liens, and unaffected by defects in title not apparent from the record. The effect of a foreclosure sale is to wipe out all junior liens on notice of the sale, including tax liens assessed against a former owner. *Commonwealth v. Hoffman-Henon Co.*, 382 Pa. 213, 114 A.2d 92 (1955). (However, in order to wipe out a validly recorded federal tax lien,

the United States must be made a party to the foreclosure action. *Miners Sav. Bank v. United States*, 110 F. Supp. 563 (M.D. Pa. 1953).)

By the same token, the successful bidder takes title subject to encumbrances and interests of record superior to the mortgage upon which the foreclosure judgment had been obtained. And, with respect to the condition of the property, the successful bidder takes the property as is. Therefore, a great deal of due diligence is advised before anyone ventures to purchase property at a sheriff's sale.

With respect to existing leases on the property, if the lease was entered into before the mortgage being foreclosed, then the purchaser at the sheriff's foreclosure sale takes title subject to the lease. On the other hand, if the lease was entered into subsequent to the mortgage, then the purchaser at the sheriff's sale has the option of affirming or disaffirming the lease. Of course, if the prior owner or tenant refuses to vacate the premises, an ejectment action may be required.

VIII. Deficiency Judgments

A mortgage foreclosure sale discharges the mortgage and releases the mortgagor from liability, even though the sale price realized is less than the amount owed on the mortgage. *Meco Realty Co. v. Burns*, 414 Pa. 495, 200 A.2d 869 (1964). If there is a guaranty, in addition to the promissory note and mortgage, then of course the lender may pursue an independent action against the guarantor on the guaranty for any deficiency.

Furthermore, if the borrower made an independent promise to pay, independent of the mortgage, for example in the underlying promissory note, then the lender may pursue an independent action against the borrower for any deficiency. For rules governing the procedure relating to deficiency judgments, see *Pa.R.C.P., Rule 3276 et seq.*

In determining the amount of any deficiency, the price obtained at the foreclosure sale is conclusive as between the parties as to the value of the premises, unless the mortgagee is the purchaser at the foreclosure sale. In that case, the amount of any deficiency, and the extent of any liability by the mortgagor to the mortgagee, must be determined in accordance with the Pennsylvania Deficiency Judgment Act, 42 Pa.C.S. § 8103.

The statute requires any mortgagee wishing to pursue a deficiency judgment against the mortgagor to petition the court to fix the fair market value of the realty sold. The mortgagor is then discharged from all liability up to the amount of the fair market value determined by the court, regardless of the actual amount bid by the mortgagee at the sheriff's auction. 42 Pa.C.S. § 8103. See also 42 Pa.C.S. § 5522.

The petition to fix the fair market value must be served and filed within six months after the sale of the property. *Commonwealth Bank & Trust Co., N.A. v. Hemsley*, 395 Pa. Super. 447, 577 A.2d 627 (1990).

Finally, if the mortgagee accepts a deed in lieu of a sheriff's sale, the mortgagee forfeits any right to relief under the Deficiency Judgment Act, and takes title subject to all existing liens, including inferior liens that would have been wiped out to a sheriff's sale.

IX. Equity of Redemption

There is no equity of redemption in Pennsylvania. "When once the property has been sold under *scire facias* proceedings on the mortgage, or by execution on the bond, the mortgagor's interest is gone forever." *Peoples-Pittsburgh Trust Co. v. Henshaw*, 141 Pa. Super. 585, 590; 15 A.2d 711, 714 (Pa. Super. 1940).