

## **FORECLOSURE OF MORTGAGES IN SOUTH CAROLINA**

The following is a summary of South Carolina's mortgage foreclosure procedure. It contains no statutory or judicial citations and is intended only as a general explanation to the reader. For more detailed information, please consult the undersigned.

South Carolina follows a judicial foreclosure procedure. An action is commenced by the filing of a Notice of Lis Pendens which effectively cuts off any subsequent lien filings. A Summons and Complaint must be filed within twenty (20) days of the filing of Lis Pendens. In the Complaint, the Plaintiff asks the Court for a money judgment against the debtor and for an Order decreeing that the mortgaged property be sold by the Court with the proceeds applied to Plaintiff's judgment. The junior liens of all defendants are foreclosed along with the debtor's interest in the property. The foreclosure sale will be subject to all unpaid ad valorem property taxes. Lessees of recorded leases should be joined as junior lien defendants if the plaintiff wishes to foreclose their interest. Even if the lease is unrecorded, the plaintiff should consider joining the lessee as a defendant, especially if the plaintiff is aware of the lease (if the plaintiff is accepting lease payments under a lease assignment, the lessee should be joined unless the plaintiff intends to honor the lease).

If there is a security agreement covering personal property, that lien may be foreclosed along with the mortgage if the plaintiff chooses to do so.

In the Complaint, the Plaintiff may seek a judgment for any deficiency remaining after the sale or may waive such deficiency. If the Plaintiff demands a deficiency judgment, the deficiency may be waived by the Plaintiff up to the date of the foreclosure sale, provided the Plaintiff follows appropriate procedures.

The Summons, Complaint and Notice of Lis Pendens are served on the Defendant debtor and any other junior lien Defendants. Senior lienholders need not be joined as their liens cannot be affected by the foreclosure. Generally, however, the Court should be made aware of the existence of senior liens so that bidders at the foreclosure sale may be advised of them.

The Defendants have thirty (30) days in which to file responsive pleadings to the Summons and Complaint. When the time for answering has expired, the Plaintiff attempts to have the case referred to the permanent non-jury judge in the county in question (known as the Master-in-Equity) or, if there is no permanent judge, to a special referee (usually an attorney) appointed by the Court. If the Defendant debtor defaults (doesn't answer the Summons and Complaint), the referral is usually accomplished very easily within a few days after the thirty (30) day period for responsive pleadings has passed. If the Defendant debtor answers, however, generally the Defendant debtor's consent to the referral is required. If the debtor refuses to consent, a Motion to Refer must be filed and heard. The time for hearing such a Motion can vary but, obviously, this will delay the proceedings.

If the Defendant debtor answers and/or counterclaims against the Plaintiff and demands a jury trial, an issue arises as to whether the case can be referred or must be placed on the jury calendar. If the case goes to the jury calendar, you should expect a much greater delay in getting

the case to trial. The rules regarding whether a Defendant in a foreclosure action is entitled to a jury trial are fairly complex. Generally, such a Defendant is not entitled to a jury trial. If the Defendant has a compulsory counterclaim, however, and if the Defendant would normally be entitled to a jury trial on the cause of action alleged in the counterclaim, then generally the foreclosure action will be stayed pending the outcome of the jury trial on the counterclaim.

Assuming the case can be referred to the Master, the next procedure is to schedule a hearing (non-jury trial) before the Master. There, the Plaintiff presents its evidence as to default, balance due, perfection of security interest, etc. The court also sets the attorney's fee to be awarded to the plaintiff. If the court finds the plaintiff is entitled to foreclose, the court issues a Judgment of Foreclosure and Sale in which the plaintiff is granted money judgment against the notemaker(s) and guarantor(s) (if the guarantors were joined in the action).

After the Judgment, the property must be advertised in a local paper once a week for three weeks before the sale. In some counties, the Court attends to the advertising while in others the Plaintiff must do so. In most counties, foreclosure sales are held only on the first Monday of each month.

If the Plaintiff is still seeking a deficiency judgment by the time of foreclosure sale, the bidding does not conclude on the day of sale but remains open for an additional thirty (30) days. After the initial sale day, both the Plaintiff and the high bidder (if other than the Plaintiff) are precluded from any further bids. Therefore, if the Plaintiff is seeking a deficiency judgment, the Plaintiff must make its first and only bid its best bid because the Plaintiff will not be able to bid again. At the conclusion of the thirty (30) days, the Master re-opens the bidding and any other bidder may purchase the property for a bid of \$1.00 greater than the previous bid.

At the conclusion of the sale, the Master issues a report on the sale, and if a deficiency judgment was requested and the sale proceeds insufficient to satisfy the judgment due the Plaintiff, the Master issues an Order of Deficiency Judgment. The Master also issues a deed to the successful bidder.

If a deficiency judgment is obtained, any defendant liable for the deficiency judgment may, within thirty (30) days from the conclusion of the sale, petition for an appraisal of the property. In the Petition, the debtor names an appraiser. The Plaintiff then has ten (10) days in which to name an appraiser and the Court appoints a third appraiser. Appraisers must be disinterested state-certified real estate appraisers. A majority of the appraisers must return a finding as to value within thirty (30) days after the Court appoints the third appraiser. The standard used is "fair value" as of the date of the foreclosure sale. The appraisers, by concluding the property was worth more than the sale price at foreclosure, may reduce or even extinguish the deficiency judgment. The appraisers cannot award any surplus to the judgment debtor (even if the appraisers believe the property was worth more than the foreclosure sale price, the result will only be to extinguish the deficiency judgment).

Either side may appeal from the return of the appraisers. Generally, this appeal is heard by the Master who receives testimony. Any party may testify as to the value (not just the three appraisers). The Master has two choices - affirm the appraisers' return or reject the return and confirm the previous deficiency judgment. Our experience is that the Master generally affirms the appraisers. The Master does have the authority to order a new appraisal, but this rarely occurs.

Any appeal from the Master is taken to the South Carolina Supreme Court, if the Order of Reference provided that any appeals are directly to the S.C. Supreme Court. Otherwise, the appeal will be to the Circuit Court from which appeal to the Supreme Court may be taken.

The S.C. Supreme Court has ruled that contractual waivers of the right of appraisal in mortgage foreclosures are void as against public policy. Subsequent to this ruling, the South Carolina General Assembly enacted legislation allowing the right of appraisal to be waived, except in foreclosures relating to a dwelling place or to a consumer credit transaction. For the waiver to be effective, the debtor (including co-makers and guarantors) must be notified in writing before the loan transaction that a waiver of appraisal rights will be required. Further, the debtor/co-maker/guarantor must sign a statement during the transaction which contains certain specified waiver language. The waiver may be in any document relating to the transaction, but must be on a page containing the signature of the person making the waiver. Certain portions of the waiver language must be underlined or capitalized.

It should be noted that the filing of an Appraisal Petition does not affect the purchaser's ability to dispose of the subject property. The Appraisal Petition only affects the deficiency judgment, so that a purchaser at foreclosure sale may proceed to use or sell the property without regard to the ongoing appraisal issues. If the debtor fails to vacate the property after sale, a Writ of Assistance may be applied for through the court ordering the sheriff to evict the party.

The Master is allowed to collect a commission of one (1%) percent of the foreclosure sale price (the maximum commission is \$2,500.00). In addition, there are transfer taxes due on the foreclosure deed (currently \$3.70 per \$1,000 of bid amount).

This description of the foreclosure process does not include the procedure for seeking a receiver for the mortgaged property.

From the foregoing, it may be seen that the time to conclude even the simplest foreclosure action (where the defendants default and do not appear) is not less than 90 days. If a deficiency judgment is sought, the time is at least 30 days longer. If the debtor appears, the action will be delayed further.

This description is intended to be only a general introduction to South Carolina foreclosure procedure. For specific questions, please contact the undersigned.

T. Eugene Allen, III  
NEXSEN PRUET JACOBS AND POLLARD, LLP  
1441 Main Street, Suite 1500  
Columbia, South Carolina 29201  
(803) 771-8900