

# A Guide to Foreclosure in Delaware



In Delaware, a mortgage is a lien against the property granted by the home owner to the lender to secure an obligation to pay the note. The note is a written promise to pay a debt (the loan). When we use the word mortgage, it will generally mean both the mortgage and the note. When you fail to make required payments on your mortgage, your mortgage will be in default. Once you are in default, the lender can start foreclosure proceedings, and you could lose your house if you have no defenses. You will probably receive notices from the lender and/or the court related to foreclosure. Some of the most common types of notice in Delaware are "notice of default," "notice of acceleration," "writ of scire facias," and "notice of sale". If you receive any notices related to foreclosure, seek help from an attorney immediately.

## Notices

### Notice of Default

If you fall behind in the payments on your mortgage, the lender will usually send you a "notice of default" or "notice of delinquency" telling you that your payments are

behind. A notice of default is often required by the mortgage. However, Delaware law does not require notice of default unless the mortgage requires such notice. The notice of default warns you of a serious problem, so you must take action immediately. It may be possible to avoid foreclosure at this stage if you immediately call the Workout Department of your lender and offer to pay the full amount of back payments and current payments, or discuss some other type of workout agreement.

### **Notice of Acceleration**

Many mortgages contain a paragraph that covers situations when you are in default or late on your payments. This paragraph is known as an "acceleration" clause because it allows the lender to accelerate, or push forward, the date that full payment on your mortgage is due. Some mortgage contracts require the lender to give "notice of acceleration" to the borrower. The "notice of acceleration," sometimes called a "demand letter," normally states that the whole balance is due and payable immediately. If you fail to pay the entire amount due, the lender has the right to foreclose on the mortgage. However, the lender must comply with the requirements of the loan documents and other relevant laws. So, it is important to seek advice from an attorney as soon as you receive a "notice of acceleration."

## **Court Notices**

### **Writ of Scire Facias**

In Delaware, a lawsuit is required to foreclose on your mortgage except for certain types of mortgages issued by the government. The foreclosure process takes an average of 5 to 6 months from filing the lawsuit until the confirmation of the foreclosure sale. Don't be surprised if none of the papers in a foreclosure lawsuit actually use the word "foreclosure." Instead, the lawsuit papers will probably use the Latin words "scire facias sur mortgage" or "sci fa sur mortgage."

If the foreclosure is in Superior Court, the Sheriff will serve you with a "writ of scire facias" (sci. fa.) at your residence. The sci. fa. has many papers including a Summons, Complaint, a certified copy of the mortgage, an Affidavit of Demand, a Fair Debt Collection Practices Act disclosure statement and a "Notice to Lien Holders

and Tenants of Filing of Action." Within 10 days of filing the foreclosure lawsuit, the lender must send by certified mail a copy of the complaint and a "Notice to Lien Holders and Tenants of Filing of Action" to you and anyone with an interest in your property, such as your tenants and other lenders. The lender will also post this notice on the main door of your house.

You must answer the complaint within 20 days after you are served with the complaint. For this reason, it is important to see an attorney as soon as possible, because, if you fail to answer within 20 days, or your answer does not meet other legal requirements, default judgment will be entered against you. Unless the default judgment is vacated or reopened, you will automatically lose your home.

In Delaware, there will usually be a notation on the complaint that plaintiff demands that defendant answer the allegations of the complaint by affidavit pursuant to 10 del. C. § 3901. This means that your answer to the complaint must include an affidavit of defense. Your affidavit of defense must give detailed and specific answers to all the allegations in the affidavit of demand, otherwise, the court may grant the lender's request for a default judgment and you would automatically lose the foreclosure lawsuit. Possible defenses to a foreclosure lawsuit are satisfaction or payment of the mortgage, or defenses that seek to avoid the mortgage, such as, assignment, discharge, duress, forfeiture, fraud, illegality, ratification, unjust enrichment and waiver.

After you answer the complaint and affidavits, then the court will send you a Case Scheduling Order. It is important for you, or your attorney, to appear at the court on the dates scheduled and meet other deadlines listed on the Case Scheduling Order. The foreclosure lawsuit gives you a chance to appear before the court and present any defenses explaining why your house should not be taken and sold to satisfy the debt. If you fail to appear, default judgment will be entered against you and you will automatically lose your home.

### **Notice of Sale**

If you lose the foreclosure action or a default judgment is entered, the sheriff will issue notice of sale and sell your house at a public sale. Notice of sale must be delivered to you at least 10 days before the day of the sale. When you receive notice of sale you should contact an attorney before the sale date to discuss whether bankruptcy would be helpful for you. Advertisements will also be posted in local

newspapers for 2 weeks before the sale. The sheriff will sell your house at a public sale usually located at the county courthouse.

### **Confirmation of Sale**

To complete the process on judgment of foreclosure, there is a confirmation hearing scheduled about 30 days after the Sheriff's Sale. If there are no objections to the confirmation of the sale, then the sheriff delivers a deed to the new owner who bought your house at the Sheriff's Sale.

## **Foreclosure Prevention**

### **Right to Cure a Default**

You can cure a default by paying the lender missed payments, plus fees and costs before acceleration of the mortgage. After acceleration of the mortgage, you may cure the default by paying the entire balance of all the principle, interest and costs due on the mortgage, but only if you do so before the Sheriff sells the property at the Sheriff's Sale. However, partial payments made after acceleration of the entire debt, evidenced by the initiation of foreclosure proceedings, do not cure the default. So the lender can refuse partial payments and continue with the foreclosure.

### **Redemption**

You may exercise the right of redemption before the confirmation of the foreclosure sale. Redemption means that you pay off the entire balance owed on the loan plus the lender's foreclosure fees and costs. In general there is no right to redeem after the confirmation of the Sheriff's Sale. In Delaware, there is an exception that allows the owner to redeem within 60 days after the confirmation of Sheriff's Sale if the property was sold to collect delinquent county taxes.

### **Sale**

You may want to ask for a delay of the foreclosure sale so that you can negotiate a workout agreement with the lender. In some cases, the lender may agree to give you an opportunity to sell the property through a realtor rather than in the foreclosure process. A private sale may help avoid potential foreclosure losses.

## **Bankruptcy**

You may want to consider preventing foreclosure by filing a chapter 13 bankruptcy. Filing bankruptcy automatically stops the foreclosure process. However, in certain circumstances, a creditor may ask the bankruptcy court to allow the lender to continue the foreclosure despite the bankruptcy. You have a right to cure a default on a mortgage if your chapter 13 plan is approved by the bankruptcy court. In the chapter 13 plan, you would most likely be required to pay your regular mortgage payments, plus an additional amount to get caught up during the length of the plan. If you want to file for bankruptcy protection, you should consult a bankruptcy attorney.

## **After Foreclosure Sale**

### **Eviction**

*If you are a tenant living in a property sold in a foreclosure sale, then the creditor or buyer must file a claim either for ejectment or possession to evict you. After a claim is filed, it can take as little as a couple of days, or as long as, a month or two before the tenant is forced to leave the rental property.*

After the foreclosure sale, you should prepare to move out. Although if you are unable to afford alternative housing, you could stay in the property until you get evicted. A lender can evict you by requesting a writ of possession from the Superior Court. The writ of possession allows the lender to evict you in a matter of weeks. It is served by a Sheriff. A buyer, unlike a lender, must file a claim for ejectment in the Superior Court to evict you. A buyer cannot file the claim for ejectment until after the deed is transferred to the buyer. Usually, the ejectment process takes months and is much slower than the writ of possession.

## Deficiency Claims

The original owner is entitled to any surplus of the sale proceeds, after the mortgage, interest and costs of foreclosure are paid. However, if the sale proceeds do not pay off the existing mortgage on the property plus costs and the foreclosure lawsuit did not sue on both the mortgage and note, then the lender must file a separate lawsuit on the note to obtain a deficiency judgment. A deficiency judgment is a final court ruling in favor of a creditor for the balance of the debt, interest and costs that are not paid off by the sale of the real estate. If the court grants a deficiency judgment against you, then you would have an obligation to pay the amount of the judgment to the lender.

# New Castle County Mortgage Foreclosure Mediations

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