

LEGAL

Foreclosure Realities, Mortgage Rescue Fraud

A reader wrote that he doesn't plan to contest the pending foreclosure and is thinking about giving the lender a deed-in-lieu of foreclosure. That may not be a good option. When mortgage foreclosures were rare, lenders were more likely to accept a deed-in-lieu of foreclosure and release the homeowner from further liability to repay their debt. The world has changed.

Many lenders are systematically foreclosing large numbers of delinquent mortgages. Lenders and loan servicers are generally ill equipped to negotiate both in terms of trained staff and their focus on completing foreclosures. After filing a foreclosure, the lender may not be motivated to accept a deed-in-lieu for several reasons. For instance, if the loan is securitized, the lender may be obligated to foreclose or have no authority to negotiate a release of the borrower's liability for the debt.

Foreclosure also has advantages for a lender over accepting a deed-in-lieu of foreclosure. A foreclosure can protect a lender by wiping out other claims against the mortgaged property that would not be extinguished by a deed-in-lieu of foreclosure. Examples include mechanics lien claims and junior mortgages.

A homeowner could record a deed-in-lieu of foreclosure without reaching agreement with the lender. However, that wouldn't obligate the lender to stop its foreclosure or to release the homeowner from personal liability for their mortgage debt. The reader asked if it's important to attend the case management conference hearing. If he isn't going to contest the foreclosure, the answer to that question may be "No." However, the more important question is whether or not the borrower understands the risks of not appearing and defending, even if he's trying to negotiate a release of the personal liability for the mortgage debt.

If a written appearance isn't filed and the owner does nothing, a judgment, by default, will be entered against him in the foreclosure. By failing to defend, he loses any bargaining power and waives whatever defenses he might have had. That can easily result in a judgment for the deficiency against him if the foreclosure sale price isn't sufficient to satisfy the amount owed. For example, if the mortgage debt, including the fees and costs of foreclosure is \$500,000, but the property only brings \$300,000 at the foreclosure sale, there's a \$200,000 deficiency. The lender can then obtain a \$200,000 judgment against the owner in the foreclosure.

If the borrower completely ignores the foreclosure, he may be rudely awakened later if the lender seeks to collect a deficiency judgment. If the borrower owns other real estate, the lender can record a memorandum of judgment, giving the lender a security

interest in the real estate that has not been foreclosed, garnish the borrower's salary or wages, or freeze and recover funds from his bank accounts. The borrower needs to understand the total situation and make an informed decision about both the foreclosure and the pros and cons of his options and alternatives.

Homeowners unable to pay their mortgages fear the results. They want to believe someone who promises to absolutely prevent them from losing their home or offers a simple, quick solution. Scam artists promise easy solutions and frequently "guaranty" results. Unfortunately, no one can honestly give such guarantees and what happens with the scam artist is likely to worsen, rather than help the homeowner's situation.

Usually the scam artist persuades the homeowner to pay the scam artist and/or sign a deed, power of attorney, or document giving the scammer some control over the property or authority to act in the name of the homeowner. Unscrupulous scam artists give that guaranty, to con homeowners into giving them money, a deed to their home, or taking other actions that benefit only the scam artist. The problem is so common that Illinois has adopted a Mortgage Rescue Fraud Act just to deal with that problem.

Time and money spent dealing with a scam artist usually worsens the homeowner's predicament. These are among the many reasons why a homeowner who's having difficulty making their mortgage payments should work with a HUD-certified mortgage counseling organization or qualified attorney – sooner rather than later.

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