

Real Estate Foreclosure Under Kentucky Law

Thomas J. Keuler, Attorney at Law
Denton & Keuler
Paducah, Kentucky



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Introduction

In Kentucky, foreclosures against real estate, and the improvements and appurtenances located thereon, must be effectuated through a court ordered judicial sale which is conducted by the circuit court's master commissioner. The purpose of this article is to provide a general outline of the foreclosure procedure which is utilized in effectuating foreclosure actions in Kentucky.

To initiate a foreclosure action, the claimant must first have a lien or interest against the real estate which is to be foreclosed upon. This type of lien or interest comes in essentially two forms. The first type of lien or interest is a lien or interest which is created voluntarily through an agreement, such as a mortgage agreement. In the mortgage agreement, the property owner conveys and transfers a mortgage interest to a lender as security for the payment of an indebtedness such as a loan between the property owner and the lender. The second type of lien or interest is a lien or interest which is created by statute, such as a mechanic or materialman's lien or a professional lien. Pursuant to statute, the lien holder is accorded a lien or interest against real estate to secure any unpaid indebtedness between the property owner and the lien claimant for labor, materials, or services which benefitted the real estate. In each case, the person asserting the lien or interest must prove that the property owner had defaulted on his obligations to the lien holder, and that the lien holder has the right to foreclose upon his lien or interest against the real estate.

A foreclosure action is instituted by the filing of a foreclosure complaint. The foreclosure complaint must be filed with the circuit court located in the same county where the real estate is located. Thereafter, the foreclosure action proceeds and is finalized through proceedings before the circuit court.

The Foreclosure Procedure

The essential elements of the foreclosure action consists of the foreclosure complaint, the lis pendens notice, the judicial proceedings to obtain a judgment from the circuit court, the findings of fact, conclusions of law, and judgment which is rendered by the circuit court, the judicial sale by the master commissioner, and the subsequent proceedings taken to obtain a deficiency judgment. Hereafter, this article shall address these elements in the time frame that these elements take place.

The Foreclosure Complaint

As noted above, the filing of the foreclosure complaint with the circuit court initiates the foreclosure action. The lien holder will be the plaintiff in the complaint and the property owner will be the primary defendant. Also named as party defendants in the foreclosure complaint will be any third party that may claim an interest in and to the real property which is subject to the foreclosure action. Such third parties could include lenders asserting a mortgage interest, mechanic or materialmen asserting mechanic or materialmen's liens, and taxing authorities asserting tax liens for unpaid delinquent ad valorem taxes. Prior to the filing of the foreclosure complaint, a title examination of the records of the

county court clerk must be performed to determine these additional third party defendants.

In the foreclosure complaint, the lien holder must also set forth allegations which describe the nature of the indebtedness by and between the lien holder and the property owner, a description of the interest which the lien holder claims against the real estate, and an assertion that the property owner is in default of his obligations to the lien holder. The lien holder must also provide in the foreclosure complaint a full description of the real estate which is subject to the foreclosure action, including a reference as to the source of title of the property owner's ownership of the real estate. In conclusion, the lien holder will request that the circuit court accord to the lien holder judgment against the property owner in the amount of the obligations which are in default, and additionally, an order of the court referring the real estate to the master commissioner for judicial sale.

The Lis Pendens Notice

The lis pendens notice is simply a notice which reflects that a foreclosure action has been filed with the circuit court. The lis pendens notice will provide information with regard to the style of the foreclosure action which has been filed with the circuit court, and additionally, a description of the real estate which is subject to the foreclosure action. The lien holder is required to file the lis pendens notice with the county court clerk's office.

The purpose of the lis pendens notice is to provide public notice that a foreclosure action has been filed against the real estate which is subject to the foreclosure action. Pursuant to Kentucky law, in the event any lien holder files any adverse lien or interest against the real estate following the filing of the lis pendens notice, it is necessary for that lien holder to assert such adverse lien or interest in the foreclosure action which is pending before the circuit court. In the event such lien holder fails to assert such interest in the foreclosure action, the adverse lien or interest asserted by the lien holder will be lost.

The Proceedings to Obtain a Judgment of the Court

Typically, the proceedings to obtain a judgment of the circuit court are in two forms, namely proceedings with regard to a default judgment and

proceedings with regard to a summary judgment. These proceedings are essentially expeditious and can be accomplished within several months.

As to proceedings for a default judgment, these proceedings are predicated on the property owner's failure to appear and file responsive pleadings in the foreclosure action within the time period as allowed by the rules of procedure. Under Kentucky law, once the property owner is served with summons and complaint, the property owner has a period of 20 days within which to appear and file his responsive pleadings. In the event the property owner fails to do so, the lien holder is accorded the right to obtain judgment from the circuit court against the property owner.

To obtain a default judgment, the lien holder must file with the circuit court a motion for default judgment. In the motion for default judgment, the lien holder will schedule the matter for hearing before the circuit court. In the event the property owner has failed to properly appear and file responsive pleadings in the foreclosure action, the court will summarily enter judgment in favor of the lien holder against the property owner.

As to proceedings for a summary judgment, these proceedings are predicated on the premise that there is no genuine issue of fact with regard to the property owner's obligations to the lien holder, the property owner's default in his performance of these obligations, and that the lien holder is entitled to judgment as a matter of law. In the event there is no dispute as to these facts, the lien holder typically will be entitled to judgment as a matter of law.

To obtain a summary judgment, the lien holder must file with the circuit court a motion for summary judgment, together with an affidavit in support of the motion for summary judgment. In the motion, the lien holder will assert that there does not exist any genuine issue of fact as to the matters which exist between the lien holder and the property owner, and that the lien holder is entitled to judgment as a matter of law. The affidavit must be filed with the motion for summary judgment so as to provide verified proof that the facts as alleged by the lien holder in his foreclosure complaint are true and accurate. As in the case of a motion for default judgment, the lien holder will also schedule a hearing on the matter before the circuit court. In the event there

does not exist any genuine issue of fact with regard to the claim of the lien holder against the property owner, and in the event the lien holder is entitled to judgment as a matter of law, the circuit court will accord judgment to the lien holder.

In the event it is necessary for the lien holder to take possession and operate activities located upon the real estate subject to the foreclosure action, the lien holder has a right to request the circuit court to appoint a receiver. Typically, receivers are sought in foreclosures of malls, hotels, apartment complexes, and other enterprises which generate revenues. In the event a receiver is appointed by the court, it will be the receiver's responsibility and authority to take possession of the real estate and to operate all activities located on the real estate. Pursuant to KRS 425.600, to obtain the appointment of a receiver, the lien holder must demonstrate to the court the lien holder's right to the real estate, and additionally, that the real estate, or the profits realized from the operation of the real estate, are in danger of being lost, removed, or materially injured. Additionally, an agreement between the property owner and the lien holder, such as a mortgage agreement, may authorize the lender to have a receiver appointed. Any receiver appointed by the court will be deemed an officer of the court, and must be bonded and sworn before the appointment is made. The receiver will be required to make periodic reports to the court with regard to the operations conducted on the real estate, with a final report and accounting being made by the master commissioner upon completion of his receivership.

The Findings of Fact, Conclusions of Law and Judgment

In most foreclosure actions, the circuit court will enter its findings of fact, conclusions of law, and judgment in favor of the lien holder. In the findings of fact, the circuit court will find that obligations exist between the property owner and the lien holder, that the property owner is in default of the performance of his obligations to the lien holder, and that the lien holder is entitled to assert his lien or interest against the real estate. In the conclusions of law, the circuit court will conclude as a matter of law that the lien holder has a right to judgment against the property owner in the amount of the obligations which are in default, and additionally, that the lien holder is entitled to a judicial sale of the real estate. In its judgment, the circuit court will award judgment to the lien holder in the amount of the obligations which

are in default, and additionally, will refer the matter of judicial sale to the master commissioner of the court.

The Judicial Sale

Once the matter is referred to the master commissioner, the master commissioner will initially appoint two disinterested persons to perform an appraisal of the real estate. Typically, the master commissioner appoints realtors to provide to the master commissioner a report as to their opinion of the value of the real estate. The investigation performed by these two disinterested persons is quite limited and essentially consists of a general inspection of the real estate, and of any improvements and appurtenances located thereon.

The purpose of this appraisal is to determine the redemption value of the real estate. Under Kentucky law, in the event the proceeds realized from judicial sale do not exceed the redemption value of the real estate, statute accords to the property owner the right to repurchase the real estate from any successful purchaser of the real estate at judicial sale by paying unto the successful purchaser the purchase price paid, together with interest. Redemption value is an amount equal to two-thirds of the appraised value of the real estate as determined by the appraisers. The successful purchaser should consider offering a bid in excess of the redemption value so as to extinguish the property owner's right of redemption.

In addition to the appointment of the two disinterested persons, the mater commissioner is also required to advertise the judicial sale. Pursuant to Kentucky law, the mater commissioner is required to cause an advertisement of the judicial sale to be placed with the prominent newspaper in the area. This advertisement must occur once a week for a period of three weeks. Additionally, the master commissioner is also required to publish a notice of the judicial sale at the courthouse. The purpose of the advertisement and notice is to provide public notice of the time and place of the judicial sale, together with a description of the real property which is subject to the judicial sale.

Thereafter, the master commissioner will sell the real property at the time and place of judicial sale as advertised. Judicial sales typically take place at the county courthouse. The public is invited to bid on the property. Prior to the judicial sale, the master

commissioner oftentimes informs the public of the property owner's right to redeem and the redemption value of the real estate. As in the case of all auctions, the successful bidder will be the bidder who bids the most for the real estate. Following consummation of the judicial sale, the successful bidder will be required to provide to the master commissioner a cash equivalent down deposit on the bid together with some type of bond to secure his promise that he will consummate sale with the master commissioner.

Following consummation of the judicial sale, the master commissioner will then make his report to the circuit court. In his report, the master commissioner will report the amount of the purchase price realized from the judicial sale. The master commissioner will also report his costs and expenses in conducting the judicial sale. These costs and expenses will include the master commissioner's commission, which is based on a percentage of the proceeds realized from judicial sale, and the costs and expenses of the appraisers and the advertisement. The master commissioner will also report to the court whether there are any delinquent unpaid ad valorem taxes against the real estate. The master commissioner will then request the circuit court's approval to distribute proceeds first to the master commissioner to pay his costs and expenses, then to the payment of any delinquent ad valorem taxes, with the remaining proceeds to be applied to the judgment amount obtained by the lien holder against the property owner. Any remaining proceeds following application of these proceeds will be paid either to the property owner, or to any subsequent holder of any additional lien or interest against the real estate. Thereafter, the circuit court typically enters an order approving the report. The circuit court will also direct the master commissioner to prepare a deed conveying the real estate to the successful purchaser. Once approved, the deed is then given to the successful purchaser who will record it with the county court clerk wherein the real estate is located.

The Deficiency Proceedings

In the event the proceeds of sale do not satisfy the judgment entered by the court in favor of the lien holder, the lien holder will have the ability to obtain a deficiency judgment against the property owner. The deficiency judgment will be the difference between the judgment and the amount of proceeds applied to the judgment. Once a deficiency

judgment is entered, the lien holder has the right to seek enforcement of the judgment as in the case of all other judgments.

Summary

This article merely sets forth the general outline of the judicial proceedings relating to a foreclosure. This article is by no means an exhaustive dissertation as to all aspects and issues relating to a judicial sale. Foreclosure proceedings can get complicated. Accordingly, it is recommended that in the event one seeks to enforce a lien or interest against real property through judicial sale, an attorney familiar with this procedure should be retained.

About Tom Keuler

Tom has been a practicing attorney with **Denton & Keuler** for 26 years. He has represented Banks in hundreds of foreclosure actions, including complicated foreclosures relating to malls and apartment complexes.

Author **Thomas J Keuler** is a partner at the law firm of **Denton & Keuler** located in Paducah, Kentucky. You can reach Tom via email at tkeuler@dklaw.com

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