

FEDERAL STANDARD ABSTRACT

TITLE NEWS

Issue #30

April 2007

Title News

Foreclosures

This topic has been in the news a lot lately. Subprime defaults are increasing, which is having an effect on both the housing market and the stock market. The housing market is caught, seemingly, in a vicious cycle where increasing foreclosures push the prices of homes steadily down with no end in sight, and the stock prices of companies owning subprime mortgage debt are falling. For the sake of clarification, therefore, it seems necessary to spell out what is involved in the foreclosure process, since foreclosures may become more and more common with time. (Some predict as many as two million families will lose their homes to foreclosures.)

Lis Pendens

All actions or lawsuits to assert a right in real property usually begin with the filing of a Lis Pendens, otherwise known as a Notice of Pendency. The Notice of Pendency is filed with the County Clerk and puts all prospective buyers or lienors on "constructive notice" that a lawsuit is pending with respect to the subject property. The New York State statute section that discusses the Lis Pendens is C.P.L.R. article 65.

The Notice of Pendency must include the names of the parties to the action, the object of the lawsuit, and a description of the real property at issue. If block and lot numbers exist, they must be stated in the Lis Pendens. Usually, the plaintiff in a lawsuit uses the caption from the summons and complaint in the Notice, and the Notice directs the

County clerk to "index this notice to the names of all of the above named defendants" as well. Forms for Notices of Pendency can be found in any form or reference book series.

Generally, the Lis Pendens is filed the same day that the plaintiff files a summons and complaint with the County Clerk. However, the Notice of Pendency may be filed before or after the service of the summons, and at any time prior to the filing of the judgment. If the Lis Pendens is filed before the lawsuit is started, however, the plaintiff has 30 days from the filing of the Lis Pendens to serve the summons and complaint; otherwise, the Lis Pendens is legally ineffective. If the summons has been filed, the plaintiff/mortgagee has 120 days from the date of filing to file the Notice of Pendency. In a foreclosure action, furthermore, the Lis Pendens must be filed at least 20 days before the entry of judgment of foreclosure.

The Lis Pendens lasts for 3 years. (For title insurance purposes, 6 years) If the time allotted expires and the Notice of Pendency has not been renewed, by motion to the court, the Notice "dies" so to speak. In the past, once a Lis Pendens "died," it could not be renewed. Therefore, if you were foolish enough to allow the Notice of Pendency to expire, you were simply out of luck. This was changed, however, by Real Property Actions and Proceedings Law article 13 which requires a Lis Pendens as a condition to suing to foreclose a mortgage. The courts, therefore, allow a plaintiff to file a completely new Lis Pendens in a foreclosure action, even though that is not allowed in

other types of actions, such as an action to foreclose a mechanics lien.

Nevertheless, defendants in foreclosure actions will cite once-valid case law holding that a Lis Pendens cannot be renewed. If the plaintiff is foolish enough to ask the court to renew the old Lis Pendens, even in a foreclosure action, the court will find in favor of the defendant/debtor because an expired Lis Pendens can never be *renewed*: the plaintiff in the foreclosure action must file a *brand-new* Lis Pendens or none at all. The point may seem small, but hours of litigation and thousands of dollars in legal fees may be involved because a new Lis Pendens cannot be filed until the court gives permission, and without that *new* Lis Pendens, the foreclosure action itself cannot be prosecuted. Without a valid Lis Pendens, the foreclosure action itself “dies.”

Besides expiration based on time elapsing, a court may cancel a Lis Pendens for the following reasons:

The summons was not served within 30 days of filing the Notice.

The lawsuit was settled, discontinued or abated.

1. Plaintiff's time to appeal a final judgment expired.
2. Enforcement of a final judgment against the plaintiff has not been stayed.
3. The court finds the plaintiff started the lawsuit in bad faith.

Foreclosure of a Mortgage

A judgment of foreclosure terminates a property owner's “right of redemption” to buy the property back from a lender after having defaulted on the loan. In New York State, foreclosure takes place upon court order and by advertisement in the media. Both methods of foreclosure result in an auction of the subject property, though the majority of foreclosures are judicial ones.

The Real Property Actions and Proceedings Law article 13 does not allow a plaintiff to sue to foreclose a mortgage if a previous judgment was issued granting the plaintiff any part of the mortgage debt, unless an execution against the debtor's property was issued and returned unsatisfied. In other words, you cannot sue on both the Mortgage and the Note.

A foreclosure action begins with the filing of the summons and complaint, and, as already mentioned, the Notice of Pendency. A Lis Pendens in a foreclosure action must also state the date of the mortgage, the parties to the mortgage, and the place where it was recorded, besides the general information required in a Lis Pendens as noted above. A title search should be done to determine all the necessary parties to the action. If a defendant is left out of the summons and complaint, the plaintiff must move the court for permission to amend the complaint and to serve a supplemental summons on any new defendants. New defendants also mean an amended Notice of Pendency must be filed with the County Clerk, as well. If the debtor/defendant has conveyed the property to a “dummy” corporation or LLC under his or her exclusive control in order to frustrate the foreclosure action, these “amendment” requirements must be met in order to join the “dummy” company.

Persons who must be included in a foreclosure action are:

1. Those who have an estate or interest in possession in the subject property.
2. Those who have a right of dower in the property.
3. Every person possessing a subordinate lien or encumbrance on the property.
4. The State, when it has an interest or lien upon the property that is subsequent to the mortgage.

Anyone possessing an interest in the property superior to that of the

plaintiff/mortgagee need not be named in the foreclosure action.

Referee

When all the defendants have been served properly and no further amendments are needed, and no answer from the mortgagor has been served, the plaintiff may move the court to compute the amount due to the plaintiff/mortgagee or to appoint a referee to do so. Generally, the courts appoint a referee. If an answer has been served, the mortgagee may move for summary judgment, and if it is granted, the court will usually appoint a referee anyway. The referee will determine not only the amount due to the mortgagee, but all amounts due to any parties who have an interest in the subject property.

The motion to appoint a referee may be made *ex parte* and should state:

1. The dates of the filings of the summons, complaint, Lis Pendens and any amendments.
2. Proof of service of all of the above, shown by affidavits.
3. Any notices of appearance that have been received.

4. A statement that the time for the defendant to answer has expired and that no motion or answer from a defendant has been received.

The referee's hearing is generally a formality not attended by anyone. The plaintiff submits a deposition and documentary evidence to the referee, who then signs off on papers prepared by the plaintiff/mortgagee.

Judgment

Once the amount owed has been determined by the court or a referee, the plaintiff may then move to confirm the referee's report and/or to enter the judgment of foreclosure. The motion to confirm the referee's report or to enter the judgment of foreclosure must be supported by an affidavit of regularity. Once the judgment has been entered, the sale or auction of the property may then take place. There are strict requirements as to how the auction must be conducted, including notice requirements. Applicable statutes and regulations should be consulted.

DISCLAIMERS

These materials have been prepared by Federal Standard Abstract for informational purposes only and should not be considered professional or legal advice. Readers should not act upon this information without seeking independent professional or legal counsel.

The information provided in this newsletter is obtained from sources which Federal Standard Abstract believes to be reliable. However, Federal Standard Abstract has not independently verified or otherwise investigated all such information. Federal Standard Abstract does not guarantee the accuracy or completeness of any such information and is not responsible for any errors or omissions in this newsletter.

While we try to update our readers on the news contained in this newsletter, we do not intend any information in this newsletter to be treated or considered as the most current expression of the law on any given point, and certain legal positions expressed in this newsletter may be, by passage of time or otherwise, superseded or incorrect.

Furthermore, Federal Standard Abstract does not warrant the accuracy or completeness of any references to any third party information nor does such reference constitute an endorsement or recommendation of such third party's products, services or informational content.

If you have any questions or comments, contact us at fsa@federalstandardabstract.com