



Foreclosures: Everything You Wanted to Know but Was Afraid to Ask

A. Types of Foreclosures

a. Judicial Foreclosure

1. Lawsuit with Judge or Jury
2. Remedy for Defaults on Mortgages

b. Power of Sale Foreclosure

1. Most Common form of Foreclosure

- a. Quasi Judicial Proceeding Conducted by the Clerk of Court
- b. Authority comes from the Provisions of the Security Instrument and Chapter 45 of the NC General Statutes

2. Notice of Default and Demand for Payment

- a. Notice of Default and Demand for Payment must be sent to debtor
- b. Within 30 days of the Notice of Hearing
- c. To last known address
- d. Written statement must detail amount owed

3. Notice of Hearing (NCGS 45-21.16)

Note: A Hearing is held to determine whether a valid debt exists, whether there has been a default, that foreclosure is permitted by the security instrument and that notice was proper. These matters are rarely contested.

- a. Must be Filed with Clerk
- b. Must be served on all Necessary Parties
- c. Necessary Parties:
 - i. Any person listed in the Security Instrument as being entitled to notice
 - ii. Guarantors
 - iii. Owners of any future or present interest
 - iv. Does not include:
 - 1. Trustee of the Deed of Trust
 - 2. Beneficiary of the Deed of Trust
 - 3. Judgment Creditor
 - 4. Junior Lienholders
 - 5. Mechanicsmen Lien Claimants
- d. Service:
 - i. Personal Service w/i 10 days prior to Hearing; or
 - ii. Posting on Property w/i 20 days prior to Hearing

4. Hearing

- a. Held at the date and time specified in the Notice
- b. Clerk Must Find:
 - i. Valid Debt
 - ii. Default
 - iii. Right to Foreclose
 - iv. Notice to Appropriate Parties
- c. Clerk issues Order

5. Notice of Sale (NCGS 45-21.17)

Note: The Sale is an auction usually done at the courthouse which has the effect of transferring the property to the highest bidder.

- a. Must be posted in Designated Area to days 20 prior to Sale; and
- b. Must be Published once a week for 2 weeks in a qualified newspaper 10 days prior to sale; and
- c. Must be mailed 20 days prior to the sale to each party entitled to Notice and anyone who has filed a Request for Notice; and
- d. Must be sent – and received -- by certified mail to IRS 25 days prior to sale for any IRS tax liens on record

6. Sale

- a. Must be held at time and place noted in the Notice of Sale
- b. Must be held between the hours of 10:00am and 4:00pm
- c. Cannot be held on Sundays
- d. Sale must be held in county where property is located

7. Final Report of Sale

- a. Must be submitted 5 days after Sale
- b. Final Report of Sale must be filed with Clerk w/i 30 after receipt of proceeds of sale by Trustee

8. Trustees and Post-Sale Matters

- a. Substitution of Trustee must be filed prior to Notice of hearing if Trustee is not the person named in the Security Instrument
- b. Trustee's Deed is Filed upon tender of sales price to Trustee
- c. Upset Bids may be submitted up to 10 days after sale
- d. Redemption: Sale is terminated if total debt – including interest, late fees and attorney's fees, is satisfied prior to expiration of the Upset Bid Period

B. Biggest Foreclosure Issues

a. Proper Notice

1. Who is Entitled to Notice of Hearing (NCGS 45-21.16)

- a. Any person identified in the Security Instrument
- b. Any person obligated to repay the indebtedness
- c. Record Owner of the Real Estate
 - i. Includes Owners of present or future interest
 - ii. Does not include:
 1. Trustee of the Deed of Trust
 2. Beneficiary of the Deed of Trust
 3. Judgment Creditor
 4. Mechanicsmen Lien Claimants

2. Who is Entitled to Notice of Sale (NCGS 45-21.16)

- a. Any person identified in the Security Instrument
- b. Any person obligated to repay the indebtedness
- c. Record Owner of the Real Estate
 - i. Includes owners of present or future interest
 - ii. Is determined as of the date of the hearing
 - iii. Does not include:
 1. Trustee of the Deed of Trust
 2. Beneficiary of the Deed of Trust
 3. Judgment Creditor
 4. Mechanicsmen Lien Claimants
- d. Tenants under unrecorded leases (if less than 15 residential units)
- e. IRS (if lien is older than 30 days)
- f. Any person who filed a "Request for Notice" (45-21.17A)

- i. Must be filed prior to filing of the Notice of Hearing
- ii. Separate Instrument
- iii. Must reference the Security Instrument

3. Consequences of Failing to Provide Proper Notice

- a. Foreclosure Invalid if improper **Notice of Hearing**
- b. Color of Title not Available
- c. IRS Tax Lien continues to be attached
- d. Improper Notice of Sale **may not** be Fatal

b. Redemptive Rights

1. Who is Entitled to Redeem

1. Borrower/Owner
2. IRS

2. Time Frames for Redemption

1. ***Borrower/Owner***

- a. Must tender full amount owed including interest, penalties, late fees and attorney's fees
- b. Must be tendered prior to expiration of Upset Bid Period
- c. Cannot be refused by Trustee or Beneficiary
- d. Can be exercised by anyone with an interest in the property whose interest would be extinguished by the foreclosure
 - i. Heirs (if Mortgagor is dead)
 - ii. Judgment Creditor
 - iii. Transferee
 - iv. Junior Liens
 - v. Spouse of Mortgagor

2. ***IRS***

- a. 120 days if received notice

b. No time frame if Notice was not provided

3. Distinguish Between IRS Redemption Rights and Borrower Redemption Rights

c. Upset Bids (NCGS 45-21.27)

1. Must be 5% more than original bid
2. Must deposit 5% of Bid with Clerk w/i 10 days of the filing of the Report of Sale
3. Notice of Upset Bid must be filed with Clerk at same time as the Deposit

d. Review of Critical Time Frames

1. Notice of Hearing – 10 days (Personal Service) or;
2. Notice of Hearing – 20 days (Posting)
3. Notice of Sale – 20 days (Posting)
4. Notice of Sale – 10 days (Published once a week for 2 weeks)
5. Notice of Sale – 20 days (Mailed)
6. Notice of Sale to IRS - 25 days (Certified mail)
7. Final Accounting – 30 days (Filed with Clerk)
8. Upset Bids – 10 days

e. Bankruptcy

1. Effect of Bankruptcy Filing

- a. Automatic Stay
- b. Foreclosure must be Halted
- c. If it is not, the Foreclosure may be Invalid

2. Order from Bankruptcy Court

- a. Necessary to complete sale
- b. If Order is signed by Bankruptcy Sale, Foreclosure is Valid

C. Tax Foreclosures

a. Two Types

1. Section 105-375 (In Rem Method)

- i. Notice required, but no hearing
- ii. Execution Sale by Sheriff
- iii. May be Unconstitutional
- iv. Not Insurable for 7 years

2. Section 105-374 (In Personam Method)

- i. Quasi - Judicial Proceeding which borrows the procedures of Chapter 45
- ii. Section 374 sales may be *insurable*
- iii. Insurability of Section 374 sales turn on proof of *actual personal service*

b. Often difficult to find owners

c. Even if service is proper, transaction may be uninsurable for one year after sale

D. Importance of Good Title Search and Attorney Review

a. Rise in claims related to increase in foreclosures

- i. Leads to finding more defects
- ii. Abstractors and attorneys have to diligently look at the files

b. Sloppy Foreclosure Attorneys

- i. Commoditization of the Foreclosure process
- ii. Have to be very detailed in your review of Foreclosure files

c. Title Search will reveal the following information:

- i. Identity of Current Owners
- ii. Identity of Junior Lienholders and Judgment Creditors
- iii. Identity of anyone make a Request for Notice
- iv. Title defects which may impact the foreclosure
- v. Existence of IRS Tax Liens

E. Correction Procedures

a. Reformation Actions

1. Legal remedy in which the court is asked to “reform” the deed of trust so that it is correct
2. Common remedy when the legal description is erroneous

b. Constructive Trust

1. Equitable Remedy in which court is asked to treat loan proceeds as the formation of a trust
2. Used when the instrument itself fails
3. Essentially, lender is asking for their money back and the property is looked to as the source of the reimbursement

