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Challenging Wrongful Foreclosure in Tennessee

This is a brief guide for lay persons about how to challenge foreclosure successfully, a feat that is possible though difficult. This memo is not a substitute for legal assistance, which is usually essential in this complex area of the law. It is divided into the following parts:

- Filing Bankruptcy before Foreclosure Occurs
- Suing to Enjoin Foreclosure before It Occurs
- Suing to Set Aside a Foreclosure that Has Already Taken Place
- Filing a Counterclaim in the Detainer Action after Foreclosure Has Occurred
- Filing Bankruptcy after Foreclosure
- Procedural Grounds for Challenging the Foreclosure
- Substantive Grounds for Challenging the Foreclosure

Filing Bankruptcy before Foreclosure Occurs

This is often the shortest and simplest procedure. It has the following advantages: a bankruptcy filing automatically prevents foreclosure temporarily and sometimes permanently; you have the opportunity to cure a default in your payments by paying the delinquent amount in installments over a reasonable period; you may be able to reduce or eliminate the fees of the lender's attorney; and you may be able to avoid interest on the amount you are delinquent (though not interest on the loan itself).

Generally, you will need a lawyer in bankruptcy. You must file before the foreclosure sale takes place, a time that usually is only 20 or so days after the foreclosure process starts with a letter to you or a notice in a newspaper.

Suing to Enjoin Foreclosure before It Occurs

To obtain an injunction, you must file a complaint in a court. You will need a lawyer. The process is made more arduous by a requirement that you give five days' notice to the lender before seeking to enjoin the foreclosure. This reduces the 20-day period to 15 days for acting.

Temporary injunctions require a "clear" showing of "immediate and irreparable injury, loss or damage" or "that the acts or omissions of the adverse party will tend to render [the] final judgment ineffectual." Judges take this requirement seriously.

The most difficult requirement of all may be the need to give a bond “in such sum as the court ... deems proper” unless you successfully obtain permission to bring the action as an indigent person. A homeowner with only modest amounts of other assets and income may be unable to qualify as indigent and may also be unable to find anyone willing to provide a bond, especially one on short notice.

Suing to Set Aside a Foreclosure that Has Already Taken Place

The grounds for setting aside a foreclosure are limited to “some evidence of irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee that caused or contributed to an inadequate price.” Defenses like the absence of a delinquency or violations by the lender of federal or state commercial law may not be raised.

You have the burden of proof in a lawsuit to set aside a foreclosure. Damages are the only remedy. There is nothing to prevent a third-party purchaser from keeping your house even if he knows of your claim against the lender and even if he believes that your claim is meritorious.

Filing a Counterclaim in the Detainer Action after Foreclosure Has Occurred

Foreclosure may be challenged by a counterclaim when the lender (or other new owner of the property) seeks possession by a “detainer” action. It is better to file the counterclaim in writing, and the grounds for doing so are discussed below. It is preferable that you use a lawyer to assist you, but most persons do not.

There is an initial problem. A statute says: “The estate, or merits of the title, shall not be inquired into” *in a detainer action*. Lenders may assert that a wrongful foreclosure may not be challenged even when the parties are before the court on the issue of possession, the right to possession is necessarily founded on ownership, and ownership depends on the lawfulness of the foreclosure. In our view, the statute disallows only attacks upon title based on transactions prior to the creation of the deed of trust. We also believe that the statute is inapplicable to counterclaims seeking *to set aside a foreclosure*, even if it bars defenses to the detainer action.

Not every new owner is successful in obtaining possession. It may overlook the proof that is necessary to show that it the foreclosure was conducted properly and that it was entitled to foreclose – things like affidavits or testimony showing that you did not make timely payments. You may and should contest every assertion made by the new owner, even if you do not have a lawyer. The new owner has the burden of proof. If it fails to meet that burden, the judge may conclude that you are entitled to remain in possession even though you no longer own the home.

On the other hand, if the new owner is successful in the detainer action, it is entitled not only to possession but also to the rental value of the property from the date of foreclosure until the date of removal. You have only ten days for an appeal to Circuit

Court and must furnish a bond. The amount of it can be prohibitive: a “sufficient amount to cover, besides costs and damages, the value of the rent of the premises during the litigation.” Even the furnishing of an affidavit of indigency may be insufficient to retain possession during an appeal.

Filing Bankruptcy after Foreclosure

It is possible to set aside the foreclosure through the bankruptcy process. The grounds that may be asserted are discussed below.

There is some good news even if you lose the challenge; bankruptcy usually discharges all or part of a deficiency judgment against you for any amount still due after the foreclosure occurs.

Procedural Grounds for Challenging the Foreclosure

- *Failure to Give Personal Notice.* No personal notice to a borrower is required by statute. However, we believe that federal and state constitutions require personal notice to each borrower, either by summons or by certified mail that is actually received, and we are litigating cases so as to establish this principle.

- *Insufficient Notice by Newspaper Publication or Posting in Public Places.* Under Tennessee statutes, advertisement of a foreclosure sale must be made three different times in “some” newspaper “published” in the “county where the sale is to be made.” Only 20 days’ notice is required, and the use of publications read almost exclusively by lenders and lawyers is permitted. Both the shortness of the time and the use of obscure newspapers seem vulnerable to constitutional objection. In addition, some counties have no eligible newspapers. In this case, written notice may then be posted in five “of the most public places in the county.” There is no guidance about what such places are or how they are to be determined. This is too vague a standard to pass constitutional muster.

- *Failure to Give Notice Required by the Deed of Trust.* Many deeds of trust require notice of foreclosure by certified mail, or at least by mail, in addition to notice by newspaper publication. Many also require notice – before foreclosure is sought -- that the entire sum has been declared to be due because of a late payment or other default.

- *No Meaningful Opportunity to Dispute the Foreclosure.* This too is a constitutional challenge to Tennessee’s foreclosure process. It is based on the notion that making you find a lawyer and file a lawsuit in 15 days, assume a high burden of proof, and furnish a bond are unfair hurdles imposed on you.

- *Defects in the Foreclosure Sale.* Tennessee judges have said that the foreclosure must occur in the county in which the property is located; it must take place at an accessible location; and a lender may not use a purely technical default as a basis for foreclosure. However, when the lender demands the full amount of the debt, they have refused to let the borrower cure the delinquency by paying the disputed amount before

the foreclosure occurs. They also have ruled that there is no minimum price that must be paid and have allowed the lender to recover a deficiency judgment if the amount received in the sale is less than the amount owed. They have yet to decide whether the combination of a shockingly low price and another procedural defect are sufficient to disallow the foreclosure.

Substantive Grounds for Challenging the Foreclosure

The following claims and defenses are among those that may be raised so as to defeat a foreclosure altogether or reduce the amount of any deficiency:

- *Late Payments Were Accepted on Other Occasions.* This suggests that the lender waived the right to refuse late payments and was estopped from foreclosing.

- *The Lender Refused to Supply a Pay-Off Amount or Accept Full Payment so Foreclosure Could Be Avoided.* Despite unfavorable precedent, this could be a viable ground.

- *A Borrower was in Military Service at the Time of the Foreclosure.*

- *The Loan was Unconscionable.* That is, the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

- *The Making of the Loan, or the Servicing of It, was Riddled with Unfair and Deceptive Practices that Violated the Tennessee Consumer Protection Act.*

- *The Servicer Collected Unauthorized Fees for the Escrow Account, or as Late Charges, or as Attorney Fees during the Foreclosure Process.*

- *One Spouse Was Required to Sign the Mortgage Note even though the Credit of the Other Spouse was Sufficient.*

- *One or More Borrowers Lacked the Mental or Physical Capacity to Borrow.*

- *The Mortgage Broker Was Paid an Unlawful Sum by the Lender.*

- *The Lender Violated a Relationship of Trust with the Borrower that Developed in the Lending Process.*

- *There Was Fraud or Misrepresentation by the Lender in the Making of the Loan.*