



Foreclosures 101

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Document Review

- ◆ Loan Documents
 - All pages?
 - Signed?
 - Acknowledged?
 - Deed of Trust:
 - Describes the encumbered property?
 - Properly recorded?
 - Right to foreclose under power of sale?
 - Right to substitute the trustee?



Title Examination

- ◆ Usually limited to a title update from the recording of the deed of trust.
- ◆ Also get source deed and review it for evidence the borrower owned the property at the time it was encumbered.



Title Examination

- ◆ Obtain a copy of **all** federal tax liens filed and **all** Requests for Notice recorded pursuant to N.C. Gen. Stat. §45-21.17A.



Statutory Demand Letter



- ◆ Statute requires that a written statement be sent within 30 days of the date the notice of hearing is filed with the Clerk.



Attorney's Fees - Notice

- ◆ Attorneys' fees incurred by the lender in connection with a foreclosure proceeding can be recovered from the borrower and/or guarantor(s) in addition to trustee's fees.
- ◆ However, must give notice of the intent to enforce the attorneys' fees provision before the foreclosure is filed. N.C. Gen. Stat. §6-21.2.



Notice of Hearing

- ◆ “Record owners” of the property and any other person obligated on the debt.
- ◆ Personal service on each party entitled to receive notice in any manner provided by the Rules of Civil Procedure for service of Summons. N.C. Gen. Stat. §45-21.16(a)



◆ **Must Serve:**

- Those to whom the security instrument itself directs notices to be sent;
- Those obligated to repay the indebtedness against whom the holder intends to assert liability therefor, including guarantors; and
- Every “record owner,” including tenants in possession under recorded leases or rental agreements. N.C. Gen. Stat. §45-21.16(b)



Notice of Hearing

- ◆ Allows service by posting if personal service cannot be affected after “reasonable and diligent effort.”
- ◆ But, must file an affidavit describing the circumstances warranting the use of service by posting.



Notice of Hearing

- ◆ Foreclosures are filed as special proceedings.
- ◆ Notice of Hearing details:
 - Loan
 - Parties
 - Default
 - Hearing Date
 - Power to Foreclose



Hearing



- ◆ At the hearing, the Clerk determines whether there is a basis for proceeding with the foreclosure.
- ◆ Must find that the following four criteria are met:
 - Notice
 - Right to foreclose
 - Valid Debt
 - Default



Right to Foreclose



- ◆ Does the deed of trust have a power of sale clause?



Valid debt




- ◆ Is the party seeking to foreclose on the property a holder of a valid debt?
 - Evidenced by possession of the note.



◆ Invalid Debt?

- Absence of the Note or missing signatures
- Debt procured through fraud or misrepresentation
- Was the debt incurred without consideration?
- Is the recovery of interest, late charges, costs, or fees authorized by the debt instruments and/or by law?


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- ◆ Disputes over the amount owed are beyond the scope of the hearing, as opposed to the nature and type of the charges.
 - ◆ The clerk is only required to find and should only attempt to determine whether or not there exists a valid debt **in any amount**.



Default



- ◆ Has the borrower failed to make payments in full when due or on maturity? The amount in default is irrelevant.
- ◆ Other defaults under the loan documents?

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- ◆ Frequently, circumstances can develop where the occurrence of an event of default is not clear.

For Example:

- The lender regularly and consistently accepts late payments from the borrower.
- The lender untimely or improperly handles payments by the borrower



Defenses



- ◆ The borrower may raise defenses before the clerk but only on the four issues: notice, right to foreclose, valid debt, and default.
- ◆ All other defenses, such as the amount of the debt, must be brought before the judge in a civil action. N.C. Gen. Stat §45-21.34.




Trustee


- ◆ The trustee is a fiduciary to the lender and debtor.
- ◆ Brings the action for the lender, but must remain neutral in a contested case.
- ◆ Substitute the original trustee with an independent substitute trustee.



Appeal from Clerk's Order of Sale

- ◆ 10 days from the entry of an order of sale in which to appeal the clerk's decision. N.C. Gen. Stat. §45-21.16(d).
- ◆ If the borrower's appeal is not filed timely, the decisions and determinations made on the four issues before the clerk are *res judicata* and cannot be relitigated.

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- ◆ All parties have the right to appeal the Clerk's final order entered at the hearing. N.C. Gen. Stat. §45-21.16(d1).
 - ◆ Appeal to District or Superior Court having jurisdiction. N.C. Gen. Stat. §45-21.16(e).
 - ◆ On appeal, heard *de novo* and limited to the same four issues that were before the clerk at the hearing.

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- ◆ Appealing party must “post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any problem or loss by reason of appeal; and upon posting of the bond, the clerk shall stay the foreclosure pending appeal.” N.C. Gen. Stat. §45-21.16(d1).
 - ◆ If a bond is not posted, the foreclosure may proceed.
 - ◆ Failure to timely appeal may result in the inability to raise those issues once the foreclosure is completed.



Notice of Sale

- ◆ Provides notice of:
 - a. the date of the sale,
 - b. the property being sold
 - c. the time of the sale,
 - d. the terms of the sale, and
 - e. the location of the sale.



◆ Notice must be:

- Posted at the courthouse at least 20 days immediately preceding the sale, and
- Published in a newspaper:
 - Published in and qualified for legal advertising in the county where the property is located
 - Publish once a week for 2 successive weeks BUT at least 7 days apart and not more than 10 days before the date of the foreclosure sale.



Servicemembers Civil Relief Act

50 App. U.S.C.A. §502

- ◆ Protects debtors who are serving in the military in the event of debt collection or foreclosure by:
 - Entry of stays,
 - Adjustment of outstanding obligations, and
 - Imposition of criminal penalties for violations.
- ◆ Protections apply for the entire time of military service and for a period of 90 days thereafter.




Unfair Debt Collection Practices

- ◆ Both federal and state laws offer special protection to debtors who are obligated to repay debts incurred for consumer, family, and household purposes.
- ◆ NC provides penalties and sanctions for debt collection practices that involve threats and coercion, harassment, unreasonable publication, deceptive representation, or the use of “unconscionable means.” N.C. Gen. Stat. §75-50 through 75-56.



Sale and Upset Bids

- ◆ The foreclosure sale is held at the courthouse or at the property on the date and time given in the Notice of Sale.
- ◆ The actual sale can be postponed up to 90 days
- ◆ Subsequent sales are by the filing of upset bids and the posting of deposits

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- ◆ Within 5 days after the actual sale, the trustee files an initial report of sale
 - ◆ 10 days to file upset bids and post deposits after the sale or filing of the initial report of sale
 - ◆ Increase last high bid by 5% or \$750, whichever is greater
 - ◆ Deposit 5% of the total upset bid amount, or \$750, whichever is greater.
 - ◆ New 10 day period triggered by each new upset bid



Final Report of Sale

- ◆ After the bid period expires with no new upset bids:
 - Property deeded to high bidder
 - Lender?
 - 3rd Party?
 - Trustee files a Final Report of Sale.
 - Clerk audits the Final Report of Sale, but cannot question the amounts or appropriateness of fees.




Defaulting Bidders

- ◆ A defaulting bidder may be held liable for its bid. N.C. Gen. Stat. §45-21.30:
 - All costs of resale, and
 - The difference between the high bid and the resale price, if less than high bid.



Surplus Funds

- ◆ Any amounts remaining after the payment of all costs of foreclosure (i.e. the balance of the mortgage, trustee fees, advertising costs)
- ◆ Trustee pays surplus funds to the parties entitled to the funds. N.C. Gen. Stat. §45-21.31. If the trustee does not know who the proper parties are, the trustee can deposit the fund with the Clerk of Court.

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- ◆ Any person who believes he or she is entitled to the surplus funds may file a special proceeding before the clerk for those funds. The clerk will determine ownership of the funds based on priority, not on who filed the action.



Avoiding Foreclosure



Tips for Buying Property in Foreclosure



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