

Massachusetts (MA) Foreclosure Laws

When you develop a definite plan of action with well-timed, well-informed steps, you can stop the foreclosure process and save your home. We have outlined the foreclosure process for the state of Massachusetts.

The Process

In Massachusetts, there are two methods by which a mortgage may be foreclosed:

the lender may enter and take possession of the property by several alternative means, in which case the lender's ownership can become final after three years, and

the lender may complete a non-judicial sale under a power of sale clause.

The first method, entry and possession, is seldom used as the primary means of foreclosure. Instead it is used as a backup in case of technical error in non-judicial sale procedures. The first method is essentially a variation on the strict foreclosure theme. The second method, a foreclosure sale under a power of sale clause, is the usual procedure. The power of sale foreclosure takes place out of court. In spite of the fact that the power of sale foreclosure is conducted out of court, it is nevertheless customary to file a lawsuit before attempting such a sale in order to make sure that the federal Soldier and Sailor's Relief Act does not apply to the borrower's situation.

Entry and Possession Procedures

A lender can foreclose in Massachusetts by lawfully taking possession of the premises and then waiting three years for title to become final in the name of the lender. Lawful recovery of possession can be done by several alternative means:

file a lawsuit and obtain a court order giving the lender possession, enter peaceably and take possession or obtain the borrower's proper consent to entry.

The first method consists of filing a lawsuit to recover possession. The lender's lawsuit must allege that there was a breach of a condition in the mortgage, such as failing to pay the loan. If so, the court may render a conditional judgment giving the lender possession. The court will also grant a writ of entry which will permit eviction of the borrower. However, the

borrower may recover possession within two months by paying the amount due under the mortgage or correcting any other breach of the mortgage. Unless the borrower can come up with enough money to pay off the mortgage within three years, however, the lender's ownership becomes final and the borrower's right to redeem the property is cut off.

The second method the lender can use to recover possession lawfully is for the lender to openly and peaceably enter the mortgaged premises. Two witnesses must swear that the entry was proper. Once in possession, the lender has to wait three years for full title.

The third method the lender can use to recover possession is to obtain the borrower's consent. The borrower must sign and record a written memorandum to the mortgage deed. The recording must be done within 30 days from the signing. Once again, the lender must wait three years for full title under this method.

During the time the lender obtains possession pending foreclosure, the lender must account for rents and profits. The lender may deduct the costs of reasonable repairs and improvements.

Power of Sale Clause Foreclosure

In Massachusetts the usual method of foreclosure is through sale under a power of sale clause in the mortgage. The sale must be conducted in accordance with the requirements specified in the power of sale clause. Notice of the foreclosure must be published once a week for three weeks in a newspaper of general circulation in the town where the land is located. The first publication must be at least 21 days before sale. Notice must also be sent by registered mail to any owner whose interest was recorded as of 30 days prior to the sale. The actual date of mailing must be at least 14 days prior to the foreclosure sale.

In Massachusetts there is an exhaustive list of potential addresses to which the lender must mail the foreclosure notice, the purpose of which is to make sure the borrower gets a copy of the notice, if it is at all possible. Initially the lender should mail the notice to the address found in the registered land records, or if none is found, then to the last known address appearing in the lender's records, or if none is found, then to the address on the deed or probate petition. If the address is still not found, then it should be mailed to the last address to which a tax bill was sent any time within the previous three years. If that address can not be found, then to any address shown in the deed or documentation for any other land owned by the same owner. Nevertheless, there is no requirement for the borrower to actually receive the notice, merely for the lender to make a diligent effort to locate the borrower. Notice should also be sent to any junior lien holders.

The actual sale must be conducted at the date, time and place specified in the notice. The sale will be made to the highest bidder. Within 30 days after sale, the person selling the property at foreclosure must record a copy of the notice of sale and an affidavit that the foreclosure sale was properly conducted. Any lien or encumbrance on the property that was not part of the mortgage that was foreclosed on and not included in the auctioneer's bargain remains intact and can affect the title to the property after the foreclosure sale. If there is any money left from the foreclosure sale after paying off the lender, the surplus goes to the borrower. A proper sale prevents the borrower from exercising any right to reclaim the property through redemption.

If a suit in equity is filed to clear up problems that could result from the Soldier and Sailor's Relief Act of 1940, service is considered sufficient if the above described notices were published 21 days before the return day and mailed 14 days before the return day for the lawsuit. The return day is the day by which the lawsuit must be answered.

Deficiency

If the foreclosure sale proceeds are not enough to pay off the lender, then the borrower is liable for any deficiency. However, the statutory notice of intention to foreclose must have been sent at least 21 days before the sale. Furthermore, the affidavit that the sale was complete must be on record 30 days after the sale. Otherwise, no deficiency can be obtained. The statute of limitations on deficiency judgments is two years after the date of foreclosure or two years after the loan payments were accelerated and the loan's unpaid balance was made due entirely. If there was no foreclosure sale under a power of sale clause, and the lender attempts to sue the borrower on the theory that the value of the real estate the lender obtained at foreclosure was less than the balance due on the loan, then the borrower has a right to bring a suit for redemption within one year after recovery under such a judgment.

Redemption

The basic rule in Massachusetts is that the foreclosure under a properly conducted power of sale clause cuts off the borrower's right to redeem. The sale must be conducted in good faith and the lender must use due diligence to comply with the statutory requirements for a power of sale foreclosure, as previously outlined.

Interestingly, however, the borrower may use the right of redemption as a vehicle for slowing down a foreclosure sale, even though the lender is attempting to foreclose under a power of sale clause, which normally cuts off the right of redemption. A borrower may bring a suit to redeem the

property before the first notice of sale is published. Such a suit will delay the foreclosure sale. The court must determine the amount due under the mortgage on which conditions remain unperformed such that if the amount is paid or the conditions are performed, the borrower will have a right to redeem. The court can specify a time period and manner for payment or performance, and if the borrower complies with the court's specified conditions, the borrower will have a right to discharge the mortgage and receive a decree regaining possession- If the borrower fails to perform by the time and in the manner specified by the court, the lender can proceed to mail and publish the foreclosure notices (14 days and 21 days, respectively) and then hold the foreclosure sale.

The Massachusetts Uniform Fraudulent Conveyance Act and Bankruptcy

The Massachusetts bankruptcy courts have shown a particular willingness to invalidate foreclosure sales. Because of this propensity, numerous additional steps should be taken if a lender forecloses in Massachusetts. The U.S. bankruptcy courts for Massachusetts have ruled that all the statutory procedures outlined above may be insufficient to guard against invalidation of the foreclosure sale if the borrower files bankruptcy after the foreclosure. If the sale took place for less than market value, it may be ruled to be a fraudulent conveyance, under section 548 of the Bankruptcy Code, which commands that reasonably equivalent value must be obtained before the foreclosure sale will be left undisturbed by the bankruptcy court. Reasonably equivalent value is market value.

The invalidation of a foreclosure at less than market value can also be accomplished through the application of the Massachusetts Uniform Fraudulent Conveyance Act. Therefore the lender should take further precautions by appraising the property at the time of foreclosure, by advertising it in the real estate section of the newspapers, by mailing a notice of the sale to anyone who expressed an interest in buying the property, and by notifying real estate brokers in the immediate vicinity that the property is for sale. All of these steps should be taken if the lender wants to be sure to avoid future trouble from the borrower's bankruptcy petition after the sale, or a suit to set the sale aside under the Massachusetts Uniform Fraudulent Conveyance Act.