Avoiding Foreclosure During a Loan Modification

Mark Twain supposedly said once that "A verbal contract isn't worth the paper it's printed on." A client recently learned that the same can be said of a lender's promises during negotiations for a loan modification.

These homeowners had hired another law firm to represent them during the loan modification process. The lender had delayed a foreclosure sale several times while negotiations were ongoing. Without notice to the homeowners, the lender decided to cease negotiations on a Friday and conducted the foreclosure auction the following Monday. The home they had occupied for 15 years was sold to a third party bidder and now there is little they can do to save their home.

My colleagues that do loan modification work tell me that it is often necessary to advise homeowners to stop paying their mortgage before a lender will even discuss changes to a loan. When considering a loan modification, lenders look at several factors including (1) the nature of the hardship causing the mortgage problems; (2) the borrower's ability to pay; (3) the amount owed; (4) the equity in the property; and (5) the borrower's future financial situation. Without a delinquency, the lenders or loan servicers often have little incentive to modify a performing loan.

When a borrower defaults on a loan, the risk is that they will get so far behind that the lender will simply choose to foreclose rather than have a bad loan on the books. It is also possible get so far behind that a Chapter 13 bankruptcy repayment plan might not be able to help a borrower save their home. Before starting the loan modification process, consider the following tips:

- Hire an experienced mortgage attorney to examine your loan documents for potential violations of laws such as the Truth in Lending Act or the Real Estate Settlement Procedures Act. This may give you leverage in the negotiation process.
- Obtain a complete written life of loan history to see if there any inappropriate charges and fees included in their mortgage balance.
- Do not spend the money you would have used to make your house payments. Consider setting the money aside in a separate bank account. The lender might require a "good faith" payment at some point in time during the process and you will want to have those funds available if needed.
- Get all assurances in writing. If the lender does foreclose, written assurances could be used in legal proceedings to set aside the sale.
- Have a bankruptcy attorney on standby. The automatic stay can stop a foreclosure sale before it happens. A debtor can also use a Chapter 13

repayment plan to get caught up on the past due mortgage payments. We offer a free consultation on new bankruptcy matters.

In this economy, negotiating a loan modification can be very risky yet very beneficial given the right circumstances. If you need assistance with debt relief or a referral to a loan modification specialist in Southern California, please contact us.

About the Author: *Carl H. Starrett II has been a licensed attorney since 1993 and is a member in good standing with the California State Bar and the San Diego County Bar Association. Mr. Starrett practices in the areas of bankruptcy, business litigation, construction, corporate planning and debt collection.*