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TITLE OF THE PROJECT REPORT

Foreclosure Defense: The survival strategy

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Introduction:

In order to determine the quickest solution for saving homes of borrowers who are defaulters and facing foreclosure with auction date within next one month, I'll focus on the following points

1. missing note (securitization),
2. bankruptcy
3. predatory lending
4. QWR (qualified written request) - non / inadequate response.

We will also see the probability of **conciliation conference** as a possible alternative to foreclosure such as restructuring the loan, modifying payments or arranging a short sale.

Let us first understand **what Foreclosure is:** Foreclosure is a legal term which means that equitable relief given to mortgagor against forfeiture of the security is withdrawn.

What is a Foreclosure Suit? A Suit to obtain a decree that a mortgagor (borrower-debtor) shall be absolutely debarred of his right to redeem the mortgaged property is called a Suit for Foreclosure.

Who is Plaintiff? In a Foreclosure Suit, the Plaintiff is the mortgagee or the lender.

Who is Defendant? The mortgagor or the borrower is the defendant in a Foreclosure Suit.

Who is mortgage holder? Mortgage holder or mortgagee is "one to whom property is mortgaged; the mortgage creditor or lender." Uniform Civil Code, Article 3, define who is holder.

Securitization process: You can understand it in this way: - A mortgagor (borrower) goes to mortgage lender. The lender (mortgagee) finances the purchase of real estate. The mortgagor signs a note and mortgage or deed of trust. The original lender sells the note and assigns their mortgage to an entity that securitizes the note by combining the note with hundreds or thousands of similar obligation to create a package of mortgage backed securities, which are then sold to investors.

What is MERS? MERS is the Mortgage Electronic Registration System. It is a mortgage banking "utility" that registers mortgage loans in a book entry system so that real estate loans can be bought, sold and securitized. MERS acts as agent for the owner of the note. Its authority to act should be shown by an agency agreement. If the owner is unknown, MERS can not show that it is an authorized agent of the owner.

SURVIVAL STEPS:-

You should take the following steps one by one: -

1. There is no doubt - to get an immediate relief from foreclosure, sale and eviction is to file bankruptcy under chapter 13 and,
2. To support your position you will need a TILA (Truth in Lending Act) audit before or immediately after filing the bankruptcy petition,
3. When you file your petition state the mortgage and note to be contingent liabilities based upon TILA violation; you should also name, as the creditor, the original lender, and state the amount of loan as a contingent liability to them.

Why you should do all these things? Because the trustee or other party coming into court or posting notices of sale on your property probably is getting his/her marching orders from someone who either does not have or cannot prove they know the amounts you paid, to whom or what is currently due. "Put the burden of proof, if required, on them."

Almost in 95% of cases plaintiff lacking the **standing** before the court as they are not the true holder of note and mortgage, because there are so many intermediaries and a series of assignment to them and in most of the cases these assignment were not registered with MERS, so this will not give them a standing before the court.

To show standing in a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage, at the time, the complaint was filed and that the holder of the note and mortgage is harmed usually by not having received payments on the note.

4. You should file an adversary proceeding or action under TILA, RESPA (Real Estate Settlement Procedure Act), fraud etc. making all appropriate claims for rescission, refund of interest, points, loss of value in the property etc.
5. File the TILA action in Federal Court and go the state court and ask the state court to issue a stay because there is pending litigation in Federal Court.

The investors or the government are the only parties with standing to make any claim on the mortgage note or obligation, but they usually won't make that claim because that would expose them to liability for predatory lending, usury, fraud and dozens of other claims from the borrower such as security violation, rescission, treble damage etc.

6. If there is an opportunity of “conciliation conference” then do not hesitate to avail that in your favor as a possible alternative to foreclosure, such as restructuring the loan, modifying payments or arranging a short sale.

Remember: - Do not try to take the help of inexperienced lawyers.

What are the problems with lender or creditor?

Missing Note: - In a motion for relief from stay in a bankruptcy proceeding, there are the pleading problems that arise when the holder of the note is unknown.

According to F.R.Civ.Pro.17, “an action must be prosecuted in the name of the real party in interest.”

When the actual holder of the note is unknown, it is impossible – not difficult but impossible – to plead a cause of action in a Federal Court unless the movant simply lies about the ownership of the note. Unless the name of the actual note holder can be stated, the very pleadings are defective.

CASE LAWS: -

In re Nosek; 286 Br. 374 (Bankr D Mass. 2008)

Those parties who do not hold the note of mortgage do not service the mortgage do not have standing to pursue motions for leave or other actions arising from the mortgage obligation.

In re Hayes; 393 B.R 259 (bankr. D. Mass 2008)

Standing must be established before either a claim can be allowed or a motion for relief be granted.

In re Foreclosure Cases, 521 F. Supp.2d (S.D.ohio 2007)

In a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time that the complaint was filed.

Issues of standing and ownership under both Federal and California law are relevant.

The person seeking to enforce the note must show that: -

1. It is the holder of this note original by transfer, with all necessary rounds;
2. It had the possession of the note before it was lost;
3. If it can show that title to the note runs to it, but the original is lost or destroyed, the holder must be prepared to post a bond;
4. If the person seeking to enforce is an agent, it must show its agency status and that it's principal is the holder of the note.

Then and only then, do the issues of evidence of debt and default and assignment of mortgage rights become relevant.

Conclusion

No title can arise from a fraudulent act. Borrower did not make a payment to a party that is not entitled to receive it. Borrower can argue that they are entitled to dismissal of a foreclosure suit based on insufficient service of process, lack of subject matter jurisdiction, lack of standing, failure to state a claim for relief, and failure to join an indispensable party.

Here objective should be force them to go to judicial foreclosure from non-judicial on the basis that they have no interest, ownership or authority to foreclosure.

Remember non-compliance or failure to answer of questions of Qualified Written Request within 60 days of its receipt, under the Real Estate Settlement Procedure Act, 12, section- 26059(e), as well as a

request under the Truth in Lending Act, United State Code, section- 1601, will attract the penal provision and fines under RESPA.

So the borrower, be careful and by knowing your rights, you can easily tackle down the problems of foreclosure.

Bibliography

I took the help of the study material attached with my E-mail and the following articles available on Livinglies's weblog and Timothymccandless's weblog.

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