

## Real Estate Title Insurance & Construction Law

### The Rights and Remedies Available to A Distressed New Jersey Homeowner

Entitled to receive actual notice of a sheriff's sale date

By Glenn R. Reiser

In the current mortgage foreclosure crisis, there are multiple factors at play which often create a circuitous series of events leaving distressed New Jersey homeowners in a complete state of confusion about the status of their loan modification applications and sheriff's sales on their properties.

In most situations, the lender usually employs an outside agent to handle the loan servicing, and an attorney to process the foreclosure case. These two factions do not necessarily communicate properly with borrowers, often passing the buck to one another. So for example, if a homeowner calls the bank directly to find out what the status of his or her mortgage loan modification application or the sheriff's sale date, the bank will likely direct the homeowner to contact the loan servicing company. Because most loan servicing

companies use automated phone systems, however, it can be extremely difficult for homeowners to reach a live person.

Even when homeowners are fortunate enough to get through to a customer service representative of the loan servicing agent, they are often instructed to call the bank's attorney. This game of "ping pong" in passing the borrower back and forth between the loan servicing company and the bank's attorney can sometimes go on for months, with sheriff sale dates being adjourned from month to month while the borrower patiently waits to receive the lender's final approval or rejection of his or her loan modification application.

So what happens in the scenario when, after numerous months of waiting for an answer on a loan modification application, the bank denies the application, proceeds with a rescheduled sheriff's sale but neglects to provide the homeowner with written notice of the adjourned sheriff's sale, and the property is acquired by the bank or another third-party purchaser at the sale?

Under Jersey law, a homeowner is entitled to receive actual notice of a sheriff's sale date, including any postponements or adjournments of the sale. This is an important due process right because a sheriff's sale triggers the 10-day redemption period under New Jersey law for the homeowner to redeem or repurchase the property by paying off the full amount of the foreclosure judgment, or for the homeowner to file a Chapter 13 bankruptcy within the same 10-day period which extends the 10-day redemption period for an additional 60 days pursuant to 11 U.S.C. 109(g). Redemption means "paying off the existing obligation." *First Nat'l Bank and Trust Co. v. MacGarvie*, 41 N.J. 151, 157 (Ch. Div. 1956), modified, 22 N.J. Super. 539 (1956).

In the absence of the lender's compliance with this actual notice requirement, the prudent homeowner should consider filing a motion to vacate the sheriff's sale and invalidate the sheriff's deed. But time is of the essence for the homeowner to preserve his or her remedies, especially if an innocent third party has purchased the property at a sheriff's sale and the sheriff is in the process of, or has delivered, the deed, thus consummating the sale. Pursuant to R. 4:65-5, "[A] sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection

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to the sale is served within 10 days after the sale or at any time thereafter before the delivery of the conveyance.”

New Jersey Court Rule 4:65-2 requires that notice of a sheriff’s sale be posted by the sheriff in the sheriff’s office and also on the property being sold. See also N.J.S.A. 2A:61-1 (requiring posting on the premises of the property being sold at least three weeks prior to the sale). In addition, the party who obtained the order for the sale must serve the owner of the property with notice of the sale at least 10 days in advance of the sale by registered or certified mail, return receipt requested. Rule 4:65-2. The rule is clear — it requires that the property owner receive “actual notice” of the sale. See *New Brunswick Sav. Bank v. Markouski*, 123 N.J. 402, 426 (1991) (Court held that readily identifiable holders of property interests adversely affected by the sale are entitled to actual notice of the sale).

In a case that merits close scrutiny in this current economic crisis, in *First Mut. Corp. v. Samojuden*, 214 N.J. Super. 122 (App. Div. 1986), the Appellate Division extended the actual notice requirement under Rule 4:65-2 to apply to adjourned sheriff sale dates, concluding that effective notice is the guiding principle of procedural due process.

The Appellate Court in *First Mut. Corp.* further explained that Rule 4:65-4 governs adjourned sales, and construed the rule’s inclusion of the phrase “public adjournment” to implicitly require that

actual notice of the adjourned sale be given to interested parties:

The subject of adjourned sales is treated by R. 4:65-4, which provides in this respect only that “[t]he sheriff, receiver or other person may continue such sale by public adjournment, subject to such limitations and restrictions as are provided specially therefor.” Although it is thus true that R. 4:65-4 does not expressly require notice of the adjourned sale either, we find that requirement to be implicit in the stipulation that the adjournment be public. We deem it fairly inferable that the requirement of a public adjournment was intended not only to give notice to those attending the sale of the fact of adjournment but also notice of the date of the adjourned sale.

Faced with a circumstance where the notice provisions have not been met, the Chancery Court may either set the sale aside or allow a period of redemption. *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 164 (App.Div.1967); see *United States v. Scurry*, 193 N.J. 492, 506 (2008) (allowing plaintiff a reasonable period of time to redeem her property, which had been sold at a sheriff’s

sale, because she had not received the required ten days of notice of the sale).

But, when there is no intervening bidder at a sheriff’s sale and the homeowner does not have actual notice of any adjourned sale date, then vacation of the sale is the appropriate remedy. See *First Mut. Corp. v. Samojuden*, 214 N.J. Super. at 128-129 (“We are, however, satisfied that after the passage of the time here involved, First Mutual was not at liberty to direct the sheriff to sell the property without having made some reasonable communication of that fact to the other parties in interest. Since it did not, and since neither the owner nor the subsequent encumbrancer had any actual knowledge of the sale, and since there were no intervening rights of innocent third persons, we are satisfied that the trial judge should have vacated the sale.”).

While every case is decided on its own facts and the Chancery Court has broad discretion in applying the appropriate equitable remedies, the prudent attorney representing a distressed homeowner who has lost his or her house in a foreclosure sale should determine if the lender provided “actual notice” of the sheriff’s sale or any adjourned sheriff’s sale date. However, there is limited time to act because R. 4:65-5 requires that an objection to a sheriff’s sale must be filed within 10 days of the sale or prior to the time the sheriff conveys the deed to the purchaser. ■