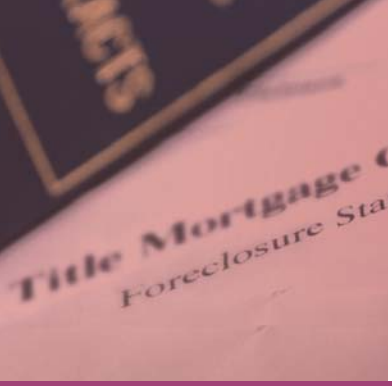

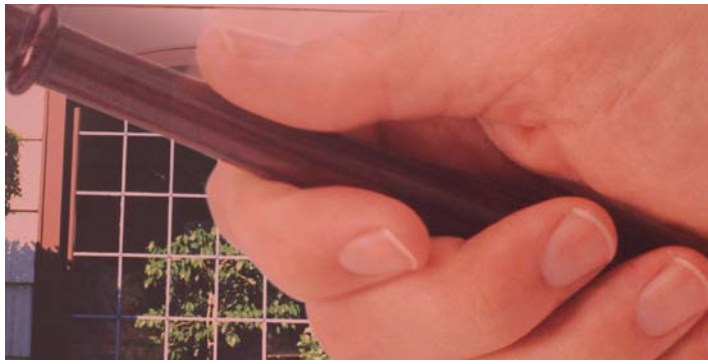

Consumer Law

Consumer Mortgage Defense

By Kevin W. Kevelighan

CHALLENGING NON-JUDICIAL FORECLOSURES IN DISTRICT COURT SUMMARY PROCEEDINGS

Non-judicial foreclosure by power of sale is created by contract and, as a result, the process is privately conducted. The majority of Michigan foreclosures are non-judicial; thus, court supervision is rarely encountered. Recently, however, foreclosure litigation has surfaced in the district court summary proceedings, the final stage of non-judicial foreclosure, when possession of the property is sought. Here, consumers can challenge improper foreclosures and lending practices and, in the process, retain possession of the premises.

Summary Proceedings and Jurisdiction

Summary proceedings move quickly: the summons is issued, and the hearing is usually 10 days later. Most consumers are served by mail, and the court may enter a default judgment for non-appearance, which usually provides 10 days before an eviction order may be entered. Most consumers appear unrepresented and agree to consent judgments. Unbalanced negotiations generally focus only on when the consumer has to move; at best, they get a few extra weeks. The consumer has 10 days to file a post-judgment motion or claim of appeal; however, if such a motion or claim is filed with a bond at any time after entry of the judgment of possession and before the sheriff executes on the eviction order, all proceedings will be stayed until the matter is resolved.[1]

If the consumer appears, courts will allow time to get an attorney to defend. Demand for jury trial must be made in the first response, and the jury fee must be paid with it.[2] Although it is widely believed that the district court is not authorized to quiet title, the summary proceedings statute arms the district court with "equitable jurisdiction

and authority concurrent with that of the circuit court . . . ."[3] A broad spectrum of "land-based" equitable counterclaims are available to quiet title:

> *In an action under chapter 57, the district court may hear and determine an* ***equitable claim [involving] a right, interest, obligation, or title in land.*** *The court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection . . . .* (Emphasis added.)[4]

The Michigan Court of Appeals acknowledged this "general availability of equitable defenses in foreclosure and summary proceedings"[5] and declared that "the district court has jurisdiction to hear and determine equitable claims and defenses involving the mortgagor's interest in the property."[6] Notwithstanding, at least one court recently held that a mortgagor is limited to challenging the validity of the foreclosure procedures, not the other "underlying equities," including those "bearing on the instrument;"[7] however, that court relied solely on *Reid v Rylander*,[8] a 1935 case that seems clearly abrogated by the current summary proceedings statute.[9]

Opponents, therefore, can argue that the litigation should be limited only to the public aspects of the foreclosure because, otherwise, bidders are unfairly held responsible for things outside their control, which consequently chills bidding. The equities in favor of broader jurisdiction, however, are compelling. First, the lender is the party in full control of all aspects of the foreclosure, and studies have shown 77–90 percent of foreclosures, whether judicial or non-judicial, were purchased by the lender, as the sole bidder, for the balance plus costs.[10] Second, in the rare instances of third-party bidding, purchasers generally make "very large profits" which, according to Professor Stark (at the time, chair of the ABA Foreclosure and Related Remedies Committee), are "unconscionable," ranging from 32 percent to 326 percent.[11] This shows two things: (1) these bidders stand to gain so much they would likely purchase notwithstanding the risk of litigation, and (2) these bidders are on notice that serious equitable issues may exist since the consumer stands to lose so much equity. Also, equitable payback would be required if the auction is declared invalid;[12] thus, a bidder's risk of loss is minimal. Finally, it has long been held that

> *[the] mortgagor may hold over after foreclosure by advertisement and test the validity of the sale in the summary proceeding. Otherwise, the typical mortgagor who faces an invalid foreclosure would be without remedy, being without the financial means to pursue the alternate course of filing an independent action to restrain or set aside the sale.*[13]

FAST FACTS

Foreclosure litigation has recently surfaced in the district court summary proceedings, the final stage of non-judicial foreclosure, when possession of property is sought.

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Strict bankruptcy laws and record-high foreclosures have prompted an influx of non-judicial foreclosure district court summary proceedings.

It seems clear that such jurisdiction was intended; however, if jurisdiction is denied, at least the record is preserved for appeal, which includes an automatic stay upon filing a claim of appeal and payment of a bond. On appeal, meritorious defenses are very often referred to mediation, which could result in an attractive settlement.

In conjunction with trials, a monthly escrow is usually required. The plaintiff will want the escrow to equal the mortgage payment. An appraisal with rent schedules and expenses proves helpful in this instance; the escrow should not exceed the profits the plaintiff would have made had it been given immediate possession.

Defenses

Claims and defenses vary according to the facts and circumstances. For example, if the lender failed to follow any of the foreclosure by advertisement statute's positive requirements, the court cannot ignore such violations;[14] therefore, the sale is "voidable," and the consumer must show he was prejudiced to void it.[15] This finds application in *Worthy v World Wide Financial*,[16] in which the federal district court fashioned an interpretation of the foreclosure by advertisement statute's adjournment requirements:

> *Under the law, a party who publishes an initial notice of adjournment may continue to adjourn a foreclosure sale from week to week without having to republish a notice of the adjournment every week.*[17]

This is not exactly what the statute says; in fact, it outlines two ways to adjourn: (1) *publishing* in the newspaper to adjourn beyond a week or (2) *posting* at the auction site week to week.[18] The court used the words "publishes" and "republish" (words the statute uses to describe newspaper publication) to describe the on-site "posting" required for a week-to-week adjournment. The very portion of the treatise on which the court bases its opinion is at odds with the court's analysis: the treatise outlines that if you adjourn using the "week-to-week" method *(by posting the notice at the auction site before each auction time),* then you will avoid the "beyond-a-week" method's hassle, expense, and inflexibililty *(which requires you to republish the new date in the newspaper every week until the new date).*[19] It makes more sense that Worthy's lender had to post 15 notices, one each week before each week's auction. It makes no sense that a lender could post only the single notice adjourning the original auction date to the next week and then hold an auction 15 weeks later with no further notices posted; regardless, the court stated that even if a statutory violation existed, no prejudice was shown to warrant voiding the auction. Such a violation of the adjournment provisions should be considered a voiding violation; after

all, they are the only required notices. Notice is not given personally, by mail or by posting on the property. Even though the Sixth Circuit affirmed on appeal,[20] week-to-week adjournments conducted in this manner may and should be challenged in state courts.

The auction may also be voided for failure to follow contractual procedures. In *Pine Oaks v DeVries,*[21] the mortgage required certified mailing of notices. It was alleged that the notice that triggers the time when the power of sale may be invoked was not delivered. If the lender failed to send this, it failed to invoke the power of sale; thus, any auction that follows is invalid.

Additionally, an auction may be voided when the purchase price is less than the property's value if (1) the inadequacy of the price is so gross as to shock the conscience, and (2) there is a defect, such as fraud, mistake, unfairness, or irregularity.[22]

Finally, mortgages themselves are often vulnerable. For example, under the Truth in Lending Act, if the mortgagee failed to provide a notice of the consumer's three-day right to rescind, the right may be extended as long as three years and, if asserted timely, may void the mortgage. Issues such as mortgage fraud, predatory lending, forged signatures, and incomplete or incorrect legal descriptions may also be raised. Much can be found digging into public records, closing packages, and witness recollection. When the mortgage is invalid, it should follow that an auction through the power of sale contained therein is invalid.

Conclusion

Consumers in foreclosure are often advised that they have no options after expiration of the redemption period; therefore, they simply move out. Strict bankruptcy laws and record-high foreclosures have prompted an influx of non-judicial foreclosure district court summary proceedings. Aggrieved consumers can assert claims and defenses in response and, in the meantime, remain in possession. ◆

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Footnotes

1. MCR 4.201(M) and (N).
2. MCR 4.201(F)(3).
3. MCL 600.8302(1).
4. MCL 600.8302(3).
5. *Manufacturers Hanover v Snell,* 142 Mich App 548, 554 (1985).
6. Id.
7. *Jackson v Laker Group,* 2005 WL 2901787 (Mich App, 2005).
8. 270 Mich 263, 258 NW 630 (1935).
9. Id.
10. Stark, *Facing the facts: An empirical study of the fairness and efficiency of foreclosures and a proposal for reform,* 30 U Mich JL Ref 639 (1997); Wechsler, *Through the looking glass: Foreclosure by sale as de facto strict foreclosure—An empirical study of mortgage foreclosure and subsequent resale,* 70 Cornell L R 850 (1985).
11. Stark, supra, at 667.
12. *Grabendike v Adix,* 335 Mich 128, 140, 55 NW2d 761 (1952) (for party to obtain cancellation, other party must be restored).
13. *Manufacturers Hanover v Snell,* supra at 554.
14. *Guardian Depositors Corp of Detroit v Keller,* 282 NW 194, 286 Mich 403 (1938).
15. *Jackson Inv Corp v Pittsfield Prod Inc,* 162 Mich App 750 (1987).
16. 347 F Supp 2d 502 (2004).
17. Id. at 510–511.
18. MCL 600.3220.
19. John Cameron, Jr., Michigan Real Property Law (3d ed), § 18.81, pp 747–748.
20. Docket No 05-1171 Sixth Circuit Court of Appeals.
21. 2004 WL 2827396 (Mich App 12/09/2004); 474 Mich 887, 704 NW2d 702 (Mich 10/19/2005) (MSC Order for Oral Argument on Motion for Leave to Appeal); 708 NW2d 95 (Mich 01/10/2006) (Stipulated Order Dismissing Application for Leave to Appeal).
22. *Gottlieb v McArdle,* 580 F Supp 1523 (1984).