

OBTAINING POSSESSION POST FORECLOSURE

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The foreclosure action has been completed, the deed has been recorded, the title policy has issued, however parties still remain in possession of the property. This is the bane of all the REO departments and sometimes the foreclosure specialists. The urge to quickly place the property on the market and sell the property is quickly tempered by the fact that there are parties in possession of the premises. This article will discuss some of the issues regarding post possession after the foreclosure action has been completed.

Once a Judicial Sale has been held, there is a requirement that an Order Approving the Sale be entered by the court verifying and confirming all aspects of the sale. As part of this procedure, an Order of Possession is entered wherein the judge grants the plaintiff or the purchaser at the sale the Order of Possession pursuant to statute. The procedure provides that the holder of the certificate of sale or the deed shall be entitled to possession as to the date thirty days after the order confirming the sale is entered against those parties to the foreclosure whose interest the court has ordered terminated, without further notice to any party, further order of court or resort to any proceedings under any other statute. Therefore, the action to obtain possession cannot occur until thirty days subsequent to the entry of an Order Approving the Judicial Sale and Order of Possession.

In the event that the mortgagors are the parties in possession, there are really no problems. The Order for Possession is certified, given to the Sheriff along with the appropriate fees and the Sheriff then moves forward with the eviction process. Each county has its own procedure for processing evictions as well as whether or not a board up company, locksmith and bags or movers are necessary. You can consult with your attorney with respect to what each of these processes are in each particular county.

The Sheriff will evict the mortgagor since they were named and presumably served in the foreclosure action. A problem arises with third parties who were not the borrowers or named in the action. The case of Rembert v. Sheahan, 62 F.3d 937 (7th Cir. 1995), dealt with the issue of the Cook County Sheriff and evictions as to third parties who were not named in the foreclosure action. The 7th Circuit Court of Appeals decision does not resolve this particular matter, but you need to go to the district court's order that was entered subsequent to the remand by the 7th Circuit Court

of Appeals. The facts in Rembert were that the foreclosing mortgagees placed the Order for Possession with the Sheriff of Cook County asking the Sheriff to evict not only the named mortgagors, but all "unknown owners". The Sheriff took the generic term "unknown owners" to mean that they were to evict anyone in possession of the property. The Remberts were tenants in the property and had not been served with summons in the foreclosure action. They had been paying rent to the mortgagors and claimed that due process had not been complied with to terminate their interest. During the pendency of their federal case, the Illinois Mortgage Foreclosure Act was amended to add subsection (h) to 15-1701, which now specifically addresses this issue.

The District Court entered a Consent Judgment between the Remberts and all parties situated on behalf of the Remberts and the Sheriff of Cook County. The Consent Order provides that the Sheriff of Cook County will not evict a party unless they have been named either in the foreclosure action or in the supplemental proceeding action and an order entered as to that particular party. The Sheriff will move to knock on the door and ascertain the identities of the parties and to the extent that a party has documentation or identification indicating that the party is residing at the property, the Sheriff will then review the order to determine whether or not that party has been named, and to the extent that the party has not been named, will not perform the eviction. In the event that the party has been named, then the eviction can proceed.

As an aside, we have found that this has been quite a land mine for mortgage lenders. It tends to become general knowledge that if someone were to procure a gas bill, telephone bill or other source of identification showing that the address of the property is the billing address, then the Sheriff will take the position that they will not evict that particular party. We have even heard of circumstances where the Deputy Sheriff himself had mentioned to parties in possession to just tell us that you are living there and we will not evict you. It is a very difficult process when parties have not been named in the foreclosure action.

How do you move to evict these parties if they have not been named in the foreclosure action? The statutory section of 15-1701(h) provides that there is a Supplemental Petition proceeding quite similar to the Forcible Entry and Detainer Act wherein the mortgage holder can present a petition to name those parties that have been ascertained to be in possession of the property, have them served and have a hearing on same. At the time of the hearing, the court will then enter a supplemental order authorizing the eviction of those particular parties in possession and that order along with the original order of possession can be given to the Sheriff to be able to evict all persons in possession. It is important to notice the time frame set forth in subparagraph (h).

First, the petition can only be brought up to ninety days after the date of the order confirming the sale. Therefore, it is imperative that the condition of the property as well as the person in possession be ascertained during that time period. Further, the order is enforceable for no more than ninety days after its entry unless extended by the court.

There has been some discussion as to whether or not it would be more advisable to move forward in a Forcible Entry and Detainer action than to move forward under the Supplemental Petition action in the foreclosure act. The costs are less if you move forward in the foreclosure action since there are no additional charges other than the service charges. If you were to file a forcible entry case, you will incur the clerk's charges. A defendant in a Forcible Action can request a trial by jury, which they are not entitled to in the foreclosure action. The bottom line is to have the Order of Possession entered and it is more efficient and effective to try to move forward under subsection (h) than under a separate forcible entry action.

The problem that we have run into is that people continue to move in and out of properties and once you get one party served and place the order with the Sheriff, the next thing you know there is another party who has obtained the necessary identification or billing and the Sheriff refuses to evict. The property becomes a revolving door and it is quite frustrating to the lender in terms of moving forward toward the eviction process.

We are constantly requesting from our clients information concerning persons in possession of the property. This is especially true when we notice that the mortgagor is living at an address other than the foreclosed property. This is an indication to us that the property is either vacant or there is a tenant in possession. We hope that our clients will know who is in possession of the property so we can name them at the time of the foreclosure complaint. If we do name them at the time that we file the foreclosure complaint and obtain service over these parties, then they will be added to the Order of Possession and we will avoid the Supplemental Petition entirely.

In some of our jurisdictions, our process servers perform a "door knock" service. This is not available statewide presently within our firm, but we are attempting to implement this within Cook County and its surrounding counties. These seem to be the areas where we have the most problems and we are attempting to use the process server to ascertain parties in possession of the property so that we can name them at the onset of the foreclosure action. It also serves a dual purpose in that if the property is vacant, we will obtain an Affidavit of Abandonment and attempt to shorten the redemption period to thirty days.

The issue of obtaining possession of a property post-foreclosure is a thorny issue and causes consternation among the foreclosure and REO departments. However, it can be solved with due diligence being performed by the client in conjunction with the attorney and naming all parties who are in possession.