

West Virginia Foreclosure From the Creditor's Side of the Fence



To pledge real property as security for a loan, a borrower executes a legal instrument known as either a Mortgage or Deed of Trust. A Mortgage is a two party agreement between the "mortgagor" (owner/borrower) and "mortgagee" (lender) whereby the owner conveys a security interest in his property to the lender. A Deed of Trust ("DOT") is very similar to a Mortgage but involves three parties instead of two. The borrower grants the security interest to a "Trustee" who holds the real property in trust for a "beneficiary," i.e., the lender. Both instruments secure the repayment of the debt through a document known as the "Promissory Note."

The lender's contract to repay the funds loaned to the borrower is the Promissory Note, which is secured by the DOT. The creditor has now helped the borrower achieve the American Dream-home ownership. As long as the borrower makes the payments promised both parties are happy. However, if the borrower defaults, the creditor must seek foreclosure. The guidelines below enumerate the law and procedure needed to facilitate this necessary but unfortunate evil.

West Virginia uses the Deed of Trust almost exclusively. Mortgages have largely disappeared. Therefore, West Virginia foreclosures are typically non-judicial and arise from the "power of sale" clause included in the Deed of Trust. The power of sale clause pre-authorizes the Trustee to sell the property to pay off the balance of the loan in the event of the borrower's default. The power of sale is typically vested to the Trustee. Upon default, the lender will send the file to the Trustee to commence foreclosure proceedings.

A. Recording the Deed of Appointment of Substitute Trustee

West Virginia state law requires that the Trustee conducting the sale be a West Virginia resident. If the creditor must or wishes to use a person or firm other than the Trustee stated in the original DOT, the creditor must first file its notice of substitution of Trustee with the clerk of the county in which the DOT is filed. The DOT will set forth the method of substitution. The substitution must be accomplished before the foreclosure process begins or the entire sale will be voided. Hafer v. Skinner, 542 S.E.2d 852 (W.Va. 2000).

B. Determining How to Proceed With the Foreclosure Sale

Generally, the DOT provides the terms for the institution of a foreclosure proceeding, however if it is silent, West Virginia Code §38-1-5 governs the terms of sale for real property.

1. Notice of Default and the Right to Cure. The borrower must be notified regarding the amount of his/her delinquency and that he/she has a right to cure the default by making the payments necessary to bring the account current. Dennison v. Jack, 172 W. Va. 147, 304 S.E.2d 300, 1983 W. Va. LEXIS 557 (1983).

Also, please note that West Virginia Code §46A-2-115(b) specifically limits the amounts which may be charged to the borrower during the reinstatement period which is after the Trustee's notice of foreclosure and before the foreclosure sale. The following costs are permissible:

- (i) Publication costs paid to the publisher of the notice;
- (ii) Appraisal fee, when required by the circumstances or by a regulatory authority and only after the loan has been referred to a Trustee for foreclosure;
- (iii) Title check and lienholder notification fees not to exceed two hundred dollars, as adjusted from time to time by the increase in the consumer price index for all consumers published by the United States Department of Labor; and
- (iv) Certified mailing costs.

West Virginia Code §46A-2-115(c) also provides that "all amounts paid to a creditor arising out of any consumer credit sale or consumer loan shall be credited upon receipt against payments due." However, the statute notes that amounts received and applied during a cure period will not result in a duty to provide a new notice of right to cure; and that partial amounts received during the reinstatement period do not create an automatic duty to reinstate and may be returned by the creditor. Default charges should be accounted for separately; and such charges, which arise during the reinstatement period, may be added to principal. (See generally, W.Va. Code §46A-2-115).

Once the borrower has been provided with notice of the default and given the opportunity to cure the default, then a notice of sale must be prepared for publication and service unless the property is being sold under a DOT, which was executed and recorded before July 1, 1980. Deeds of trust recorded prior to that date waive the requirement of notice by publication.

2. Prepare The Notice of Sale and Publish and Distribute It

According to West Virginia Code §38-1-4, every notice of sale by a Trustee under a trust deed must contain the following information:

- (a) The time and place of sale;
- (b) The names of the parties to the deed under which it will be made;
- (c) The date of the deed of trust;
- (d) The office and book in which the deed of trust is recorded;

- (e) The quantity and description of the land or other property or both conveyed thereby;
and
- (f) The terms of sale.

The West Virginia Code requires that the sale be conducted in strict accordance with the terms set forth in the deed of trust, or by the terms set forth in West Virginia Code §38-1-5, which governs the terms of sale for real property if none are mentioned in the deed.

West Virginia Code §38-1-4 mandates that the Trustee publish the notice of the Trustee's sale as a Class II legal advertisement, which is an ad published once a week for two successive weeks in the county where the property is located. (See, West Virginia Code §59-3-2).

The notice of sale must be served as follows:

- a) By certified mail, return receipt requested to the grantor named in the trust deed, or his agent or personal representative, directed to the address shown on the deed of trust. The statute is silent in regards to the amount of time prior to the sale that notice must be given to the grantor. However, the Court held in Joy v. Chessie Employees Fed. Credit Union, 411 S.E.2d 261 (W. Va. 1991), that notice must be given a reasonable amount of time prior to the sale, and the Court further found that eighteen (18) days notice is reasonable notice to the grantor under §38-1-4. *Id.*
- b) Any subordinate lienholder who has previously notified the primary lienholder by certified mail of the existence of a subordinate lien must be notified at least twenty days prior to the sale.
- c) Although not specifically required by the West Virginia Code, all guarantors or other persons obligated in any way on the debt in question should be served with a copy of the notice of sale. Also, any lienholders of record after the deed of trust was recorded should be served a copy of the notice of sale.

Notice will be deemed complete when such notice is mailed in accordance with the statute regardless of whether the mail is returned as refused or is undeliverable. W. Va. Code §38-1-4. Remember that if the DOT requires a longer period of publication, additional notices to parties or any other provisions not contained in the code, the Trustee must strictly adhere to the DOT's requirements. After the notice of publication has run and all necessary parties have been served with notice of the sale, the foreclosure sale can be held.

C. The Foreclosure Sale

1. Does the Trustee Have to Post a Bond?

Pursuant to West Virginia Code §38-1-10, a bond is not required unless the grantor or his assignee specifically requests it ten (10) days before the sale in an

amount equal to the full value of the property to be sold. If the Trustee does not post the bond within twenty (20) days after such notice, the power of the Trustee to sell the property will cease until the bond is posted.

2. Before the Sale

Immediately prior to conducting the foreclosure sale, the title report to the subject property should be updated to identify junior liens and to confirm that title is in order. The Trustee should also confirm that the beneficiary (creditor) has not received any notice of bankruptcy, injunction, or other legal action, which would enjoin the sale. Additionally, the Trustee should ensure that the beneficiary has received the publisher's affidavit.

3. Conducting the Sale

In accordance with West Virginia Code §38-1-3, the foreclosure sale must be conducted on the date and at the time and place specified in the notice of sale as required by the Deed of Trust. The lender provides the Trustee with an opening foreclosure sale bid.

The Trustee must be personally present to supervise the foreclosure sale unless the deed of trust contains a provision, which allows the Trustee to act by agent or attorney. See, Smith v. Lowther, 13 S.E. 999 (W.Va. 1891). However, West Virginia law does allow the Trustee to hire an auctioneer to conduct the sale. Copelan v. Sohn, 82 S.E.2d 1016 (W.Va. 1914). The Trustee may only sell the grantor's interest as conveyed by the deed of trust. See W.Va. Code §38-1-3 and Moore v. Hamilton, 155 S.E. 2d 877 (W.Va. 1967). At the foreclosure sale, the Trustee should make a record of the persons in attendance, any individuals making a bid, and the amount of the bids. The Trustee will begin the foreclosure sale by reading a copy of the notice of sale. The Trustee then offers the property for sale to the highest bidder. After the bidding is completed, the Trustee announces that the bidding is closed, as well as the name of the purchaser and the dollar amount of the bid. The Trustee cannot purchase the property upon which he conducts the sale. See, Robinson v. Robinson, 163 S.E. 633 (W.Va. 1932).

The lenders typically bid at the foreclosure sale. If the lender's bid is the highest bid the property will revert to the lender. The lender will then take the title to the property and will typically forward the matter to its Real Estate Owned (REO) department for resale. However, if a third party's bid is the highest, then the third party will become the new owner.

After receiving the balance of the purchase price, the Trustee must prepare, execute, and deliver a deed conveying the property sold to the successful bidder and apply the proceeds of sale and make a report of the sale. See W.Va. Code §38-1-8. West Virginia Code §38-1-6 contains a statutory form of the Trustee's deed.

There are several types of warranties that the Trustee can pass to the new purchaser when the property is deeded to the new owner. A general warranty deed gives more protection to the buyer because the seller warrants (or guarantees) good title to the property, free and clear of all liens and encumbrances not specifically mentioned in the deed. The seller also agrees to defend against any defects found in the deed. A special warranty deed only guarantees against claims or defects, which existed while the seller was the legal owner of the property. However, the quitclaim deed provides the purchaser the least amount of protection because the seller conveys only whatever interest it had in the property with the only warranty being they did not encumber the land in any way. After the property has been conveyed by deed to the new owner, the contract of sale between the Trustee and purchaser will be completed once the Trustee makes a memorandum of the sale and its terms and signs the memorandum. Fleming v. Holt, 12. W.Va. 143 (1877).

4. The Trustee's Expenses

West Virginia Code §38-1-8 indicates that the Trustee's expenses of sale are entitled to be paid first from the proceeds, including:

- (a) The cost of publishing the notice of sale;
- (b) The cost of certified mailing of the notice of sale or other service of the notice;
- (c) The Trustee's fee, which under West Virginia Code §38-1-7 is 5% of the first \$300.00 and 2% of the residue;
- (d) Transfer stamps;
- (e) The cost of deed preparation; and
- (f) The auctioneer's expenses and costs.

After payment of the Trustee's expenses, the balance is then applied to the indebtedness secured by the deed of trust under which the foreclosure has occurred. After the trustee's expenses are deducted and the DOT is satisfied from the sale proceeds, and monies left are considered surplus funds. If there is a surplus, West Virginia Code §38-1-7 directs that the Trustee pay the surplus "to the grantor, his heirs, personal representatives or assigns, as their interests may appear." Any surplus proceeds will normally be distributed based on the priority of the liens as they are recorded in the land records. However, if there are many junior lienholders and a surplus remains from the sale proceeds, the Trustee may want to institute an interpleader action in the circuit court of the counties where the property was sold and let the court determine who is entitled to the proceeds. Rule 22, W.Va.R.Civ.P.

5. Recording of Documents

The Trustee must make a report of the sale within two months after the sale is completed. W.Va. Code §38-1-8. The report of sale should include:

- (a) the publisher's affidavit certifying that the notice of sale had been published;

- (b) a recital by the Trustee that notice was served upon the parties required to be served under W.Va. Code §38-1-4; and
- (c) a detailed accounting of the proceeds of the sale, including the amount of the proceeds paid to the holder of the lien upon which foreclosure was made.

The Trustee must execute this memorandum of sale and record it with the Clerk of the County Commission of the county where the deed of trust was first recorded. W.Va. Code §38-1-8. Failure to file the memorandum of sale within the timeframe will cause the Trustee to forfeit the commission. In such case, the grantor or any beneficiary of the DOT may recover the commission if the sale proceeds do not extinguish the secured debt. Id.

Congratulations, you have just completed your first foreclosure sale! However, what happens when the delinquent borrower or some other occupant continues to reside in the home after the foreclosure sale? The lender should arrange for an inspection the next day to determine if the property is still occupied. If the property is occupied, the lender should commence eviction proceedings.

D. Eviction

In West Virginia, an unlawful detainer is the most common action used to obtain possession of real property after a foreclosure sale. After the foreclosure sale, the purchaser must demand possession of the property and provide the occupant notice to quit, by certified return receipt mail, with a notice to vacate. This notice to quit gives the occupant five (5) days to vacate the premises before the filing of the unlawful detainer.

West Virginia magistrate courts have initial jurisdiction over unlawful detainer cases regardless of the amount in controversy, but removal to circuit court is a matter of right if the case "involves" more than Three Hundred Dollars (\$ 300.00). W. Va. Code § 50-4-8.

After serving the notice to vacate, a complaint for unlawful detainer must be filed in the magistrate court to initiate the actual legal proceeding to evict the occupant. The complaint states that the plaintiff is the owner of the property and the defendant is the former borrower or an unknown occupant holding over after a foreclosure sale. Once the complaint is filed, the defendant is served with process by the sheriff.

A hearing is scheduled within five (5) business days from the date of filing. At the hearing, if the defendant and or unknown occupant does not appear, then the plaintiff is entitled to judgment for possession (the order allowing eviction) by default.

If the borrower or other occupant appears and contests the matter, a trial is set. Unless the occupant has a valid defense to the action, this normally results in an order that the purchaser is entitled to a Writ of Possession. At a contested hearing, the purchaser must present evidence that the foreclosure occurred and that the party seeking the eviction was the purchaser at the foreclosure sale, or a transferee of the purchaser. Once these facts are proven, the purchaser is usually granted a judgment declaring that it is entitled to possession of the property. The judgment becomes final in twenty (20) days unless appealed.

