

The Law in **Practice**

# Motions to Stay Foreclosure Sales



**Recently, RealtyTrac, a seller of foreclosed properties, reported that 1% of all U. S. households are in some stage of foreclosure. Case filings for the first few months in 2008 are double the astronomical levels reached in comparable months last year.**

**A**CCORDING TO THE CLERK OF THE CIRCUIT COURT OF Cook County, there were 10,836 foreclosure cases filed in just the first three months of 2008, an increase of 43% over the record levels reached in comparable months last year. For the entire calendar year of 2007, a total of 32,269 foreclosure cases were filed. If the current volume holds for this year, Cook County will see 43,344 foreclosure cases filed in calendar year 2008. Twelve years earlier, in 1996, only 8,006 foreclosure cases were filed, so it is clear that the pace of foreclosure filings is increasing significantly.

The huge volume of new foreclosure cases precipitated the establishment of the Mortgage Foreclosure/Mechanics Lien Section of the Cook County Circuit Court's Chancery Division. Currently, ten judges are assigned to the section; seven hear foreclosure cases almost exclusively, and three hear a mixed docket of foreclosure and mechanics lien cases. The judges in this section have established detailed procedures to efficiently handle the review and disposition of these important matters. These procedures are memorialized in standing orders which are distributed to the legal community and the public. Copies of the standing orders are available from the Clerk of the Circuit Court, 802 Daley Center, or from the Supervising Judge of the Section in room 2806.

Matters heard in the section are generally governed by provisions in the Illinois Code of Civil Procedure and the Illinois Mortgage Foreclosure Act (IMFA). 735 ILCS 5/Art. XV. The IMFA grants residential property owners who are sued the right to reinstate their mortgage within 90 days of service by merely paying the lender the amount of the current delinquency. Once that right has been exercised, however, it may not be used again for five years from the date the foreclosure case was dismissed. 735 ILCS 5/15-1602. The IMFA also allows most property owners to redeem their property from foreclosure by repaying the entire amount borrowed, plus accumulated interest, costs, and fees, by the later of seven months from the date of service or three months from the date of the entry of the foreclosure order. 735 ILCS 5/15-1603. If the loan is neither reinstated nor redeemed, and if the lender prevails in its suit, the property is subject to judicial sale. The proceeds of that sale are used to repay the lender. 735 ILCS 5/15-1507. After the sale is confirmed by the court, the new owner can obtain possession of the property and have the sheriff evict the borrower from the premises. 735 ILCS 5/15-1508(g).

Some foreclosure cases are resolved through reinstatement or redemption. Many cases, however, proceed to judicial sale without the borrower ever intervening. In many of the latter cases, the homeowner has conceded that he cannot repay the loan and simply abandons the premises. In some cases, however, the borrower wishes to keep the home and will use every tool at his disposal to buy time to raise sufficient funds to pay off the mortgage and stave off the judicial sale.

A property owner may file for bankruptcy and obtain an automatic stay of the state court foreclosure proceedings. Lenders will, however, quickly respond to such a filing and obtain an order lifting the stay, which permits the foreclosure to proceed. Recent changes in bankruptcy law have made it more difficult for homeowners to file sequential bankruptcy cases in an attempt to frustrate state court foreclosure proceedings. 11 U.S.C §362 (c) (3). Accordingly, homeowners will often resort to equitable remedies to stay judicial foreclosure sales of their property. A stay is considered an equitable remedy under Illinois law. *Marsh v. Illinois Racing Board*, 179 Ill. 2d 488, 495 (1997). Along that vein, owners will often bring requests to stay a planned foreclosure sale. These stay motions are usually brought on an "emergency" basis on the very eve of the scheduled sale.

### **Reasons Court Can Refuse to Confirm Sale**

The IMFA provides that once a judicial sale is actually held, the court cannot refuse to confirm the sale unless: (1) notice of the sale was not properly given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) "justice was otherwise not done". 735 ILCS 5/15-1508. The final provision gives judges some discretion with respect to confirmation of judicial sales, but reviewing courts have not yet provided a bright-line definition of what defects in the sale process might constitute an "injustice" in this context. See, e.g., *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill.App.3d 293, 645 N.E.2d 1038, 206 Ill.Dec. 786 (1<sup>st</sup> Dist. 1995) (court justified in refusing sale confirmation if "unfairness is shown which is prejudicial to an interested party").

But, inadequacy of sale price is clearly not a sufficient reason, standing alone, to deny confirmation of a judicial sale. *Lyons Savings and Loan Ass'n v. Gash Associates*, 189 Ill.App.3d 684, 545 N.E.2d 412, 136 Ill.Dec. 888 (1<sup>st</sup> Dist. 1989) (noting that property does not bring full value at forced judicial sales and that mere inadequacy of price "is no reason for upsetting a judicial sale"); see also *Freedom Mortgage Co. v. Burnham Mortgage Co.*, 2006 U.S. Dist LEXIS 10538 (N.D. Ill.). Because the court's options after a sale are quite limited, property owners are well-advised to seek relief before the sale occurs.

The IMFA prohibits judicial sales from taking place until after the last day for the owner to redeem the loan has expired. 735 ILCS 5/15-1507 (b). Accordingly, when a motion to stay a sale is heard, the owner's right to redeem may have already expired and the lender must voluntarily agree to repayment or refinancing terms of its own choosing.

The IMFA facilitates rescheduling of foreclosure sales by providing that notice of a new sale date need not be re-published unless the new date is more than 60 days after the original sale date, as

long as the new date was announced by the selling officer to those attending the original sale. 735 ILCS 5/15-1507 (c)(4). The IMFA does not otherwise address requests to stay foreclosure sales. Accordingly, this article seeks to explain the factors which judges in the foreclosure section have found to be helpful when considering stay motions, and to encourage practitioners to incorporate them into their stay motions.

A judgment which forecloses a mortgage and authorizes a judicial sale is a non-appealable, non-final order. *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill.App.3d 293, 645 N.E.2d 1038, 206 Ill.Dec. 786 (1<sup>st</sup> Dist. 1995). Accordingly, the circuit court retains jurisdiction to alter, amend, vacate, or stay a judicial sale. A court hearing a motion to stay a sale must necessarily review the relevant facts, apply various tests, and balance the relative equities of the parties to determine whether a stay is warranted.

#### Criteria for Entry of A Stay

There is a well-established four-element test for stays which courts have applied to cases in many areas of the law. *See, e.g., Boberski v. Ryan*, 793 F. Supp. 170 (N.D.Ill. 1992) (application of standard stay tests to request to stay suspension of bank officer); *Hilton v. Braunskill*, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987) (stay tests govern whether a habeas corpus petitioner should be released pending a state appeal);

*Anonymous v. Federal Deposit Ins. Corp.*, 619 F. Supp. 866, 874 n.30 (D.C.D.C. 1985) (applying stay factors in case involving FDIC law).

The test is virtually identical to that used by Illinois courts when considering whether to stay decisions of administrative agencies pending review. Section 3-111(a) of the of Illinois Code of Civil Procedure provides that "good cause" to stay administrative decision is shown when: (i) an immediate stay is required in order to preserve the status quo without endangering the public, (ii) it is not contrary to public policy, and (iii) there exists a reasonable likelihood of success on the merits. Under this test, the court considers: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits, (2) whether he will suffer irreparable injury unless a stay is granted, (3) whether other interested parties will be substantially injured by a stay, and (4) whether a stay will disserve the public interest. In the case of a foreclosure, "success on the merits" might be construed to mean that the forced sale will be avoided, rather than that the owner will actually succeed in winning the foreclosure case on the merits.

Before seeking a stay, counsel should carefully review the mortgage foreclosure section's standing orders regarding emergency motions. The judges hear emergency motions at particular times during the week. However, some judges require pre-schedul-

ing of each particular emergency motion. All judges require that courtesy copies of the emergency motion be submitted to chambers, along with proof of advance notice of the emergency motion to the lender's attorney at least by the day before the motion will be heard. An attorney representing a homeowner seeking a stay of a judicial sale should be sure to pay for and file a written appearance. Failure of counsel to file an appearance can, of course, be a valid ground for the judge to refuse to hear the motion.

Property owners seeking a stay often do so because they have arranged for the property to be sold to a purchaser for a favorable price, sufficiently high to pay off the existing mortgage and accumulated costs. If the property has sufficient equity, the sale may generate surplus proceeds for the property owner. These proceeds might not necessarily be created, however, if the property is sold at a forced judicial sale. Some owners seeking to stay sales will have arranged alternate financing for the property, or even have gathered up sufficient funds from family members or friends to pay off the delinquency. Still other owners may have recently filed for bankruptcy, thus triggering an automatic stay of the judicial sale.

When seeking to stay a foreclosure sale, owners should apprise the court of all relevant facts and circumstances. The more information, the better. If the property is to be sold to a third party, the owner should provide a copy of the signed contract of sale, note the closing date, provide evidence (if any) that the purchaser is qualified for financing, and demonstrate to the court that the proceeds from the sale will be sufficient to pay the outstanding loan and any additional charges. Additionally, the owner should advise the court if an attorney has been retained to review the contract and handle the sale, and if that same attorney is also assisting the owner with the foreclosure case.

If the owner plans to refinance, the court should be given information regarding the loan qualification and commitment status, including any outstanding contingencies. Applying the traditional tests for granting a stay outlined above, the foreclosure judge may then determine whether staying the sale makes economic sense. In the case of a

loan payoff, the owner may wish to provide the court with copies of bank statements, pay roll records, or similar materials to demonstrate that the payoff is viable. If the owner seeks to terminate the foreclosure proceeding by a "short sale", in which the property is sold for less than the outstanding debt, then the owner should apprise the court of the precise status of negotiations with both the lender and the purchaser.

#### **Always Provide Basic Information**

It is also crucially important to provide the court with basic information regarding the foreclosure case history, including when the case was filed, when the defendants were served, when the foreclosure order was entered, the originally-scheduled sale date, whether the sale will fall outside the publication date, and whether any previous stays were entered. Similarly, if a bankruptcy case is at issue, the owner should give the court information regarding that case, including at least the case number, but preferably a full docket report. If staying the sale would require re-publication of the sale notice, then the property owner might be expected

to commit to pay the re-publication costs as a precondition for staying the sale.

All real estate is unique, and thus so are all foreclosure cases. Depending on the characteristics of the property and the circumstances surrounding the foreclosure, a lender might not object to staying the sale. Therefore, owner's counsel should contact lender's counsel early on to see if the lender might be amenable to staying the sale by agreement. Having the information discussed above will facilitate a prompt and informed decision, and can often obviate the necessity to docket and argue a motion to stay a given sale.

By following these procedures, an owner, or counsel, will greatly assist the court in making an informed and appropriate decision regarding the request to stay the foreclosure sale. ■

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*Associate Judge Mathias W. Delort is assigned to the Mortgage Foreclosure/Mechanics Lien Section of the Chancery Division, Circuit Court of Cook County.*