

## **REFORECLOSURE - THE GOOD, THE BAD AND THE UGLY**

After a year and a half dueling with foreclosure defense counsel, you finally have a foreclosure judgment in hand and a sale date scheduled when you learn of a subordinate lienor whose lien pre-dates the foreclosure suit, but which you didn't name as a defendant because the pre-suit title search failed to uncover it.

Just for a moment, panic sets in. The client is counting on getting title at the upcoming clerk's sale and won't be happy. What to do?

Never fear, all is not lost. There is a remedy (albeit, one with a catch) – reforeclosure.

Where a subordinate lienholder is omitted in a foreclosure action, its lien is not extinguished, unlike the lien of any lienor properly named and served. But that doesn't necessarily give the omitted lienor a windfall. The lien can still be foreclosed out, even after the clerk's sale has occurred. While the successful high bidder at the sale takes its title subject to the omitted lien, it can eliminate the omitted lien via a re-foreclosure suit:

**“The remedies of a purchaser at the foreclosure sale against an omitted junior mortgagee are a motion to compel redemption by the junior, or re-foreclosure in a suit de novo. The omitted junior mortgagee may defend in the same manner as if the initial foreclosure had not happened. *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005).” *Marina Funding Group, Inc. v. Peninsula Property Holdings, Inc.*, 950 So.2d 428 (Fla. 4th DCA 2007).**

The reforeclosing plaintiff need not be the lender; if the clerk's sale has already occurred, the certificate of title holder may reforeclose as well, as the successor to the superior lienholder (mortgagee). *White v. Mid-State Savings & Loan Ass'n*, 530 So.2d 959 (Fla. 5th DCA 1988).

The re-foreclosure can be accomplished by a motion to compel re-foreclosure, or if the foreclosure action is already closed, by a separate suit. Therein, the complaint names only the omitted lienor as a defendant. It alleges that the lien is inferior to the foreclosed mortgage, that the lienor was inadvertently omitted from the foreclosure action, and that had it been named, this lien would have been eliminated by the foreclosure sale.

Re-foreclosure is a two-step process. The first is to obtain an order giving the lienor a set time (usually thirty days) to redeem the property by paying into the

court registry the same amount it could have paid in order to redeem the property and save its lien, had it been named properly in the original foreclosure suit (i.e., the amount owed on the superior mortgage as of the date of the original foreclosure action). This can usually be handled via summary judgment. The order also provides that if the lienor fails to redeem by the deadline, the court will enter judgment removing the lien from the property.

The second step occurs once the lienor fails to redeem the property within the set time period. After the deadline runs, a motion for entry of judgment extinguishing the lien is usually all that is needed. The court enters judgment, the lien is extinguished, and you have a happy client.

Note – reforeclosure is usually a safe procedure for clearing title to property. But here's the catch: where there is equity in the property above the redemption price, there is risk that the omitted lienor will exercise its redemption right and buy the property out from under the plaintiff. Let's say you foreclose a \$200,000 mortgage on a property worth \$400,000, and in doing so you omit a \$250,000 second mortgage. Let's further say a third party buys at the clerk's sale for \$350,000, thinking she got a great deal. If that buyer then discovers the omitted second mortgage, she can file a reforeclosure action to attempt to eliminate it and clear up her title.

But in the ensuing reforeclosure, the lienor will have the opportunity to redeem the property for the same \$200,000 it could have redeemed it for in the original foreclosure action.

“The term “right of redemption” takes on different meanings depending on whether it refers to the right of a mortgagor or a subordinate or junior mortgage. When a mortgagor redeems, his property is freed from the redeemed mortgage. “Redemption” in the context of a junior mortgagee or other junior lienor, “it refers to his right to satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to all rights of the prior mortgagee.” *Engels v. Valdesuso*, 497 So. 2d 698, 700 n.1 (Fla. 3d DCA 1986).

Since in our hypothetical the property is worth double the amount of the mortgage that got foreclosed, the missed lienor has every incentive to come up with \$200,000 and redeem within the thirty day period, thereby being subrogated to the original lender's \$200,000 lien position, per *Marina Funding*, supra. It then would have the newly-acquired \$200,000 first lien, plus its own second lien of \$250,000, for a total of \$450,000 in liens on a property worth \$400,000, using up all the

equity in the property. The purchaser at the clerk's sale would have nothing to show for her \$350,000 purchase. Not such a smart deal, after all!

Moral of the story – reforeclosure can be an effective tool for eliminating omitted subordinate liens. But it only makes sense where the mortgage that was foreclosed (and therefore the price for subordinate lienors to exercise their redemption rights) is comfortably less than the value of the property.

Note – the term “reforeclosure” only applies to omitted subordinate lienholders, not to owners of the subject property itself. Where an owner is omitted in a foreclosure complaint, the foreclosure judgment is void. As such, filing a new action to name the correct owner is not a “reforeclosure,” but rather simply a “foreclosure.” *English v. Bankers Trust Co. of California*, 895 So.2d 1120 (Fla. 4th DCA 2005).