Foreclosure Lawsuit - What the Bank Must Prove

By Nick Adama

Homeowners far too often avoid going to the initial court hearing to discuss the mortgage default, and the bank has a very easy time of proceeding from missed payments to sheriff sale to eviction. There are a number of methods and ideas that can be used during the court procedures, though, to give these families more time, more options, or a second chance to stop foreclosure and get their loans back on track. But without a broad understanding of what the court process is designed to accomplish, these opportunities may be lost before homeowners know they have them.

Every legal claim made by the lender has numerous elements that need to be proven and backed up with facts. Obviously, in a foreclosure lawsuit, the main claim will be that a contract was breached, namely the mortgage loan secured by the house. The lender will attempt to prove that the homeowners did not pay as agreed and ask the court to grant them a judgment, which will allow them to sell the house at a county sheriff sale, in order to pay off this judgment. In most foreclosure cases, this seems like it would be a pretty open and shut case, especially if the family knows it has not made a payment in several months. This may be one reason that they do not often make it to the foreclosure court hearing -- they know they have little defense and believe it will do no good to argue that a financial hardship has caused them to fall behind.

It is important, though, that homeowners understand how these processes work and what the lender has to show in order to have a legitimate case. The first element that the foreclosing bank has to prove is that there was a legally binding contract between the lender and the homeowners. After a loan has been sold numerous times, it may seem quite confusing to the average homeowner of who actually owns the mortgage. In fact, with the amount of technical, incomprehensible adjustable rate mortgages and interest-only loans and subprime mortgages that were packaged and sold off to hedge funds, financial institutions, and investors, there may be some very tough questions that the lender would have to answer if challenged on this element. A court in Ohio recently dismissed fourteen foreclosure cases because the lender could not prove they owned the loans, so this is not as easy as it would seem.

The second aspect that mortgage companies have to prove when suing for foreclosure is that the lender performed as agreed under the contract. Wading through dozens of pages of mortgage contracts is not the most inviting exercise for the average homeowner, but understanding exactly what the lender's obligations are during the term of the mortgage may help them prepare a better answer to the foreclosure lawsuit. In particular, the lender is usually responsible for collecting and applying payments in a reasonable manner, a practice some lenders have been caught not following.

In fact, we receive stories from homeowners every day that state their lender did not apply a payment, applied payments incorrectly, or lost payments completely, which led them to initiating a foreclosure unjustifiably. There are also literally hundreds of stories from homeowners who have had their loans serviced in a fraudulent manner. Simply assuming the bank has performed its duty under the contract relieves them of the burden of proof. Homeowners can ask for real proof that the bank actually did fulfill its own obligations under the terms of the agreement, a request that the bank may have trouble complying with.

The lender must also show that the homeowners have breached the contract, thereby satisfying the proof required of the third element. This is usually easier to show, because they can bring in payment records with clear gaps in payments. However, homeowners who have had payments misapplied or cashed but not applied at all can state these defenses, and the lender must prove that they did not actually receive payment. If the foreclosure victims can show they have not breached the contract, there is usually no case against them. In fact, they may have claims against the lender who was negligent about collecting payments and began a potentially fraudulent foreclosure lawsuit against the clients.

But even in cases where the payments were simply never sent in due to a financial hardship, homeowners can often utilize other resources of the court to resolve the problem. Often, judges would rather keep the case from going to trial if a settlement can be reached. This may involve the two parties coming up with a mutually agreed-upon repayment plan, temporary loan modification, or other similar program which gives the homeowners another chance to get back on track with the mortgage and repair their credit.

The final element of a foreclosure case that the lender must prove is that they have suffered actual damages due to the homeowners' breach of the contract. Obviously, they are not collecting interest or principal payments, which does hurt the lending business and decreases their ongoing revenue. Also, they have to expend more resources in attempting to collect the missed payments, reviewing loan documents, examining the benefits of foreclosing on the property, paying costs of foreclosure, and so on. It is clear that banks suffer some damages of the loan during a foreclosure, even if it is only a very small part of the company's overall business.

The burden of proof falls upon the bank to prove each and every single one of these elements of their case against the homeowners. When foreclosure victims avoid these hearings, though, and judge themselves as guilty without requiring the lender to show proof, they make the foreclosure process much easier for the lenders. Hopefully, by being aware of the general aspects of a foreclosure (and any other breach of contract) case, the homeowners will be able to mount a more substantial defense and show these mortgage companies that they will not simply be pushed around, intimidated, and forced out of the home due to irrational fears and anxieties over the situation.

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