PUBLICATION

What to Expect after a Foreclosure Sale in Virginia: The Commissioner of Accounts

February 17, 2014

In many non-judicial foreclosure jurisdictions, a foreclosure is generally considered concluded when the foreclosure trustee conveys the property to the purchaser. Though this is true from the purchaser's perspective, the trustee and the creditor's attorneys still have work to do. Within six months of the sale, the trustee is required to file an accounting of the sale with the Commissioner of Accounts for the jurisdiction in which the sale took place. Understanding the accounting process is essential for creditors, their counsel, and foreclosure trustees, to keep the foreclosure process moving.

The Commonwealth of Virginia established the Office of the Commissioner of Accounts in 1849 to make the administration of estates and the supervision of fiduciaries more effective and efficient. Circuit courts appoint commissioners to supervise all fiduciaries acting within the court's jurisdiction, including the administrators of estates and trusts, conservators, guardians, and foreclosure trustees. These fiduciaries are required to file with the commissioners inventories and accountings of the property and funds under their control. In the foreclosure context, commissioners review the trustee's accounting of the foreclosure sale to ensure that the creditor and trustee conducted the foreclosure according to the terms of the Deed of Trust and Virginia law.

A commissioner may approve or disapprove an accounting in whole or in part. Upon disapproval, the commissioner may allow the trustee to file supplemental accountings or provide additional documentation of expenses. Upon completion of the review process, the commissioner files a report with the circuit court. The trustee, creditor, or any other affected party may file exceptions (or objections) to the report within fifteen days. At that point, the circuit court may correct any errors, refer the matter to another commissioner for review, empanel a jury to decide factual disputes, or confirm the report in whole or in part. When the report is confirmed, it is deemed correct and binding upon any person who was a party to the exceptions. However, the circuit court's decision may be appealed, and any other party may sue to surcharge or falsify report. Thus, the trustee-creditor side of the foreclosure process may continue for an extended period after the purchaser has taken title to the property.

This post-foreclosure review process puts a premium on the creditor's and trustee's pre-foreclosure procedures. In short, creditors and trustees are best advised to meticulously document the foreclosure process. Depending upon the circumstances of the case and the requirements of the individual commissioner, the trustee's accounting of the foreclosure sale may be required to include (1) a copy of Deed of Trust, (2) the original Promissory Note or a lost note affidavit, (3) proof of any endorsements or assignments of original Promissory Note; (4) the original Promissory Notes of any junior lienholders who received distributions from the foreclosure sale proceeds; (5) an original affidavit of publication with a copy of the advertisement and proof of payment; (6) copies of any written bids submitted to the trustee; (7) proof that real estate taxes and other fees and taxes have been satisfied; (8) a copy of the recorded Substitution of Trustee; (9) copies of vouchers, bills, receipts, or cancelled checks for recording fees, certified mailing costs, title examination costs, and any other disbursements listed on the accounting; (10) a copy of the Clerk's receipt for payment of the grantors' tax; (11) copies of invoices for attorneys' fees; (12) a statement of the trustee's commission; (13) proof that statutory notice requirements have been met, including written notice to property owner; (14) a copy of the recorded trustee's deed to the auction purchaser; (15) an itemized statement of the amounts due on the note at the time of the foreclosure; (16) a statement of the amount of proceeds from the foreclosure sale signed by the noteholder or the trustee; and (17) proof of the creditor's bid.

This list of contents may serve as an effective foreclosure checklist. When trustees and creditors approach a foreclosure by looking forward to their meeting with the Commissioner of Accounts, they will realize two benefits. First, they will conduct foreclosures with greater care; thus, avoiding many legal traps along the way. Second, they will be in the best position to minimize or avoid post-foreclosure delays, exceptions, and appeals, and the attendant costs, expenses, and fees.