



## *Practice Note*

*Connecticut*

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# *Searching Foreclosure Files Identifying Errors in Proceedings That Impair Title*

## **Introduction**

When it comes to mortgages, Connecticut is a “title theory” state. Connecticut law regards the mortgage deed as a transfer of the legal title to the lender to hold as security for the debt. The property owner of record continues to hold equitable title, or the “equity of redemption”: the ability to regain the legal title by paying the debt due in full (Standard of Title 3.4, Comment 8). Foreclosure actions in Connecticut are equitable proceedings designed to terminate the equity of redemption (equitable title) of the debtor when the debt due has not been timely paid (Standard of Title 19.2, Comment 2). The lender becomes the owner of the property and can sell it to satisfy the debt. Under the title theory of mortgages, the mortgage deed and the foreclosure action and decree are the muniment of title (Standard of Title 19.2, Comment 1). Therefore, when a search of the land records discloses that title has passed by foreclosure or a foreclosure action is in progress, the title searcher must check the Superior Court file for certain limited matters in order to determine the marketability of the title. This rule applies not only to mortgages but to liens,

such as judgment liens and mechanics’ liens, which are foreclosed in the same manner as mortgages (Standard of Title 3.4, Comment 8).

## **Reviewing the File**

In examining the foreclosure file, the searcher should be looking to confirm that the documents recorded on the land records are supported by the foreclosure proceedings and the judgment in the file. **A review of the case on the judicial website is not a substitute for a review of the court file.** To the extent that there are defects in the foreclosure proceedings, the title will be defective. Defects in the proceedings, such as defective service of process, will often not appear in the recorded documents, and you rely on those documents at your peril.

*A checklist for reviewing a foreclosure file is included at the end of this material.*

**1. The Lis Pendens.** Technically, the lis pendens is not part of the foreclosure file. The lis pendens is served and recorded at the commencement of the foreclosure action, and return of service is made to the office of the foreclosing plaintiff's attorney, who may or may not file a copy of the return with the court.

In mortgage foreclosures, the lis pendens is not jurisdictional. The foreclosure action may be commenced and proceed to completion without a lis pendens ever being recorded. In the foreclosure of a lien, the service and recording of a lis pendens may be necessary to preserve the lien from expiration if it is close to the end of its statutory life. (See Conn. Gen. Stat. § 52-380a(c) and Conn. Gen. Stat. § 49-39.)

The function of the lis pendens in a foreclosure action is to bind any taker of an interest in the title after its recording to the judgment rendered in the action that led to its recording. It will do so only if it is proper in form and proper procedure was followed. To be in proper form, the lis pendens must give notice of the action being brought in accordance with Conn. Gen. Stat. § 52-325: it must correctly name the parties, identify the nature of the action as a foreclosure and what is being foreclosed, identify the court to which the action is returnable and contain a legal description of the property. Errors in the lis pendens will impair or destroy its binding authority as to subsequent parties.

Prior to October 1, 2005, the lis pendens statute required that, to be fully effective, the lis pendens had to be properly served. That requirement was eliminated from the statute effective October 1, 2005. However, if you have a foreclosure that was commenced prior to that date and there are creditors who took a security interest in the property or other parties who acquired an estate or interest in the property after the recording of the lis pendens, you must determine that proper service of the lis pendens was made. If there is no return of

service in the foreclosure file, you must contact the foreclosing attorney's office for evidence of service.

## **2. The Parties.**

The plaintiff in a foreclosure action must be the holder of the mortgage or lien being foreclosed. The title searcher must grantor the party named in the mortgage deed or lien to determine whether it has been assigned. On occasion, a foreclosure action will be commenced and then the mortgage will be assigned. Sometimes the assignment will not be recorded. Depending on how far the action has progressed before the assignment occurs, the assignee may or may not be substituted for the original plaintiff. Even if no substitution occurs, title will vest in the party who holds the note and mortgage or lien on the date title vests. The assignment **must** be of record for that party's title to be marketable.

A foreclosure action brought by a plaintiff who does not hold the mortgage of record is binding on the parties who were properly named and served. It will not bind the holder of record of the mortgage, however. To clear title, the original assignment, a retroactive assignment or a quitclaim deed from the lender of record to the foreclosing lender will be necessary to make the title marketable.

The defendants in the foreclosure action must, of course, include the owner of the equity and must also include any other parties who have an interest in the property such as tenants in possession, if those interests are to be erased by the foreclosure.

The plaintiff cannot foreclose out any interests prior in right to the interest held by the plaintiff. Interests that are prior in right are those that were recorded before the plaintiff's interest or that have a statutory priority. A statutory superpriority exists for common interest community liens, water and sewer liens, municipal property tax liens, demolition liens and the like. Even if recorded after the

plaintiff's mortgage or lien, these liens are prior in right and cannot be foreclosed out.

Parties who hold interests, mortgages or liens subsequent in right to the mortgage or lien being foreclosed will be foreclosed out only if they are properly named and served in the foreclosure action, as evidenced by the court file. What constitutes proper service is beyond the scope of this *Practice Note*. Searchers and attorneys representing buyers of foreclosed property should familiarize themselves with the rules of service for the types of parties found in the land records prior to reviewing the foreclosure file. Questions should be resolved by looking at the statutes and the Practice Book.

If a party holds multiple interests of differing types and priorities in a property, that party must be named for all affected matters, in order to foreclose them all out. Failure to properly name and serve the holder of a subsequent encumbrance is jurisdictional: the court cannot foreclose out the omitted interest. Any title report issued would have to report the interest as an encumbrance, and it will have to be paid off and released to clear title.

Service on the owner of record is generally done in hand or by abode service. Abode service is proper only if the owner is resident at that address. If an owner has vacated the property and is living elsewhere or has never resided at the property, abode service at the property will not give the court jurisdiction. The sole exception to this rule was recently promulgated by the Connecticut Supreme Court in *Argent Mortgage Company, LLC v. Deyse M. Huertas*, 288 Conn. 568 (2008), in which the Court held that abode service at a party's usual place of residence is proper even though that party is incarcerated at the time of service. The method of service should be noted when examining the court file so that any question of jurisdiction can be brought to light or further explored.

If an owner-mortgagor has died prior to the commencement of the action, the proper parties to serve and join in the action are the remaining

joint tenants, if the property is held in survivorship, or the heirs of the decedent (Conn. Gen. Stat. § 47-33(a); Conn. Gen. Stat. § 52-69). The State of Connecticut must also be named and served as a defendant in order to clear the lien for succession or estate taxes from the title.

- 3. The Property.** Only the property described in the mortgage deed can be subject to foreclosure. Title problems arise when there is no description attached to the mortgage or when the description attached is incomplete or erroneous. In order to have good marketable title post-foreclosure to the property owned by the mortgagor, a count for reformation of the mortgage must be brought as part of the foreclosure complaint and a judgment for reformation should be entered by the court prior to or at the same time as the judgment of foreclosure is issued.

If the description error is not caught and corrected prior to the foreclosure and is not dealt with in the foreclosure, an action to quiet title may be required afterwards to make the title marketable to the property or that portion of the property not properly described in the mortgage deed.

- 4. The Foreclosure Proceedings.** Standard of Title 19.5 states that, so long as the court had jurisdiction over the subject matter and the defendants were properly named and served, marketability of title to the foreclosed property is not impaired by errors committed by the court in the course of the proceedings. Standard of Title 19.6 states that marketability of title is also not impaired by the absence of or errors in any military affidavit as to any defendant. Those two standards limit the scope of the title searcher's review to those matters that are jurisdictional. Two of those jurisdictional matters – failure to properly name and serve a necessary party and failure to get the correct property before the court – have already been discussed. There are several other matters that a searcher should watch for in reviewing the foreclosure proceedings.

**a. Selection of Mediation.** Commencing July 1, 2008 and ending July 1, 2010, foreclosure mediation must be made available through the court system to any homeowner facing foreclosure. (P.A. 08-176) The mediators are employees of the state judicial branch and are trained to address various foreclosure issues such as seeking a foreclosure by sale in lieu of a strict foreclosure, the assignment of law days in a strict foreclosure, reinstatement or restructuring the mortgage to dispose of the foreclosure and the like. At the commencement of the action, the foreclosing mortgagee's attorney must attach to the complaint a notice of availability of foreclosure mediation and a mediation request form. The defendant homeowner must file the request for mediation and an appearance within fifteen days of the return date. If the notice is not given, the entry of judgment may be delayed by the court for fifteen days to give the homeowner time to participate in mediation. If elected, mediation can last up to 60 days, or longer, if the court grants an extension. (See Senate Bill 1200 of the November 24, 2008 Special Session.) It is important to note whether or not mediation was selected, and, if it was, what the outcome of the mediation is or was.

**b. Federal Tax Liens or Other Federal Interests.** If the title search shows a federal tax lien or other encumbrance running to the federal government recorded prior to the lis pendens, the foreclosure must be by sale in order to extinguish the federal interest.

If the lien or other federal interest is recorded after the lis pendens, a foreclosure by sale will wipe it out, but the IRS will have 120 days after the auction to redeem the property. Other federal agencies who hold interests can have up to one year to redeem. This right of redemption is an encumbrance on title that must be reported in a search report and listed in Schedule B of

the title policy if a closing takes place within that time period.

If the federal tax lien is recorded after the lis pendens and a strict foreclosure is done, the lien will be extinguished **only if** (i) it was recorded more than 30 days before the last law day passed and title vested, AND notice of foreclosure was properly given to the IRS at least 25 days before title became absolute in the foreclosing party; or (ii) the lien was recorded less than 30 days before the last law day passed and title vested. No notice is required in that case.

If notice is required and not given, the lien remains on title. Evidence of the notice should be in the foreclosure file. If notice is required and given, the lien will be foreclosed out, but the IRS will have its 120-day right of redemption.

**c. Change in Priority.** Parties made defendants in a foreclosure action may challenge their status and argue that they have priority over the foreclosing encumbrancer. If the court recognizes their priority, they will be dropped as a defendant and the interest they hold will survive the foreclosure. Generally, the issue of priority will be raised either by an answer or by a special defense. The file should be reviewed for the presence of such pleadings, and the outcome.

**d. Assignment of Law Days.** The order of the law days in a strict foreclosure is generally submitted by the plaintiff at the time motion is made for the entry of judgment. The court will generally include in its judgment only the actual date of the first law day belonging to the property owner. Encumbrancers' law days follow in the inverse order of priority, but the dates will not necessarily be included in the judgment. There may be a statement of the date on which title will vest in the foreclosing plaintiff. These dates should be noted, in the event that they haven't yet passed and the owner is trying to sell and

redeem before his or her law day, or to be sure that a redeeming party did not redeem too early or too late.

- e. **Appeal from Approval of Sale.** Pursuant to Section 63-1 of the Connecticut Practice Book, there is a 20-day right of appeal from the approval of the committee sale in a foreclosure by sale. (Connecticut Rules of Appellate Procedure) If an appeal is filed, it will automatically stay any further proceedings. If successful, it will result in the sale being set aside. When the court enters its approval of the sale, it will generally order the closing to take place within 30 days. The parties to the closing must take into account the 20-day right of appeal, however, in setting the closing date. Realistically, that allows a ten-day window to close.

Because the property owner is not completely divested of title until the appeal right has run out, the owner may file a motion to open the judgment along with an appeal from the sale approval. The file should be reviewed for the presence and disposition of such motions.

- f. **Notice of Judgment.** Section 63-1 of the Connecticut Practice Book states that the 20-day right of appeal from the judgment begins to run from the date notice is given by the court clerk to all appearing parties. Notice can be given in open court and/or by mail. The failure to give notice of the judgment to non-appearing parties does not affect the running of the appeal period, but it does affect the running of the appeal period as to parties who did appear, whether *pro se* or through counsel. The foreclosure file should be checked to establish whether and when notice was given, if judgment has entered.
- g. **Conversion in the Foreclosure Method.** The majority of foreclosures in Connecticut are strict foreclosures. Foreclosure sales are ordered at the court's discretion only when it

appears there may be substantial equity in the property over and above the amount of the debt, or when the federal government is a party to the foreclosure action. Since foreclosure is an equitable proceeding, however, if the court deems the price at which the property has been sold to be inadequate and thus unfair, it can refuse to approve the sale and order a strict foreclosure instead.

In examining the foreclosure file, the searcher should be looking to confirm that the documents recorded on the land records are supported by the judgment in the file.

- h. **Bankruptcy.** The filing of a bankruptcy petition under Title 11 of the United States Code will, in most cases, give rise to an automatic stay of further debt collection proceedings (11 U.S.C. § 362). Since October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, there are circumstances under which the automatic stay will be limited in time or not apply at all. Nevertheless, every foreclosure file must be checked for evidence of any bankruptcy filing made by the property owner. Conn. Gen. Stat. § 49-15 requires the mortgagor to file either a copy of the bankruptcy petition or an affidavit stating the date of the bankruptcy with the court clerk. The filing of a petition in bankruptcy automatically opens a judgment of strict foreclosure as to the law days. Upon resolution of the bankruptcy, if the foreclosure is going to continue, the law days must be reset.

The automatic stay that arises on the filing of the bankruptcy petition will stay any further court and/or committee proceedings where judgment has not yet entered or a judgment of foreclosure by sale has entered, until the bankruptcy is complete or the creditor seeks and obtains relief from stay.

Finding evidence of a bankruptcy in the foreclosure file may suggest a need to review the bankruptcy proceedings as well.

## **Conclusion**

The quality of a title to property that has come through foreclosure is determined by the quality of the mortgage or lien that was foreclosed, along with the foreclosure process itself. What is recorded on

the land records as evidence of the foreclosure cannot be relied on as an accurate record of the proceedings. The foreclosure file must always be reviewed for jurisdictional issues and finality of judgment in order to have confidence in the marketability of the title.

If you have any questions or need assistance, please contact any member of CATIC's underwriting staff.

## *Foreclosure Review Checklist*

1. Property: \_\_\_\_\_

2. Court: Judicial District of \_\_\_\_\_ at \_\_\_\_\_

3. Docket Number: \_\_\_\_\_

4. Plaintiff: \_\_\_\_\_

5. Defendants:

	Service of Process	Appearance	Nature of Interest
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

6. Interests alleged to be prior in right to plaintiff's:

\_\_\_\_\_  
\_\_\_\_\_

7. Parties added after case returned to court:

\_\_\_\_\_  
\_\_\_\_\_

8. Date of Judgment: \_\_\_\_\_ Judge: \_\_\_\_\_

Debt: \_\_\_\_\_ Attorney's Fees: \_\_\_\_\_

9. Appraised Value: \_\_\_\_\_

10. Judgment of Strict Foreclosure:

Law Days Assigned:

Owner: \_\_\_\_\_

Defendant: \_\_\_\_\_ : \_\_\_\_\_

Defendant: \_\_\_\_\_ : \_\_\_\_\_

Defendant: \_\_\_\_\_ : \_\_\_\_\_

Defendant: \_\_\_\_\_ : \_\_\_\_\_

Title becomes absolute in plaintiff on: \_\_\_\_\_

11. Judgment of Foreclosure by Sale:

Committee: \_\_\_\_\_

Sale Date: \_\_\_\_\_

Sign: \_\_\_\_\_

Advertising: \_\_\_\_\_

Appraiser: \_\_\_\_\_ Return by: \_\_\_\_\_

Return of appraisal was made on: \_\_\_\_\_ Appraised value: \$ \_\_\_\_\_

Committee report filed on: \_\_\_\_\_

Successful Bidder: \_\_\_\_\_

Amount of Bid: \_\_\_\_\_

Sale approved on: \_\_\_\_\_ Judge: \_\_\_\_\_

Committee fee allowed: \$ \_\_\_\_\_ Expenses: \$ \_\_\_\_\_

12. Any indication of a redemption?

\_\_\_\_\_ No.

\_\_\_\_\_ Yes. Satisfaction of judgment filed \_\_\_\_\_. Redeeming party was \_\_\_\_\_ who redeemed on \_\_\_\_\_.



13. Any indication of a bankruptcy?

\_\_\_\_\_ No.

\_\_\_\_\_ Yes. Claim for exemption filed by: \_\_\_\_\_

Date of bankruptcy petition: \_\_\_\_\_

Bankruptcy court district: \_\_\_\_\_

Case Number: \_\_\_\_\_

14. Any motion(s) to open judgment?

\_\_\_\_\_ No.

\_\_\_\_\_ Yes. Filed by \_\_\_\_\_ on \_\_\_\_\_

Ruling?: \_\_\_\_\_ Denied.

\_\_\_\_\_ Granted. Date: \_\_\_\_\_ Judge: \_\_\_\_\_

(Law Day) or (Sale Date) extended to: \_\_\_\_\_

15. Any indication of an appeal?

\_\_\_\_\_ No.

\_\_\_\_\_ Yes. Appeal filed by \_\_\_\_\_ on \_\_\_\_\_

appealing from ruling on \_\_\_\_\_

16. Special Concerns:

Condominium association lien foreclosure:

Total claim of association: \$ \_\_\_\_\_

Amount found to be prior to mortgage: \$ \_\_\_\_\_

Mechanic's lien foreclosure:

Any allegation (in complaint) or indication (in sheriff's return) of recording and service of a lis pendens?

\_\_\_\_\_ No.

\_\_\_\_\_ Yes. Lis pendens alleged to have been recorded on \_\_\_\_\_

and served on defendant \_\_\_\_\_ on \_\_\_\_\_.