

Lingering foreclosure bars new mortgage loan

If a lender won't proceed with foreclosure, what are homeowner's options?

By Lew Sichelman

WASHINGTON (MarketWatch)

Question: I filed Chapter 13 in March 2008; discharged April 2009. I filed due to three successive illnesses and job loss. At the time I surrendered the property to my lender freely. The foreclosure package has been at the attorney's since Sept. 21, 2009 and is still not foreclosed — and the property still being in my name is preventing my getting a VA mortgage. How can a foreclosure be forced/expedited?

Answer: Before I dispense any advice here, I must first recommend — make that highly recommend — that you consult a local attorney (preferably one versed in foreclosure matters) about your options. I don't want anything I say here to be construed as legal advice. It is not. It is just my opinion based on my experience with such matters.

As I see it, you find yourself very much in the same situation as homeowner associations that are dealing with deadbeat banks that foreclose on delinquent owners. The lenders take back the properties, but as the new owner, they fail or refuse to pay their HOA dues. Only in your case, the lender won't go through

with the foreclosure, so you are still on the hook for an outstanding and delinquent mortgage, even though you have turned the property back over to the lender.

It seems to me the simple answer is a step known as a deed in lieu of foreclosure, in which you simply give the lender the keys to your residence and the lender takes title. In your case, you have given the place to the lender but the lender is dragging his feet. The lender shouldn't need to foreclose; only to release you from your obligation.

I checked with Ben Solomon of the Association Law Group, a North Bay Village, Fla., law firm which has used a legal maneuver known as a quiet title action to force balky lenders' hands. Solomon calls the tactic the "mortgage terminator." It works like this: Associations take title to the property from a non-paying owner via foreclosure and then force the primary lien holder — the lender — to initiate its own foreclosure proceeding or release its mortgage so the association can sell the unit to recover what it is owed.

Solomon said he believes you could try to force your lender's

hands in the same manner; that is, set the foreclosure hearing for the bank and then waive all your defenses to expedite the proceeding against yourself. However, he cautions that "certain factors regarding potential liability for deficiency of the loan and credit issues need to be carefully reviewed."

That's why you need to consult an attorney.

"If the bank is not willing to take the property back by deed or through the foreclosure process," the South Florida attorney said, "it may be possible to attempt a quiet title action like our mortgage terminator, but the main factual difference would be that in this case the person is obligated to pay the bank under the note and loan agreement, whereas in our cases the association is not."

Solomon said he thinks it's unlikely that you will be successful in stripping the mortgage from the property, but you could perhaps force the bank to at least move forward with its foreclosure.