

SINCE MY HOUSE IS GOING TO FORECLOSURE, HOW LONG BEFORE I HAVE TO MOVE OUT?

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The lender will normally want to foreclose when you become three or more months behind in your mortgage payments. (Some lenders go much longer, as much as one or two years.) Before you can be forced to move out, the lender needs to first foreclose on your house, then have you evicted. Chapter 7 or Chapter 13 bankruptcy may affect if or when foreclosure takes place. Therefore, this answer will have three parts:

A. IF YOU FILE BANKRUPTCY BEFORE THE FORECLOSURE PROCESS

If the homeowner is current on his payments, and stays current throughout his Chapter 7 bankruptcy, the lender will not seek to foreclose, unless the homeowner indicates he is giving up the house. But if you are behind in your mortgage payments and then file Chapter 7 bankruptcy, the lender is thereafter forbidden from foreclosing by law. This is called the “automatic stay.” (If a foreclosure is already in process, filing bankruptcy brings an abrupt halt to the proceedings, even if it is the day before the scheduled foreclosure sale.) However, this is only a temporary setback to foreclosure; the lender’s attorney can ask the Bankruptcy court to remove this impediment to foreclosure by filing a “Motion for Relief of Stay” or “Motion to Lift Stay.” This request is usually made sometime after the 341 Hearing, which in turn is held about four weeks after the bankruptcy is filed. A hearing on the motion must then be held by the Court no less than fourteen days after the motion is filed. Depending on the judge’s procedures and how busy his/her calendar is, in Georgia the hearing is typically scheduled for 14 to 30 days or so after the motion is filed.

At the hearing, the judge gives the lender permission to foreclose despite the bankruptcy unless an attorney for the borrower can convince the judge that sufficient proof exists that foreclosure should not take place (such as by proving that all required payments have been made, or are about to be made). But if the stay is removed, the lender may then proceed with foreclosure even though you are in bankruptcy.

If you file Chapter 13 bankruptcy, you also receive an automatic stay forbidding the lender to foreclose. If your attorney files an acceptable plan with the court, proving that you can make your required mortgage payments and also catch up all overdue payments within three to five years, the stay normally is allowed to remain throughout the bankruptcy, at the end of which, if you have made all your required payments, the lender has no reason to foreclose.

However, if you file Chapter 13, file an acceptable plan, and then fail to make payments again sometime during the three to five years, the lender may file, and be granted, a Motion to Lift Stay, as with a Chapter 7, and foreclosure may then proceed.

B. THE FORECLOSURE PROCESS

The lender will normally begin foreclosing when you become three or more months behind in your mortgage payments. (*Warning: It is not uncommon for banks to claim to be considering a loan modification, in which they say you should make three “trial payments,” which are lower than your regular payments, before a modification can be finalized. They then sometimes deny the modification approval and begin foreclosure, stating the deficiency in payments (which you thought they were agreeing to) as evidence you are behind for months in your payments. Some banks even tell people to deliberately skip some payments “to make you eligible to receive a modification” – notice that they never put this in writing! – and then foreclose later, citing the missed payments. We know from our clients’ experiences that this actually happens!*)

The lender's attorney must first send you a letter in which they demand payment, in which they usually tell you that foreclosure will occur unless they are paid. They may give you thirty days to pay or to dispute the debt, but they are only required by law to wait ten days for you to pay in full.

Next, the lender's attorney is required to publically publish notice of the upcoming foreclosure sale in the official newspaper for public legal notices in the county where the property is located. This legal notice must be published for four weeks before the date of the auction. The auctions are almost always held the first Tuesday of each month. The lender's attorney must notify the lender of the sale date by certified mail within fifteen days of the sale.

At the foreclosure sale, often the only bidder for the property is the foreclosing lender, since any other purchaser would have to first pay off the existing mortgage in order to take title and then sell it. If the amount owing on the mortgage is equal to or greater than the value of the property, which it often is these days, the property is no bargain, so it does not attract outside buyers. Of course, if the value of the property is significantly higher than the amount owed on it, there may be many bidders.

C. THE EVICTION PROCESS

After a foreclosure sale, anyone living in the house technically becomes a "tenant at sufferance" under Georgia law. To make the occupant move, the new owner of the house (or the lender if it does not sell to an outsider) must demand possession of the property. If the occupant does not then willingly move, the new owner must file a "dispossessory" (eviction) with the county Magistrate court and have the Sheriff serve it. The occupant then has seven days to file an answer with the court. If they DO NOT file an answer, then the court issues the new owner a "Writ of Possession" immediately, which is an eviction order. If they DO file an answer, the court schedules a hearing on the matter, usually (depending on the county) one to two weeks later. At that trial, the judge will order the occupant to move; he/she may or may not give the occupant a brief period of time – one to two weeks is possible – to move out. Then the owner can have a sheriff's deputy come to make the occupant move, and the new owner can have his workers carry all the occupant's possessions (if they are still in the house) out to the curb.

There is no telling how long it will be after the foreclosure until the new owner demands possession. If an outside bidder wins the auction and becomes the new owner, usually they will move quickly to get possession of their new property. If not, and the owner is now the lender, some banks start within a week or a month, and some take a year or two. I have had clients get as much as three years' "free rent" before the bank took any action (in unusual cases — one or two years is more likely), so you might want to stay in the home to save up your money for your next home until you hear from the owner. Recently here in Georgia, in my limited experience most occupants of foreclosed homes do not have to move anytime soon after the foreclosure. Why do many lenders allow this? Probably because they already have too many foreclosed properties to recycle quickly, and they'd rather have a house occupied, kept up, lawn mown, etc. rather than it be a vacant target for vandals, copper pipe theft, unkempt lawn, etc. until they are ready to attempt to resell it.

D. SUMMARY

From the day you first receive a letter from the lender's attorney (assuming they have your correct address), you can be assured of having *at least* ten days (usually 30 to 50 days) until legal advertising starts, which takes four weeks leading up to the actual foreclosure sale. Foreclosure sales here in Georgia are held on the first Tuesday of each month unless it falls on a holiday. Hence, from start to finish, foreclosure takes a bare minimum of 38 days, usually at least eight weeks (56 days), and sometimes much longer. Then you add from eight days minimum (if you do not file an answer) to three weeks or more (if you do file an

answer) for the Magistrate Court to rule until you are actually evicted, once the owner demands possession and subsequently files a dispossessory action.

So, from the first letter from the lender's attorney until you are put out onto the street would take a bare minimum of 46 days, usually more like 60 days; and sometimes, as we have said, much more. And after you file Chapter 7 bankruptcy, you can add at least another 42 to 72 days to the total. And if you file a Chapter 13 Bankruptcy with an acceptable payment plan, you may avoid foreclosure and keep your house during and after bankruptcy, as long as you make the promised payments!

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