

New York Lawyers' Practical Skills Series



Includes Forms
on CD

Mortgage Foreclosures

Francis J. Smith, Esq.*

2012–2013

* This monograph was originally prepared by the late Marvin R. Baum, Esq. The 2003 and 2004 supplements were reviewed by Joseph M. Gaug, Esq.; Francis J. Smith has been the update author since 2005.

NEW YORK STATE BAR ASSOCIATION



CONTENTS

| | | |
|-------|---|----|
| I. | Introduction..... | 1 |
| II. | Opening the File..... | 1 |
| | A. Documents Required..... | 1 |
| | B. Examination of Documents | 2 |
| | C. Abstract of Title Continuation | 2 |
| | D. Examination of Abstract | 3 |
| | E. Environmental Investigation..... | 3 |
| | F. Acceleration | 3 |
| | G. Consumer Protection Legislation..... | 4 |
| III. | Election of Remedies | 4 |
| | A. Consideration of Suit on Note or Bond | 4 |
| | B. Separate Action for Mortgage Debt..... | 5 |
| IV. | Party Defendants..... | 5 |
| | A. Necessary Defendants..... | 6 |
| | B. Representative Defendants | 7 |
| | C. Permissible Defendants..... | 7 |
| | D. Effect of Failure to Name Necessary Party | 8 |
| V. | Notice of Pendency (<i>Lis Pendens</i>)..... | 8 |
| | A. Notice of Pendency; Constructive Notice..... | 8 |
| | B. Filing, Content and Indexing of Notice of Pendency | 9 |
| | 1. Filing..... | 9 |
| | 2. Content; Designation of Index..... | 9 |
| | 3. Indexing..... | 9 |
| | C. Service of Summons | 9 |
| | D. Duration of Notice of Pendency | 10 |
| VI. | Summons and Complaint..... | 10 |
| | A. Format..... | 10 |
| | 1. Summons | 10 |
| | 2. Complaint | 11 |
| | 3. Commencement of Action..... | 11 |
| | B. Service of Process | 12 |
| | C. Service on Tenants..... | 13 |
| | D. Appearance and Answers..... | 14 |
| | 1. Notice of Appearance | 14 |
| | 2. Answer..... | 15 |
| | 3. Motion to Dismiss | 15 |
| VII. | Reference to Compute | 15 |
| | A. Affidavit of Regularity..... | 15 |
| | B. Home Loans | 16 |
| | C. Referee | 16 |
| | 1. Qualifications and Duties | 17 |
| | 2. Referee's Report..... | 18 |
| | 3. Attorney Fees..... | 18 |
| VIII. | Bill of Costs | 19 |
| | A. Costs..... | 19 |
| | B. Disbursements..... | 20 |

| | | |
|-------|---|----|
| IX. | Judgment of Foreclosure and Sale | 20 |
| | A. Filing a Notice of Pendency..... | 20 |
| | B. Contents of Judgment of Sale | 20 |
| X. | Sale of Property | 22 |
| | A. Notice of Sale..... | 22 |
| | B. Sale Date | 23 |
| | C. Effect of Sale on Equity Redemption | 23 |
| | D. Adjournment of Sale | 23 |
| | E. Terms of Sale | 24 |
| | F. Upset Price | 24 |
| | G. Sale of Property | 25 |
| | H. Set Aside of Sale..... | 25 |
| XI. | Referee’s Deed..... | 25 |
| XII. | Referee’s Report of Sale | 26 |
| | A. Distribution of Proceeds of Sale | 26 |
| | B. Filing | 26 |
| | 1. Report of Sale | 26 |
| | 2. Confirmation of Report | 26 |
| | C. Deficiency Judgment | 26 |
| | D. Writ of Assistance..... | 27 |
| XIII. | Claims Where Foreclosure of Mortgage Is Void or Voidable..... | 28 |
| | A. Generally..... | 28 |
| | B. Remedy for Excluding Necessary Party | 28 |
| | C. Judgment of Foreclosure in Certain Cases | 29 |
| XIV. | Conclusion | 29 |

Addendum: Nonjudicial Mortgage Foreclosure under RPAPL Article 14

Joseph M. Gaug, Esq.

| | | |
|------|---|----|
| I. | Introduction..... | 30 |
| II. | Highlights of RPAPL Article 14..... | 31 |
| | A. Commencement of Nonjudicial Proceeding | 31 |
| | 1. Notice of Intention to Foreclose | 31 |
| | 2. Service of Notice of Intention to Foreclose..... | 31 |
| | B. Nonjudicial Foreclosure by Power of Sale | 31 |
| | 1. Notice of Sale | 31 |
| | 2. The Sale | 32 |
| | 3. Conveyance of Title | 32 |
| | C. Post-Conveyance | 32 |
| | 1. Distribution of Sale Proceeds | 33 |
| | 2. Report of Sale..... | 33 |
| | D. Additional Relief Available | 33 |
| III. | Limitations of RPAPL Article 14 | 34 |
| IV. | Conclusion | 34 |
| | Bibliography | 35 |
| | Mortgage Foreclosure Forms Index..... | 39 |
| | Table of Authorities | 85 |
| | About the Author | 91 |

**MORTGAGE FORECLOSURES—
FORMS**

CONTENTS*

| | |
|--|----|
| Notice of Pendency of Action..... | 41 |
| Summons (General) | 43 |
| Summons (Residential Property of Not More Than Three Units)..... | 45 |
| Complaint..... | 47 |
| Help for Homeowners in Foreclosure Notice | 51 |
| Notice to Tenants of Buildings in Foreclosure | 53 |
| Order of Reference in Mortgage Foreclosure | 54 |
| Affirmation of Regularity | 55 |
| Supplemental Affirmation with Explanatory Memo | 57 |
| Referee’s Oath..... | 61 |
| Report of Amount Due | 62 |
| Schedule A—Abstract of Documentary Evidence | 63 |
| Costs of Plaintiff with Attorney’s Affirmation | 65 |
| Judgment of Foreclosure and Sale | 67 |
| Affirmation of Service by Mail..... | 70 |
| Notice of Foreclosure and Sale | 71 |
| Terms of Sale | 73 |
| Upset Calculation..... | 75 |
| Referee’s Deed | 77 |
| Referee’s Report of Sale | 79 |
| Statement of Sale | 81 |
| Order Confirming Referee’s Report of Sale | 83 |
| Notice to Tenants by Successor in Interest | 84 |

* All of the forms contained in this monograph are included on the forms CD accompanying this publication.

FRANCIS J. SMITH, ESQ.

Mr. Smith joined McNamee, Lochner, Titus & Williams, P.C. in 1988 and has been a principal since 1994. Mr. Smith received a J.D. degree, cum laude, from the Albany Law School of Union University in 1980, and a B.A. degree, cum laude, from Siena College in 1977. Prior to joining the firm, Mr. Smith spent eight years with the New York State Supreme Court, Appellate Division, Third Department, the last six of which were spent as confidential law clerk to the Honorable A. Franklin Mahoney, Presiding Justice of that Court. Mr. Smith is a member of the Committee on Character and Fitness to Practice Law for the Third Department.

Mr. Smith's practice is concentrated in the area of appellate practice and administrative law as well as all forms of state and federal court litigation representing creditors and lenders. His practice also includes commercial mortgage foreclosures and representation of secured creditors in Chapter 11 commercial bankruptcies.