

SECURITY PLUS LAW
Barristers & Solicitors
Unit 203
120 Traders Boulevard E.
Mississauga, Ontario
L4Z 2H7

Tel: 905-568-3810
Fax: 905-568-1206
Email: info@securitypluslaw.com

Options to Enforce a Mortgage in Ontario: What you need to know

There are three different options to enforce a mortgage in Ontario, namely foreclosure, judicial sale, and power of sale. This article discusses each and their relative advantages and disadvantages.

The following are discussed in this article:

What is involved in exercising the remedy of foreclosure?

What is involved in exercising the remedy of judicial sale?

What is involved in exercising the remedy of a private power of sale?

Key Takeaway

What is involved in exercising the remedy of foreclosure?

Foreclosure is a court-supervised mortgage enforcement procedure whereby a holder of a mortgage (the lender) takes title to the property in full satisfaction of the debt owed. In legal jargon, this is referred to as “foreclosing on the equity of redemption”.

The most important advantage of foreclosure from the viewpoint of the lender occurs when the amount of the debt is less than the value of the property. In this situation, if a lender successfully forecloses on the property, the lender does not have to account to the borrower for the difference between the value of the property and the amount owing on the debt. On the flip side, if the value of the property is less than the debt, the lender is unable to pursue the mortgagor for any deficiency.

The rules governing the exercise of a foreclosure procedure are set out in Rule 64 of the Ontario Rules of Civil Procedure. A lender wishing to foreclose on a property initiates a foreclosure action in the Ontario Superior as plaintiff. The Statement of Claim must name as defendants all

persons with an interest in the “equity of redemption”. This includes the borrower of course who owns the equity of redemption but also includes any subsequent encumbrancers. This extends to any subsequent mortgages or other interests such as construction liens and registered Writs of Execution.

Rule 64 also grants substantial rights to the borrower. One such right is the ability to serve on the lender a “Request to Redeem”. Upon receipt of this document, the lender must provide an accounting to the borrower (effectively a discharge statement) within 7 days. The borrower is then entitled to a further 60 days to discharge the mortgage. This is referred to as “redeeming the mortgaged property”. There is no doubt that the foreclosure remedy generally takes more time, and is more expensive than a private power of sale.

However, if in the eyes of the borrower the mortgaged property is worth more than what is owed to the lender, the borrower can serve a Request to Sell the Property which converts the sale into a judicial sale (see below). At that point, if the lender wants to continue with the foreclosure process, it must file evidence with the court to establish that the property is not worth more than debt, which typically would be a formal appraisal. As can be appreciated this adds additional cost and complexity to the process.

The borrower’s ability to convert the process to a judicial sale makes it unlikely that a lender can realize a windfall gain by foreclosing. However, it may be a good option if the lender believes the value of the property has been reduced by a temporary market downturn, and it is likely to recover. This will allow the lender to take title to the property and to wait for more favorable market conditions.

What is involved in exercising the remedy of judicial sale?

A judicial sale process is effectively a Court-supervised sale of the mortgaged property. This can be contrasted with the exercise of a private power of sale process which does not involve the court in the actual sale. However, it should be noted that in exercising a private power of sale over a residential property, an action for possession will be required in order to obtain an eviction order which must be authorized by a judge.

Much like the foreclosure procedure, the judicial sale process in Ontario is governed by Rule 64 of the Rules of Civil Procedure. The lender must commence an action in the Superior Court of Justice. The process that must be followed is complicated and is set out in this Rule. The nitty-gritty of this procedure is beyond the scope of this article but needless to say, it is a lot more complicated, time-consuming, and expensive process than proceeding by private power of sale which is discussed below.

The primary difference between a judicial sale procedure and a foreclosure is that the lender does not foreclose on the equity of redemption. The property is sold and the proceeds of the sale are applied to the debt outstanding to the lender. To the extent that there is a shortfall, the lender can

pursue the borrower for the balance of the remaining debt by enforcing its judgment that must be issued by a judge on a motion to the court. If the proceeds of the sale are more than the amount owed by the borrower, the lender must distribute this money first to subsequent-ranking encumbrancers, with any balance being paid to the borrower.

The most important advantage of the judicial sale procedure is likely the protection from liability it affords a lender. This is because it is exercised within the framework of an action in the Superior Court and is overseen by a court appointed referee. As a result, the lender is insulated from potential litigation attacking the integrity of the procedure followed. The remedy of judicial sale is most commonly employed in messy bankruptcy proceedings where there are multiple competing claims to the net equity in the property, and the lender wants to make sure as to the order of priority between subsequent creditors. The end result will be that upon sale of the property, the distribution of the net proceeds is authorized by court order.

What is involved in exercising the remedy of a private power of sale?

Given what is discussed above, you may have already figured out that the private power of sale procedure is the most common mortgage enforcement remedy used in Ontario. It allows the mortgagee, through a privately managed process, to sell the property and use the proceeds of the sale to satisfy the amount outstanding on the mortgage.

As with the judicial sale process, exercising a private sale does not extinguish the lender's right to pursue the borrower for any deficiency that remains outstanding after applying the net proceeds of the sale to the debt. Of course, it also requires a lender to account for any surplus firstly to subsequent encumbrances, and then to the borrower.

Perhaps the biggest difference between a private power of sale and a judicial sale as described above is the role that the Court assumes in the proceedings. In a judicial sale, the court is involved in the sale process from the outset. However, in private power of sale, the process proceeds without the involvement of a judge except to the extent it is residential property and the owner must be evicted. This requires an action to be initiated in the Superior Court of Justice seeking judgment for possession. Upon judgment for possession being issued by the court, a motion must be filed seeking a court order for leave to have a Writ of Possession issued. The court department responsible for evictions is called the Sheriff's Office in Ontario. They will not evict without presenting to them the order granting leave issued by a judge.

Contrary to the exercise of a judicial sale remedy, the exercise of the private power of sale remedy is not a court-supervised process except to the extent you are dealing with residential property. As discussed above, a court order for leave to evict will be required for this step in the process. However, the court will have no involvement in the actual sale. As such the "protection" against liability afforded the lender in the judicial sale process is not present in a private power of sale. As a result, the lender is under a positive obligation to sell the property at a fair market value. Failure to do so will open the lender to a potential claim from a subsequent encumbrancer

or the borrower for an improvident sale. To avoid exposure to this liability, the process employed by the lender in executing the sale includes all reasonable steps to ensure the maximum price is obtained.

In Ontario, the lender's authority to execute a private power of sale remedy is almost always contractually provided for in the Commitment the borrower signs when the mortgage terms were negotiated. These terms are carried forward into the registered mortgage document. If for any reason this right was omitted, the Mortgages Act of Ontario grants a mortgage lender a statutory right to use the power of sale procedure.

The first step in the power of sale process is to prepare and serve upon the borrower and any other party indicated on the registered title as having an interest in the property as a document called a "Notice of Sale under Mortgage". The lender must also serve this document upon any other person where it has actual notice of the interest being asserted by this person even though this interest is not indicated on the registered title.

It is very important that the service requirements of the Mortgages Act be complied with in serving this document, and that the amount owing to the lender is accurately set out in the document. Failure to ensure strict compliance with these requirements will give the borrower grounds to make a motion to the court to have the Notice deemed invalid.

Perhaps the biggest advantage of the power of sale process is the relatively short time it takes to execute the process and sell the property to recover the outstanding debt. The Notice of sale can be served to start the process after the mortgage has been in default for 15 days. The notice period within which the borrower must remedy the default is 35 days. As such the process of listing the property for sale can be commenced 50 days after default. Generally, it is best to allow a few extra days to ensure comfortable compliance with these timelines but this is still significantly faster than any court-supervised process

The private power of sale procedure is not without drawbacks. Perhaps the most important is that it can expose the lender to an improvident sale claim by the borrower as discussed above. However, this can be managed by following a procedure to ensure the maximum price is obtained for the property. In the end, the quickness and lower cost of the power of sale process make it the most commonly used enforcement procedure used in Ontario.

Key Takeaway

The process of enforcing a mortgage in Ontario is complicated. This article is intended to provide a general overview of the options available and is not intended to provide actionable legal advice concerning any particular fact situation. If you are a lender or borrower under the terms of a mortgage that is in default we recommend you follow the instructions set out in our memo entitled "Preparing to Litigate in Ontario: What you Need to Know". After completing the factual memo recommended in this article, we recommend you retain a lawyer with expertise in

mortgage enforcement matters to assist you in arriving at the best and most cost-effective resolution to your situation.

This article has been prepared by Security Plus Law for informational purposes only. It is intended to provide general information with respect to the topic discussed. It is not intended to provide actionable legal advice with respect to any particular fact situation, and we expressly exclude any liability for unauthorized reliance on the contents of this article without first obtaining our written consent. If you need legal assistance with respect to any issue discussed in this article, please do not hesitate to contact us. We offer a free one-half-hour consultation for all potential litigation matters.

All Copyright rights in this article reserved: Security Plus Law 2023