

Commercial and Residential Foreclosure by Action (MN)

A Practical Guidance® Practice Note by Mark W. Vyvyan, Fredrikson & Byron P.A.



Mark W. Vyvyan
Fredrikson & Byron P.A.

This practice note discusses foreclosure of Minnesota mortgages by action. Unlike the other method of foreclosure in Minnesota, foreclosure by advertisement, foreclosure by action is a judicial procedure. It is commenced by service of a summons and complaint. Many of the preliminary concerns and steps to be taken prior to foreclosure by advertisement also apply to foreclosures by action. For instance, if the property is owner-occupied residential real property, you will need to make sure the borrower has been provided with notice of opportunity for foreclosure prevention counseling under Minn. Stat. Ann. § 580.021, and you should also ensure compliance with the loss mitigation / dual tracking provisions of Minn. Stat. Ann. § 582.043.

For guidance on foreclosure by advertisement in Minnesota, see [Commercial and Residential Foreclosure by Advertisement and Reinstatement and Redemption \(MN\)](#). For guidance on lending in Minnesota, see [Commercial Real Estate Financing Transactions \(MN\)](#) and [Commercial Real Estate Financing \(MN\)](#).

Parties

Your complaint should name the holder of the mortgage as the plaintiff. If the mortgage is held by more than one person, anyone refusing to join as a plaintiff should be named as a defendant. Your complaint should include the mortgagor, their successors and assigns, or anyone who has acquired rights or interests in the mortgagor's estate, or anyone

holding an interest junior to the mortgage, as defendants. See, e.g., *Banning v. Bradford*, 21 Minn. 308 (1875).

Naming all of the proper parties is important, because the interest in the property of anyone who is not named as a defendant will not be subject to the foreclosure.

Your complaint does not need to join as a party anyone holding an interest prior to the mortgage being foreclosed. You may still want to name a prior interest holder as a defendant. For instance, you will want to name a prior mortgagee as a party if a dispute exists between that prior mortgagee and the foreclosing mortgagee. *Foster v. Johnson*, 44 Minn. 290, 46 N.W. 350 (1890).

Summons

Your summons should follow the form provided in Minn. R. Civ. P. 4.01. Because service might have to be made by publication, your summons should contain a legal description of the property and a statement of the object of the action as provided in Minn. R. Civ. P. 4.041.

Your summons may contain notice that no personal judgment is sought against certain defendants, or the plaintiff may serve a separate notice so stating. If any defendant upon whom such notice is served unreasonably defends in the action, it shall pay full costs to the plaintiff. Minn. Stat. Ann. § 557.03.

Notice of Lis Pendens

A notice of lis pendens should be filed with the county recorder (or registrar of titles if the property is registered) immediately after the filing of the complaint in the district court. Minn. Stat. Ann. § 557.02. The purpose of the notice of lis pendens is to give constructive notice to subsequent

purchasers and encumbrancers of the rights and equities of the party filing the notice. Anyone who acquires an interest in the property after the notice is filed takes its interest subject to final disposition of the lawsuit.

The notice of lis pendens remains effective only if the summons is served within 90 days after the filing of the complaint.

Any party claiming an interest in the property may move the district court to dismiss the notice, making it of no further force and effect, if the action has not been brought on for trial within two years after the filing of the notice.

Complaint

Your complaint will need to comply with the Minnesota Rules of Civil Procedure for the District Courts.

At a minimum, your complaint needs to include a description of the parties, their interests in the property, the plaintiff's mortgage and the obligation it secures, the defaults in that obligation entitling your client to foreclosure, facts establishing compliance with statutory and contractual pre-foreclosure notice requirements, facts supporting relief requested by the mortgagee (such as facts supporting reformation of the mortgage), and a demand for relief requesting personal judgment against the mortgagor (if applicable) and foreclosure of the mortgage as provided in Minn. Stat. Ann. § 581.03.

Notice of Homestead Rights

If the mortgage you are foreclosing is on real property containing the homestead of the mortgagor, Minn. Stat. Ann. § 582.041, subd. 2(b) requires that a notice regarding the right of the mortgagor to designate the area of the homestead to be sold and redeemed separately be served with the summons and complaint. The notice must be in 10-point capitalized letters. This provision may have been intended to apply only to mortgages on agricultural property but, by its terms, applies to mortgages on any property containing the homestead of the mortgagor. When foreclosing on a homestead, the mortgagee must provide the notice even if foreclosure is sought as part of a counterclaim in existing litigation. *Shamrock Sod & Landscaping Inc. v. Sec. State Bank of Fergus Falls*, No. A18-1980, 2019 Minn. App. Unpub. LEXIS 875 (Sep. 9, 2019). Also, if the mortgage you are foreclosing is on agricultural property, you will need to determine whether Minnesota's Farmer-Lender Mediation Act (see Minn. Stat. Ann. Ch. 583) applies to your property and then ensure compliance with the act if necessary.

Minn. Stat. Ann. § 582.041 establishes standards for the homestead designation, so as not to adversely affect the value of the remaining property. See, e.g., *Fed. Land Bank v. Carlson*, 398 N.W.2d 595 (Minn. Ct. App. 1986) (trial court correctly found that mortgagor's designation of a homestead, which left a landlocked parcel for sale, unreasonably affected the value of the remaining parcel and violated Minn. Stat. Ann. § 582.04 (1985), the predecessor of Minn. Stat. Ann. § 582.041). The designation may be made by anyone with the right of redemption and must be filed with the foreclosing mortgagee, the sheriff, and the county recorder at least 10 business days before the sale, or it must be filed with the court in a foreclosure by action.

Any amount of the property may be included in the designation. Presumably, the statute does not allow a mortgagor to designate more than the maximum amount of acreage exempt from an execution sale.

Notice of Separate Tract Designation

If the mortgage is on real property that is agricultural property and the property contains separate tracts, a notice that the separate tracts may be sold and redeemed separately must be served with the summons and complaint. Minn. Stat. Ann. § 582.042.

Other Notices to Be Served with Summons

For residential properties, additional notices must also be served with the summons. These notices include statutory notices for "Help for Homeowners," "Notice of Redemption Rights," and "Foreclosure Advice to Tenants." Minn. Stat. Ann. § 580.041, subs. 1(a), 1(b), 2(a), and 2(b) and Minn. Stat. Ann. § 580.042. Counsel should review these statutory provisions closely as they require specific requirements, such as using colored sheets of paper. In addition, Minn. Stat. Ann. § 580.041, subd. 1(b) also requires that the notices under that section be delivered to the mortgagor with each subsequent communication about the foreclosure up to the date of sale.

Service

The method of service of the summons and complaint is provided in Minn. R. Civ. P. 4.

If personal service is used, the summons and complaint must be served together pursuant to Minn. R. Civ. P. 4.03. If personal

service cannot be obtained, service may be obtained by publication of the summons as provided in Minn. R. Civ. P. 4.04.

Prosecution of the Action

Like most other civil actions in Minnesota, a foreclosure by action is governed by the Minnesota Rules of Civil Procedure, except as provided otherwise in Minn. Stat. Ann. Ch. 581. Minn. Stat. Ann. § 581.01.

If any defendant files an answer, the matter should be prepared for trial as any other civil action (i.e., discovery should be completed, etc.). As in any other civil action, the defendant may assert defenses. The following are the most common defenses to a foreclosure by action:

- The plaintiff's failure to meet statutory or contractual prerequisites for foreclosure, such as failure to give proper notice
- Bad faith, fraud, or unfair dealing of the lender
- Standard contractual defenses, such as breach of contract or failure of consideration

See *Anderson v. Lee*, 73 Minn. 397, 76 N.W. 24 (1898).

Several of a mortgagor's defenses to a foreclosure may be barred by Minn. Stat. Ann. § 513.33, which provides that "a debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and debtor." Minn. Stat. Ann. § 513.33, subd. 2. A credit agreement is "an agreement to lend or forbear repayment of money, goods, or things of action, or otherwise extend credit, or to make any other financial accommodation." Minn. Stat. Ann. § 513.33, subd. 1(1).

In *Carlson v. Estes*, 458 N.W.2d 123 (Minn. Ct. App. 1990), the court found that a mortgage, promissory note, and mortgage collateral agreement together constituted a credit agreement within the definition of Minn. Stat. Ann. § 513.33, subd. 1(l). The debtor in *Carlson* asserted that the lender promised not to record the mortgage. The court found that the oral promise, in itself, was not a credit agreement within the terms of Minn. Stat. Ann. § 513.33. The court, however, found that the oral promise would be inadmissible under the parol evidence rule if the mortgage, promissory note, and mortgage collateral agreement were unambiguous. The debtor in *Carlson* furthermore asserted that the bank orally agreed to accept a lower interest rate than reflected in the written documents. The court found that this promise constituted a credit agreement and therefore was barred by Minn. Stat. Ann. § 513.33.

In *Fronning v. Blume*, 429 N.W.2d 310 (Minn. Ct. App. 1988), the debtor alleged the lender acted in bad faith by promising to extend credit and later refusing to do so. The debtor further alleged that his course of dealing with the lender entitled the debtor to further credit or a warning that the lender would not grant further credit. The court rejected both arguments, finding that the promise and course of dealings constituted credit agreements that were unenforceable if not in writing. The debtor further alleged that the lender fraudulently obtained a mortgage by stating the written agreement was only a description of the debtor's property and had no legal significance. The court found that evidence concerning party's intent when entering into the written mortgage was admissible and not barred by parol evidence rule, without ever mentioning Minn. Stat. Ann. § 513.33.

An oral promise to postpone a foreclosure sale is barred by Minn. Stat. Ann. § 513.33. *Brisbin v. Aurora Loan Servs., LLC*, 679 F.3d 748, 752–53 (8th Cir. 2012); *Bracewell v. U.S. Bank Nat'l Ass'n*, 748 F.3d 793, 795 (8th Cir. 2014).

If no answers have been served within 21 days after personal service (or 21 days after first publication as to service by publication), the plaintiff may move for default judgment and the following documents should be prepared and submitted to the court:

- Affidavit of default
- Affidavit of non-military status
- Motion for judgment by default –and–
- Proposed findings of fact, conclusions of law and order for judgment

If the court orders a default judgment, the notice of taxation of costs and disbursements, supporting affidavit, and proposed judgment and decree should be submitted to the court administrator (the administrator may prefer to prepare the judgment and decree). The contents of the judgment and decree are provided in Minn. Stat. Ann. § 581.03.

A certified copy of the judgment and decree should be delivered to the sheriff and serves as their authority for making the sale. Minn. Stat. Ann. § 581.03.

Sheriff's Sale

The sale is treated as a judgment sale pursuant to Minn. Stat. Ch. 550. Minn. Stat. Ann. § 581.03.

Six weeks' posted and published notice of the time and place of the sale must be given (Minn. Stat. Ann. § 550.18):

- Six weeks' posting of notice of the sale is completed "in a manner likely to attract attention, in each of three of the

most public places in the town, city, district, or county to which the subject matter of the notice relates, or in which the thing of which notice is given is to occur or to be performed.” Minn. Stat. Ann. § 645.12.

- Six weeks’ publication is satisfied if conducted in the same manner as publication of the notice of foreclosure sale regarding foreclosure by advertisement. See [Commercial and Residential Foreclosure by Advertisement and Reinstatement and Redemption \(MN\)](#) for guidance.

When foreclosing a mortgage by action, it is important to coordinate with the sheriff’s office. Some sheriffs prefer to handle the posting and publication of the notice of sale. Others prefer to have the foreclosing attorney handle those tasks. Communication is key.

Notice of the sale must be served on the judgment debtor, if a resident of the county, in the manner provided by Minn. R. Civ. P. 4. Minn. Stat. Ann. § 550.19. To avoid potential constitutional arguments, the safest course is to attempt service on the judgment debtor wherever they are located as provided in Minn. R. Civ. P. 4. If the property contains a portion of the homestead of the debtor, the debtor must be notified that the homestead may be sold and redeemed separately from the remaining property. This notice must be included with the notice of sale. Minn. Stat. Ann. § 550.175, subd. 1. Minn. Stat. Ann. § 550.175, subd. 2 specifies the form of the notice of homestead designation. Should the debtor designate the legal description of the homestead property to be sold separately by serving such designation on the executing creditor, the sheriff, and the county recorder by 10 business days before the sale is scheduled, the sheriff must offer and sell the designated homestead property, and the remaining property, separately. Minn. Stat. Ann. § 550.175, subds. 3 and 4. The debtor may redeem the designated homestead, the remaining property, or the entire property together. The period of redemption for any of the above is the same period of redemption for the entire property. Minn. Stat. Ann. § 550.175, subd. 5.

The sale is conducted by auction between 9:00 a.m. and sunset and the property must be sold to the highest bidder. Minn. Stat. Ann. § 550.20. The mortgagee, or one claiming under the mortgagee, may purchase at the sale.

Confirmation of Sale

After the sale, the sheriff’s report of sale should be submitted to the sheriff for signature. You will want to prepare the form of the report prior to the sale and complete it after the sale is conducted.

You should then move the court to confirm the sale. If the court determines that justice has not been done, it may order

a resale of the property on such terms as are just. Minn. Stat. Ann. § 581.08.

The order confirming the sale, and evidence of publication, should be filed with the court administrator.

After the order confirming the sale has been issued, you will need to have the sheriff execute the certificate of sale. Minn. Stat. Ann. § 581.08. Most sheriffs will want you to prepare the certificate. A certificate that states a five-week redemption period must be recorded within 10 days after the sale. Minn. Stat. Ann. § 580.12. Any other certificate of sale must be recorded within 20 days of the confirmation of the sale. Minn. Stat. Ann. § 581.08.

Upon confirmation of the report of sale, the court administrator should enter satisfaction of the judgment to the extent of the sum bid at the sale, less expenses and costs, and for any balance of such judgment (i.e., a deficiency), except as to property used in agricultural production, execution may issue. Minn. Stat. Ann. §§ 581.09 and 582.30.

Any surplus over the mortgage debt, with costs and expenses for the sheriff’s sale, is paid into court for the benefit of the mortgagor or person entitled thereto. Minn. Stat. Ann. § 581.06.

Redemption

The process of redemption in a foreclosure by action is almost identical to the redemption process in a foreclosure by advertisement. See [Commercial and Residential Foreclosure by Advertisement and Reinstatement and Redemption \(MN\)](#) for further information. The key difference is that the time to redeem runs from the date of the court’s order confirming the sale, not from the date of sale. Minn. Stat. Ann. § 581.10.

Also, the amount necessary to redeem in a foreclosure by action is as follows:

- Amount bid for the property at the sale
- Interest in the amount to be paid on the mortgage debt at the rate stated in the certificate of sale, and if no rate is provided, at the rate of 6%
- Amounts paid pursuant to Minn. Stat. Ann. § 582.03 (amounts paid by the purchaser at a foreclosure sale for taxes, insurance, prior mortgages, etc.) –and–
- Amounts paid pursuant to Minn. Stat. Ann. § 582.031, subd. 3, which allows the holder of the mortgage or sheriff’s certificate to add costs incurred to protect the vacant premises from waste to the principal balance of the mortgage (These costs are added to the redemption price if incurred after the foreclosure sale.)

Mark W. Vyvyan, Shareholder, Fredrikson & Byron P.A.

Mark is a litigator, known for winning important cases for his clients in areas like commercial landlord-tenant disputes, complex foreclosures, construction disputes, oil and gas litigation, and significant boundary and easement disputes.

Although Mark is a litigator and focuses his practice on real estate disputes, he also has experience handling real estate transactions, which makes him a more effective litigator. Mark has tried cases for both plaintiffs and defendants in states across the Upper Midwest. Mark also mediates real estate-related matters, including residential and commercial construction disputes, commercial landlord-tenant matters and boundary and easement disputes. Mark is well-known for his hard work, responsiveness and expertise in achieving great results for his clients.

This document from Practical Guidance[®], a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis[®]. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.