

FORECLOSURE DEFENSE:

A STRATEGIC GUIDE TO FORECLOSURE 2020



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NEW JERSEY FORECLOSURE PROCESS – 2020

Since the housing bubble burst in late 2007, foreclosures have spiked across the country. New Jersey was especially hard hit and is one of the few states in the union that continues to see an increase in foreclosure actions even now, almost ten years later.

Among the causes of New Jersey's continued foreclosure crisis is the complexity of the State's foreclosure process. New Jersey is a "judicial foreclosure" state – meaning all foreclosure actions must be prosecuted by attorneys before judges in the court system. This structure is intended to impose a level of due diligence on lenders and assure an accurate disposition on the merits of a lender's claim. The result however, is a bloated legal field that incentivizes cutting corners and rushed, even if not prompt, resolutions.

This is why a proper foreclosure defense is so important. The homeowner is the only person who understands their situation and truly cares about their home. Therefore they must be the one to stand up for their rights.

The problem for many individuals is that the system is confusing, complicated, and overwhelming. The average homeowner is not a legal expert, nor do they truly have the resources to understand a growing and nuanced area of the law. The internet is rife with foreclosure defense theories – some of which worked in 2007, some of which work now, some that work in other states, and some that never had a shot. The key to asserting a proper defense is understanding your rights, your lender's obligations, how the court system works, and the rules, statutes, and case law that control everything.

The following pamphlet attempts to summarize that information based on our representation of hundreds of foreclosure clients in New Jersey over the course of the last eight years. The pamphlet outlines the anticipated foreclosure process when you retain the attorneys at Denbeaux & Denbeaux for your foreclosure defense. This outline does not hold true in every case, nor are the suggested timelines guaranteed. Rather, we offer this information to hopefully provide some clarity as your case progresses.

DISCLAIMER: This pamphlet is for informational purposes only, not for the purpose of providing legal advice, nor is it a guarantee of a particular result. This pamphlet should not be construed as an offer to provide legal services and your receipt and or review of this document does not create an attorney client relationship. You should contact your attorney to obtain advice with respect to any particular issue or problem.

NEW JERSEY FORECLOSURE PROCESS – 2020 - SUMMARY

NOTICE OF INTENT TO FORECLOSE (“NOI”):

Permitted any time after default (generally sent 3 months or more after default)

Will state the lender’s intent to foreclose, will identify the lender, and will state the current amount owed.

– Upon receipt of this NOI, each consumer has the right to requires the company claiming to own your mortgage to Validate the Debt. This is a right provided by federal law, specifically the Fair Debt Collection Practices Act which provides that an alleged debtor has a right to demand that the creditor validate the debt before pursuing the claim further.

There are strict time deadlines in this, and you should act immediately upon receipt of the NOI to send the Debt Validation letter. Nerdwallet does a good job of explaining how to prepare and send a Debt Validation Letter: <https://www.nerdwallet.com/blog/finance/debt-validation-letter/>

This should be standard practice for foreclosure defense attorneys in New Jersey. Alas, it is not, and each consumer should ensure that a Debt Validation letter is properly served on every attempted foreclosing plaintiff.

Proper preparation and service of a Debt Validation letter goes a long way to protect consumers from errors in aggressive foreclosure practices, and also serves to delay the process of the foreclosure itself.

New Jersey leads the nation again on foreclosures and delays in the process. This in turn puts pressures on lenders and debt collectors to more aggressively pursue claims which, again in turn, causes mistakes to occur. If a mistake – or worse – is discovered, it gives the borrower leverage in the foreclosure litigation.

THE FORECLOSURE COMPLAINT:

Filed at least 30 days after receipt of the NOI

The Complaint is the formal initiation of a foreclosure action. It must be served on each Defendant (including the Homeowner) within six months of filing.

– This time frame will be extended by up to another 30 days if a timely Debt Validation notice is served upon the creditor.

THE ANSWER:

Must be filed within 35 days of the Defendant’s receipt of the complaint

The Answer is either “Contesting” – it challenges the Plaintiff’s right to foreclose – or “Non-Contesting”.

FINAL JUDGMENT APPLICATION:

Served on homeowner at least 14 days after your receipt of the FFA Notice

This is Plaintiff's application to set the amount due by you to the bank. You have 10 days to object to this motion, if it contains an error.

FINAL JUDGMENT ORDER:

Entered no less than 10 days after receipt of the FJ Application, often a month or longer depending on the Court's caseload

This Order sets the amount due to the Plaintiff and gives the County Sherriff permission to conduct a Sherriff's Sale.

SHERIFF SALE:

Generally scheduled 1 – 2 months after entry of final judgment

The sale of the house to the bank or third party – this is NOT THE EVICTION DATE. You will be provided at least 10 days' notice and may adjourn the sale a total of 4 weeks.

EVICTION:

Held a month or more after the sheriff sale

The eviction date is the date by which you must be out of the house.

NEW JERSEY FORECLOSURE PROCESS – 2020

The following attempts to provide clarity to the New Jersey foreclosure process when a defense is raised on your behalf. The timelines are estimates unless otherwise noted and nothing contained herein guarantees any particular result. SEE THE DISCLAIMER ON THE FIRST PAGE OF THIS DOCUMENT

GENERAL INFORMATION

- a. Your Loan consists of two equally important documents: the Note (the promise to pay) and the Mortgage (the agreement that should you fail to pay, the lender may take your home).
- b. Default is an event described in your Note and Mortgage generally defined as missing your monthly loan payment.
 - a. Default in some cases may also refer to a “procedural default” arising from a defendant’s failure to answer the complaint within 35 days. This is not the same as a default on your loan.
- c. The Lender is the entity to whom your debt is ultimately owed.
- d. Your Loan Servicer is the entity that collects your monthly mortgage payments.
- e. The Plaintiff is the entity alleging ownership of your loan and thus possessing the right to foreclose.
- f. The Defendants are the Homeowner and any entity with liens on the property subordinate to the Plaintiff’s.

THE FORECLOSURE COMPLAINT

- a. A foreclosure action is initiated when the Plaintiff files a Complaint in the Superior Court, Chancery Division of the county in which your home is located.
- b. Before filing the Complaint, the following must occur:
 - a. You must be delinquent (past due) on your loan.
 - b. With few exceptions, there cannot be a pending, complete, loss mitigation application.
 - c. The Lender must have sent you a Notice of Intent to Foreclose at least 30 days before filing the complaint.
- c. Once the Complaint is filed, it must be personally served on you.
 - a. If the process server cannot serve you directly, the lender may be permitted to serve you via mail.
- d. The Foreclosure Complaint is required to provide the homeowner with relevant information regarding the loan, and assert the material elements of the Plaintiff’s claim.

THE ANSWER

- a. Once you, the Defendant Homeowner, are served with the Complaint, you must file an Answer within 35 days of service. If no Answer is filed within the time proscribed, (procedural) default will be entered.
- b. The Answer can be either “Contesting” or “Non-Contesting”
 - a. A Non-Contesting answer concedes the case to the Plaintiff.
 - b. In order to enforce your rights and assert a defense, you must file a Contesting Answer.

- i. It must contain more than “mere denials” – it must specifically state the challenge to Plaintiff’s case.
- ii. It may assert Affirmative Defenses (defenses to which the Defendant has the burden of proof). Some of the most common Affirmative Defenses are:
 - 1. Standing – Challenging whether the Plaintiff has the right to sue.
 - 2. Breach of Contract – Claiming that the Plaintiff breached the agreement first.
 - 3. Fraud – Asserting that the Loan was entered into based on misrepresentations of the Lender or Lender’s agent(s).
- c. The Answer may also contain Counterclaims (claims that the Plaintiff has damaged you), however, they must be *germane* to the foreclosure action – they must relate to the *mortgage*, but *cannot* relate to the note. Generally, there are no germane counterclaims.

MOTION TO VACATE (PROCEDURAL) DEFAULT

- a. If a timely answer is not filed by the Defendant, we may be able to file a Motion to Vacate Default. – This is not the default on your loan, but rather a reference to your non-compliance with court rules.
- b. The motion to vacate default must prove that there was “Good Cause” for Defendant’s failure to Answer within the 35 days required by court rule. To prove “good cause” the Defendant must show that:
 - a. They did not act in bad faith in failing to comply with the court rules, and
 - b. That there are meritorious defenses to the foreclosure.
- c. If we are successful in our motion, the court will permit us to file an Answer and will schedule a Case Management Conference.
- d. If our motion is denied, the Plaintiff will be permitted to proceed towards obtaining a Judgment. (See *Answer Stricken Below*)

CASE MANAGEMENT CONFERENCE

- a. After the Answer is filed, the court may conduct a case management conference. It may be in person or by phone. In either event there is no need for the client to attend.
- b. At the conference, the court will set deadlines and ask if there is any chance of settlement. (Settlement options are discussed later in this pamphlet)
 - a. Some of the deadlines commonly set by the Court may be:
 - i. Discovery End Date – usually 3 – 4 months after the conference
 - ii. Dispositive (Summary Judgment) Motions – must be filed approximately two months before the trial.
 - iii. Trial – usually 5 – 10 months from date of conference.

DISCOVERY

- a. Discovery is the exchange of information *relevant* to the case between the parties.
- b. Discovery consists of four potential demands:
 - a. Interrogatories – written questions and answers (must be answered within 60 days of receipt)
 - b. Notice to Produce – written demands that certain documents be produced (must be provided within 35 days of receipt).

- c. Requests for Admission – written questions that are either admitted or denied (must be provided within 30 days of receipt).
- d. Depositions – an oral question and answer period under oath (any time before the close of discovery).
- c. The Plaintiff may or may not request discovery from you.
 - a. If requested, these demands must be responded to in accordance with deadlines set by court rule or at the case management conference.
 - b. Based on information you provide, the attorneys at the firm will draft proposed responses for your review. You will then conference with the attorney to discuss any changes that need to be made before you sign a certification as to the truthfulness of your responses.
 - c. If a deposition is requested, you will meet with an attorney prior to the deposition to discuss what to expect.
 - i. The deposition will usually be held at a mutually convenient location and could take anywhere from an hour to a full day.
- d. We will send interrogatories and Notice to Produce to the Plaintiff, but will only requests depositions or admissions on a case by case basis.
- e. The Plaintiff may or may not respond to our demands.
 - a. If they respond – we will review for completeness.
 - i. If necessary and appropriate, we may send a letter requesting more complete answers, request a conference with the judge or file a motion to compel or dismiss.
 - b. If they don't respond – we may file a motion to compel, motion to dismiss, or motion *in limine* (a motion heard directly before trial) to bar the use of information not previously produced at trial.

MOTION FOR SUMMARY JUDGMENT

- a. Once discovery is completed, the Plaintiff may elect to file a motion for summary judgment (“MSJ”) – an MSJ is a motion asking the court to determine that, as a matter of law, Plaintiff has the right to foreclose.
 - a. For the Court to grant this motion there must not be any questions of material fact.
 - b. Based on the documents and information you provide, and that we receive from the Plaintiff, we will try to raise material questions of fact.
 - c. There is no testimony at a Motion for Summary Judgment. Instead, the court relies on Certifications or Affidavits from individuals with personal knowledge.
- b. Plaintiff must file their motion at least 28 days before the return date (the date the court will hear the motion).
 - a. Return dates are set by the court and generally occur every other Friday.
 - b. We have the opportunity and right to oppose Plaintiff’s motion. Our opposition brief must be submitted no less than 10 days before the return date. All submissions to the court are done via the court’s online submission system: JEFIS. However, courtesy copies are sent to both the court and opposing counsel.
 - c. Plaintiff then has the opportunity to reply to our Opposition. Plaintiff’s Reply must be submitted no less than four days before the return date.
 - d. On the Return date, the court may or may not hear oral argument.

- e. If oral argument is heard, we will appear on your behalf. You need not appear but are permitted to do so if you choose. However, you will not be afforded the opportunity to speak during the motion.
- c. At oral argument the court will permit each side the opportunity to present their case and the Judge may ask questions as he or she sees fit.
- d. At the conclusion of oral argument the court could do several things:
 - a. It could issue an order from the bench either granting or denying Plaintiff's motion;
 - b. It could reserve its decision(that is, not make a decision from the bench) and instead mail the order either granting or denying at a later date (usually within a week);
 - c. It could request further briefing from one or both parties;
 - d. It could adjourn for further argument at a later date.
 - e. Most of the time the court will either make its decision that day or reserve and send the order the next week.

TRIAL

- a. If Plaintiff's motion for summary judgment is denied, or no summary judgment motion is filed, a trial will be scheduled.
- b. YOU MUST APPEAR AT THE TRIAL.
- c. The trial is a bench trial. A bench trial is one where the judge sits as the fact finder instead of a jury.
- d. At the trial, several things may happen:
 - a. The judge may request that the attorneys conference together with the judge prior to the trial.
 - i. This conference may be to discuss the facts or theories on the case, the possibility of settlement, whether there are any evidentiary issues, or may simply be to discuss the day's schedule.
 - b. The parties may separately discuss settlement (see *Settlement* below).
 - c. The court will then hear any motions *in limine* filed by the parties – motions heard the morning of trial.
 - d. The parties may then offer an opening statement.
 - i. Plaintiff presents its statement first.
 - e. Plaintiff will call its first, and generally sole, witness.
 - i. Plaintiff will conduct a direct examination of the witness in an effort to elicit the information necessary to prove its case and will aim to authenticate documents similarly necessary.
 - ii. We will then have the opportunity to cross-examine the witness.
 - 1. During cross examination our goal is to elicit information contradictory to Plaintiff's position and or information necessary to proving our defense(s).
 - iii. Plaintiff will then have the opportunity to redirect, after which we will have the opportunity to re-cross. This repeats until the parties are satisfied.
 - f. Plaintiff may call you as a witness.

- i. In order to be called as a witness, you must have been subpoenaed by the Plaintiff at least 5 days before the trial.
- g. After Plaintiff concludes its case in chief, we will have the opportunity to present our case – e.g. call witnesses.
 - i. Often we will not call a witness.
- h. After we have concluded our case in chief, the parties will make closing arguments. We go first this time.
- i. After oral arguments have concluded the court will issue its decision – either the court will strike our Answer or dismiss the Complaint.
 - i. If the Complaint is dismissed it will likely be without prejudice – this means that the Plaintiff has the right to refile a complaint in foreclosure at a later date
 - ii. If our Answer is stricken, the Plaintiff is permitted to proceed for a judgment.

COMPLAINT DISMISSED

- a. Your complaint may be dismissed in one of three ways – unilaterally by the Plaintiff, by the court granting a motion to dismiss, or by winning at trial.
- b. In almost all instances, a complaint that is dismissed will be dismissed “without prejudice” – meaning that the Plaintiff can refile their complaint and try again.

ANSWER STRICKEN (POST-TRIAL / SUMMARY JUDGMENT LOSS)

- a. The order from the court following a Trial or Summary Judgment loss will strike your Answer (deem it “non-contesting”) and the matter will then be sent to the Office of Foreclosure for further proceedings.
- b. At this point, the process generally slows down.
- c. After the answer is stricken you should expect to receive two documents:
 - a. *Fair Foreclosure Act (“FFA”) Notice* – this notice informs you that the bank is prepared to move for Final Judgment and that you must let them know within 10 days whether or not within 45 days you will be able to redeem (pay back what you owe in its entirety). If you don’t have the funds to redeem, there is often no reason to respond to this letter.
 - b. *Final Judgment Application* – this is an application by the plaintiff to set the amount due by you to the bank.
 - i. The Plaintiff cannot make this application sooner than 14 days after your receipt of the FFA Notice.
 - ii. Once we receive this document, we have 10 days to object.
 - 1. Objections have recently been limited by the Supreme Court and thus only objections to the calculation of the amount due are permissible.
 - 2. You must review the Application and inform us as to whether or not the numbers used are wrong.
 - a. For example, if you have been paying your taxes or homeowner’s insurance but the bank states that they have, we need to raise that issue with the court.

- iii. If the Office of Foreclosure accepts our objection, the matter will be sent back to the judge for further proceedings.
 1. The judge may request further submissions, testimony, or may rule on the submissions previously submitted.
- iv. Eventually, the court will execute an Order setting the amount due and will also execute a writ of execution – the document that gives the sheriff the authority to sell the house at a sheriff sale.

APPEAL

- a. An Appeal is a legal challenge to the trial court’s determination.
- b. An appeal cannot be filed before the entry of the Final Judgment Order and must be filed within 45 days thereafter.
 - a. In certain very limited circumstances the Appellate Division *may* accept an Interlocutory Appeal – an appeal filed before the entry of a Final Judgment – but traditionally they are not accepted in foreclosure matters.
- c. If appropriate, a Notice of Appeal is filed with the Appellate Division who then sets a briefing schedule.
- d. Once that schedule is set, the Appellant (the party bringing the appeal) will file a brief that will then be opposed by the Appellee. If necessary, the Appellant may then file a reply brief.
- e. Once the matter is fully briefed, the Court may request Oral Argument at some later date.
- f. In total, the Appeal process may take up to a year or longer.
 - a. Unfortunately, a pending Appeal does not prevent the lender from proceeding to a sheriff sale or eviction.
- g. If we are successful on Appeal, the matter will be returned to the trial court to act in accordance with the Appellate Division’s decision and the lender must “wind back” any actions it has taken.

MOTION TO VACATE JUDGMENT

- a. If a judgment is entered against you, you may be able to file a Motion to Vacate Judgment (“MVJ”).
- b. An MVJ is incredibly difficult to obtain as you generally must demonstrate excusable neglect and present a meritorious defense.
 - a. You generally must file your motion within one year of judgment.
 - b. “I was working with the lender”, or “I didn’t know I had to act” do NOT meet the excusable neglect threshold.
- c. If we are successful in our motion, the court will permit us to file an Answer and will schedule a Case Management Conference.
- d. If our motion is denied, the Plaintiff will be permitted to proceed towards sheriff sale or eviction.

SHERIFF SALE

- a. After the final judgment order is entered, the Court will issue a Writ of Execution and the sheriff will schedule a sale of the house.
- b. THIS IS NOT THE EVICTION DATE.
- c. You will receive at least ten days’ notice – often more – of the sale date.

- d. We can adjourn the sale twice for two weeks at a time (four weeks total).
- e. The sale may also be adjourned by the sheriff or the plaintiff of their own volition.

EVICITION

- a. As some point after the Sheriff Sale, an eviction will take place.
- b. The eviction date is the date by which you must be out of the house.
- c. You will receive at least two weeks' notice – often more – of the eviction date.
- d. The eviction can only be adjourned by court order or with consent of the new owner (often the plaintiff).

SETTLEMENT

- a. Modification
 - a. A modification permanently adjusts the terms of your loan and puts you back into a performing contract with the lender.
 - b. There are many modification programs that you may qualify for, but the most common are “in house” modifications – unique programs offered by lenders and servicers.
 - c. You must apply for a modification with your lender or loan servicer and will usually be required to provide information regarding your assets, liabilities, income, and expenses.
 - d. If you qualify for a modification you will often be required to complete a trial period plan – usually making your projected monthly payment for three consecutive months – before you are offered a permanent modification.
 - e. The terms of the modification will be unknown until they are offered to you, but will usually be tailored to create a monthly mortgage payment equal to 31% of your gross monthly income. However, it is not unusual to see some or all of the following:
 - i. Payment terms extended to 40 years
 - ii. Significant balloon payments – payments that come due in one lump sum – due at the last payment
 - iii. Required escrow of insurance and taxes
 - iv. Amortized payoff of back due taxes and insurance
 - f. If you are offered a modification, but believe that the terms are incorrect or were reached in error, you have the right to file an appeal with the lender.
 - g. When considering the terms of a modification, you must ask yourself at least these two questions:
 - i. “Can I afford the monthly payment along with my other monthly expenses?”; and
 - ii. “Does this offer make financial sense for me and my family?”
- b. Deed in Lieu of Foreclosure / Cash for Keys
 - a. A Deed in Lieu of Foreclosure (“DIL”) or Cash for Keys offer is an offer extended by the lender to take the home in exchange for a nominal sum.
 - b. Usually the lender will require the homeowner to vacate the home within 30 days and the home must be left in “broom clean” condition.
- c. Sell the Home

- a. Depending on whether or not you have equity in the home – the value of the home is more than the debt owed on the home – you can either sell the home or attempt a short sale.
- b. Sale of Home
 - i. You own your home and are permitted to sell it at any time, so long as you can pay off the entire debt secured by the home (including any subordinate liens).
- c. Short Sale
 - i. If you do not have equity in your home, you may apply to the lender to participate in a short sale – selling your home for less than you owe.
 - ii. The bank must agree to accept less than you owe.
 - iii. If you owe money to more than one lender, it will be very difficult to complete a short sale because the subordinate lien holders will often receive little to no money.
- d. Short Payoff
 - a. A short payoff is a resolution whereby you negotiate with the bank to pay off your debt for less than you owe.
 - b. It is highly unlikely that a bank will agree to such a resolution.

ODDS AND ENDS

- a. Foreclosure Mediation – Court sponsored negotiation facilitated by a third party neutral
 - a. Pros
 - i. Because it is court sponsored, banks may be more proactive in their analysis.
 - b. Cons
 - i. May be more time consuming since you must appear at mediation to discuss issues that could be transmitted via letter.
 - ii. Does not offer any solution(s) not otherwise available.
- b. Reinstatement and Redemption
 - a. Reinstatement occurs where you pay back the entire amount past due and continue making payments under the terms of your loan. You may reinstate any time before final judgment.
 - b. Redemption allows you to pay off your loan (including all fees and penalties) at any time up to 10 days after the sheriff sale.

BEST PRACTICES

- a. Communication – it is imperative that you communicate with your lawyer. Often times nothing will happen with your case for weeks on end. However, if you ever want an update on where your case stands, you should not hesitate to reach out to the firm. Equally important is to be responsive when the firm reaches out to you. There may be instances during the litigation where we need a prompt response from you in order to advocate on your behalf. Non-communication could cause irreparable harm to your case.
- b. Document management – You should provide every letter, notice, communication you receive from your lender or servicer to your lawyer. Often times it will be meaningless, but you should let your lawyer make that call.

- c. Records – Keep good notes about everything that happens in regard to your loan; who you spoke to, when, and about what. Again, it may ultimately be irrelevant, but it may also be the key to a valid defense to the foreclosure – let your lawyer decide.
- d. Time Management – Don't procrastinate. Sticking your head in the sand is the easiest way to lose your rights.
- e. Finance Management – While the foreclosure action is progressing, you will not be actively paying your mortgage. You should use this opportunity to save the money you would otherwise be paying to your lender and begin to repair your finances.

THE DENBEAUX & DENBEAUX ADVOCACY STRUCTURE-

When you retain Denbeaux & Denbeaux, you are retaining a team of individuals as advocates for your cause. In your foreclosure matter, that team is led by Joshua Denbeaux. Joshua will be primarily responsible for your case and will at all times be kept abreast of your litigation. Day to day, your case will be managed by one or more associate attorneys. Those attorneys will work together, with the assistance of our talented support staff, to advocate on your behalf.

As a result of this structure, you will likely receive emails from various people within the firm at varied points during and after your litigation. To that end, we strongly suggest that you add the following email addresses to your email contact list to ensure that you receive all communications from the firm:

- a. Partners
 - a. Joshua W. Denbeaux, Partner; jdenbeaux@denbeauxlaw.com
- b. Support Staff
 - a. Alison May; amay@denbeauxlaw.com
 - b. Saffit Gaynor; sgaynor@denbeauxlaw.com
- c. General Mail
 - a. pr@denbeauxlaw.com