

How to Stop a Trustee Sale

How to Stop a Trustee Sale which is Coming up Fast

Disclaimer: This is not legal advice. You are to seek legal counsel in all legal matters.

This is a quick guide to give you ideas and options of what to do if you find yourself in the situation of a trustee sale coming up fast.

Two possible ways:

1. Declare bankruptcy (BK) for the purpose of delaying the sale.
2. File a civil action and get a Temporary Restraining Order (TRO).

The quickest solution is to file for bankruptcy. There are two types of bankruptcy filings: Chapter 7 and Chapter 13.

With a Chapter 7 bankruptcy filing all your unsecured liens go away but the house lien or mortgage is not included. A Chapter 13 will stay a foreclosure sale but the bank will be able to follow up and pursue after the BK has been resolved.

You can do a bankruptcy filing yourself or with the help of a paralegal. Paralegal usually are more reasonably priced than lawyers. To do it yourself, please go to www.law.cornell.edu/rules/frbp.

The Civil Action Strategy

The other option to delay or stop a foreclosure action against you is to use a law suit against the bank. As a debtor you have the right to challenge the bank to produce proof of claims before they can proceed with the sale.

The Trustee is not obliged to stop the sale unless he is:

1. ordered by the court through a preliminary injunction or temporary restraining order (TRO);
2. made personally liable for the action through a Notice of Cease and Desist;

This means you must file a complaint or petition with your Superior, Circuit or Federal Court.

Trustee Sale Process

After the bank issues a Notice of Default (NOD), the next step is to send you a Notice of Trustee Sale (NoTS). This NoTS will have a date, time and location of the auction.

Typically, the auction will be held at the court house. Potential buyers have to present a certified cheque in order to be able to bid on the property.

After the sale the new owner will be issued the new title to the property after their payment.

The new owner will have to evict the homeowner from the property. This is done through an unlawful detainer complaint or eviction complaint. This is a court action which determines who has the legal right

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to the possession of real property. Before this takes place the Trustee has to write an affidavit and record this with the County Recorder's office.

Delay Tactic #1: Giving the Trustee a Cease and Desist Notice

Once you have filed your civil action you will be issued a case number. With this case number you create a document called a Lis Pendens which you also file at the County Recorder's office. This will give notice to all parties that there is a controversy on the title and that if they wish to buy the property they do so knowing that there will be a clouded title issue. They will not be able to gain title and title insurance even after they buy the property.

This is a big deterrent to investors and up to this point the Trustee is held harmless because he is acting at the request of the Beneficiary – the bank.

Once you have your Lis Pendens you should include a Notice of Cease and Desist and send or fax both documents to the Trustee.

So far the Trustee had been immune from civil action because he was acting on good faith. After sending the notice they are now informed that there is a problem with the title. If they proceed, they will be named an accessory to the crime.

In most cases this should push back the sale for a few weeks. If the Trustee does not comply then you have to add him as a co-defendant on your civil action. He is now liable for 50% for the suit and if he does not show up to defend himself he will also be liable for 50% of the damages due to default.

Delay Tactic #2: Subpoena the Trustee

The Trustee has to sign an affidavit and record it with the County Recorder's office before the sale can be done. Since you now have a pending civil action you now can subpoena the Trustee to come and testify under oath that everything is in order and has been verified. It means that he personally verified that the bank owns the note and has the right to foreclose. He swears that the homeowners were properly notified and followed the State Civil Procedures for the foreclosure.

Close to 100% of the time the Trustee will not testify under oath to these requests. Makes you wonder why.

Without the affidavit of the Trustee the unlawful detainer complaint cannot be executed. You get to stay in your home until the Trustee signs the affidavit.

You can get the form for a subpoena in court with the court clerk. Fill it in and send it to the Trustee. To learn specifics on how to complete the forms please consult with a legal professional.

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Delay Tactic #3: Order a Temporary Restraining Order

A Temporary Restraining Order (TRO) gives you only a short stay of typically 10 to 14 days. Judges always almost grant a TRO. To file a TRO you need to have an open civil action. You must also notify the other side of your motion for the TRO. You can notify the other party using any of the following ways:

- In person or with a process server;
- In writing via certified mail or courier;
- Via telephone (have a witness);

Always please confirm these ways with your legal expert since each state has different requirements.

Rules of the court regarding the TRO

1. When you submit a Motion for a Temporary Restraining Order you must also supply the court with an Order for a Temporary Restraining Order;
2. With each notice submitted to the court there must be a certificate of service;
3. What you give to the court you also must give to the other party (defendant); what you give the defendant you must give to the court;

The court system has certain rules to follow, hence it is a system. The judge cannot see your documents unless they are in proper order. For example, if you did not serve the other party with your request for a TRO then the judge cannot see your request you present to him.

When people complain that judges seem to rule for banks, this is only because the banks come to court prepared by following the legal system and the homeowner does not. By default the bank wins.

Elements of a TRO

A TRO must have the following four parts:

1. If the action were allowed to proceed, it will cause greater harm to the victim affected (the moving party (evicted homeowner));
2. If in granting the motion, the non-moving party is not caused greater harm in the process;
3. Likelihood of success is based on merits; evidence presented to the court presents the high likelihood of prevailing by the moving party;
4. It is in the public interest;

You must submit an affidavit in support of your motion. In your original petition you should build enough evidence in support of your case in order to convince the judge of your likelihood of success or enough controversy. With your affidavit in support of the TRI you automatically presented strong evidence or prevailing.

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Once you filed your TRO you must inform the court clerk that you have an emergency and need to have an ex parte (from one party) hearing for the judge to consider your TRO. The clerk will give you the next available time and date.

Make sure that you have your Motion and Order ready and that they were served to the other party.

The TRO is good for only 10 to 14 days. Once you have your TRO notify immediately the Trustee and defendant.

Preliminary Injunction

A preliminary injunction bars the sale of the property. The preliminary injunction is ordered by the court to stay the sale until the controversy is sorted out.

You have to file a Motion for an Injunctive Relief Barring Sale and an Order for an Injunctive Relief Barring Sale.

The injunction requires the same four elements as the TRO.

One you submit your Motion the court may take a while to grant your motion. This is why you need another motion called the Motion for Shortening Time for an Ex Parte Hearing. You will also need an order and, as stated above, whatever you submit to the court you must also submit to the other party.

The last motion will let the court hear your motion in a few days instead of three weeks.

At the hearing you do not plead your case, instead it will be determined if there is sufficient evidence and controversy to grant your motion of Injunctive Relief and to allow for discovery.

Once your Motion is granted the judge will sign your Order.

Take your Order and notify the Defendant and the Trustee.

File the Order with the County Recorder's office.

Unless the judge stipulated otherwise, the injunctive relief is in place until the outcome of the case is determined.

Summary of Sequence

If a sale is imminent, then you should order a TRO. If you have more time, then go for the Motion for an emergency Injunctive Relief.

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Sequence

1. File A Civil Action complaint
2. File a Motion for a TRO (and Order)
3. Notify the other party
4. Notify the Court Clerk that you need an ex parte hearing to have your Motion granted
5. File a Motion for an Injunctive Relief (and Order)
6. File a Motion for Shortening Time
7. Appear at the hearing to present the evidence of the controversy, e.g. "I had a recent forensic audit done and uncovered fraud. We need time for discovery to resolve this controversy".