

CHAPTER 35-22

FORECLOSURE OF MORTGAGES OF REAL PROPERTY BY ADVERTISEMENT

35-22-01. Foreclosure under power of sale - Prohibition - Exception.

Every mortgage of real property held by the state or any of its agencies, departments, or instrumentalities, containing a power of sale, upon default being made in the conditions of such mortgage, may be foreclosed by advertisement in the manner provided by law. No other mortgage of real property shall be so foreclosed, but must be foreclosed by action.

35-22-02. Right to foreclose - Prerequisites - Recording.

To entitle a party to foreclose by advertisement, it is requisite:

1. That default in a condition of the mortgage has occurred by which the power of sale has become operative;
2. That no action or proceeding has been instituted at law to recover the debt then remaining secured by the mortgage, or any part thereof, or if any action or proceeding has been instituted, that the same has been discontinued or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part; and
3. That the mortgage containing the power of sale has been recorded and, if it has been assigned, that all the assignments thereof have been recorded.

35-22-03. Notice of intention to foreclose - Service - Payment - Failure to commence foreclosure within ninety days.

Before any real estate mortgage may be foreclosed by advertisement, a notice of intention to foreclose such mortgage must be served on the record title owner of the real estate described in the mortgage unless the service thereof is excused by section 32-19-23. Such notice must be in the form specified in section 32-19-21, and must be served as provided for the service of such notice in foreclosure by action as prescribed in chapter 32-19, and the proof of service thereof, or the proof of death of the record title owner, must be recorded with the notice and certificate of sale. If the owner of the land or the owner's legal representative, before the expiration of thirty days from the service of the notice of intention to foreclose the mortgage, performs or complies with the conditions of the mortgage, the mortgage remains in full force and effect the same as if no default had occurred. If the notice of sale is not published for the first time within ninety days after the service of the notice of intention to foreclose, all proceedings under the notice of intention to foreclose are deemed discontinued.

35-22-04. Foreclosure by advertisement enjoined - Procedure.

When the mortgagee or the mortgagee's assignee has served notice of intention to foreclose a mortgage, and within the period provided by such notice it is made to appear by the affidavit of the mortgagor, or any person claiming under the mortgagor, or the mortgagor's agent or attorney, to the satisfaction of a judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, which proof must be made by affidavit stating the facts, but not on information and belief, such judge, by an order to that effect, may enjoin the mortgagee or the mortgagee's assignee from foreclosing the mortgage by advertisement and may direct that all further proceedings for the foreclosure thereof be had in the district court having jurisdiction of the subject matter. After the expiration of the period provided by the notice of intention, an order enjoining the foreclosure by advertisement shall be made only on motion or order to show cause. Notice of such motion, together with the affidavit used in support thereof, must be served upon the attorney or agent of the mortgagee or assignee in the same manner as service of other notices of motion, not less than eight days before the hearing thereon. The affidavit in support of the motion must state the facts upon which the application is made, may not be on information and belief, and must disclose a legal counterclaim or other valid defense to the collection of the whole or some part of the amount claimed to be due on the mortgage. Upon the hearing of the motion, the judge may enjoin the foreclosure of the mortgage by advertisement in

the same manner as if the application had been made ex parte within the period of the notice of intention to foreclose. Service of the restraining order may be made upon the attorney or agent of the mortgagee or assignee, if the order was obtained ex parte, or if obtained on motion or order to show cause, it may be served upon the attorney or agent or upon the sheriff of the county where the foreclosure sale is to be had. If the notice of intention does not disclose the address of a resident agent or attorney, the order may be served upon such sheriff.

35-22-05. Foreclosure for installments - Separate proceedings - Redemption.

If a mortgage is given to secure the payment of money by installments, each of the installments mentioned in the mortgage must be taken and deemed to be a separate and independent mortgage, and the mortgage for each of the installments may be foreclosed in the same manner and with like effect as if a separate mortgage were given for each of the installments, and a redemption from any such sale has the same effect as if the sale for the installment had been made upon a prior independent mortgage.

35-22-06. Notice - Published six times.

Notice that the mortgage will be foreclosed by a sale of the mortgaged premises or some part thereof must be given by publishing the same six times, once in each week for six successive weeks, in a newspaper published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one, and if not, then in some newspaper published in an adjoining county.

35-22-07. Notice of sale - Form.

The notice of sale must be in substantially the following form:

Notice is given that that certain mortgage, executed and delivered by _____, mortgagor, to _____, mortgagee, dated _____, _____, and filed for record in the office of the recorder of the county of _____ and state of North Dakota on _____, _____, and recorded in book _____ of _____ at page _____ (and assigned by said mortgagee to _____), will be foreclosed by a sale of the premises in such mortgage and hereinafter described at the front door of the courthouse in the county of _____ and state of North Dakota at the hour of _____ o'clock _____ m., on _____, _____, to satisfy the amount due upon such mortgage on the day of sale. The premises described in such mortgage and which will be sold to satisfy the same are described as follows: (here insert description and street address, if any).

There will be due on such mortgage at the date of sale the sum of _____ dollars.

The failure to include the street address in the notice does not affect the validity of the notice.

35-22-08. Sale to be conducted at public auction - Time and place.

The sale must be at public auction between the hours of nine a.m. and the setting of the sun on that day, at the front door of the courthouse in the county in which the premises to be sold or some part of them are situated, and must be made to the highest bidder by the sheriff of the county, acting in person or by deputy.

35-22-09. Sale as unit or by tracts.

If the mortgaged premises consist of a single farm or tract, the property may be sold as a unit. If the premises consist of several distinct farms or tracts, the same must be sold separately, and only such farms or tracts may be sold as are necessary to satisfy the amount due on the mortgage at the date of the sale, including the costs and expenses allowed by law.

35-22-10. Mortgagee, assigns, or representatives may purchase.

The mortgagee, the mortgagee's assigns, or the legal representatives of any of them, fairly and in good faith may purchase the premises advertised or any part thereof at the sale.

35-22-11. Certificate of sale - Contents - Recordation within sixty days after sale - Effect of certificate.

When any real property is sold by virtue of a power of sale contained in any mortgage, the officer making the sale immediately shall give to the purchaser a certificate of sale containing all of the following:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. The costs and fees for making the sale.

The certificate must be executed and acknowledged and must be recorded in the office of the recorder of the county wherein the real property is situated within sixty days after the date of the sale. The sheriff's certificate, or a copy thereof certified by the recorder, is evidence of the facts therein recited and contained.

35-22-12. Costs - Disbursements.

The person foreclosing a mortgage by advertisement is entitled to the person's costs and disbursements out of the proceeds of the sale.

35-22-13. Foreclosure - Attorney's and sheriff's fees - Division of attorney's fees unlawful.

Repealed by S.L. 1975, ch. 106, § 673.

35-22-14. Affidavit of publication - Contents - Filed within sixty days.

An affidavit, made as provided in section 31-04-06, of the publication of the notice of the sale and of any postponement must be filed for record by the officer making the sale, in the office of the recorder of the county in which the real property is situated, within sixty days after the sale.

35-22-15. Recorder - Note of sale on margin of mortgage record.

A note referring to the page and book or document number where the evidence of any sale made under a mortgage is recorded must be made by the recorder in the margin of the record of the mortgage.

35-22-16. Affidavit of publication recorded - Effect of in evidence.

The affidavit of publication must be recorded in the office of the recorder of the county in which the real property is situated in a record kept for mortgages. The original affidavit, the record thereof, and certified copies of the record are prima facie evidence of the facts contained in the record.

35-22-17. Copy of affidavit of publication to be mailed.

Within ten days after the filing of the affidavit of publication of the notice of mortgage foreclosure in any foreclosure of a real estate mortgage by advertisement, a copy of the affidavit of publication must be mailed by certified mail to the record title owner and to every subsequent mortgagee whose mortgage appears on record, addressed to the person at the post office shown of record in the recorder's office. If no post-office address appears of record, the copy must be addressed to the post office located nearest to the land described in the certificate of sale.

35-22-18. Affidavit of mailing - Recordation.

An affidavit setting forth the time and manner of the mailing of the copy of the affidavit of publication, the description of the land, and the name and post-office address of the person or persons to whom the affidavit of publication was mailed must be filed and recorded in the recorder's office.

35-22-19. Failure to mail notices - Liability.

The failure to comply with sections 35-22-17 and 35-22-18 in no way invalidates the foreclosure proceedings nor affects the title to the property involved, but such failure renders the state liable in a civil action to the person entitled to a copy of the affidavit of publication herein described for any damage sustained by the person by reason of such failure.

35-22-20. Redemption - Who may redeem - Notice to officer making sale.

The property sold may be redeemed in like manner and with the same effect as is provided for redemption of real property sold upon execution in chapter 28-24 so far as the same may be applicable by:

1. The mortgagor or the mortgagor's successor in interest of the whole or any part of the property.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

Such creditor is termed a redemptioner and has all the rights of a redemptioner under that chapter, and the mortgagor or the mortgagor's successor in interest has all the rights of the judgment debtor and the judgment debtor's successor in interest as provided therein. The notice of redemption required to be given to the sheriff under that chapter, in foreclosure by advertisement, may be given to the officer making the sale.

35-22-21. Deed - Issuance - Effect.

If the mortgaged premises are not redeemed, it is the duty of the officer who sold the same, or that person's successor in office, or some other person appointed by the district court for that purpose, to complete the sale by executing a deed of the premises sold to the original purchaser, the original purchaser's heirs or assigns, or to any person who may have acquired the title and interest of the purchaser by redemption or otherwise. The deed has the same force and effect as if it had been executed pursuant to a sale under a foreclosure of the mortgage by an action in which all persons having an interest in or lien upon the property subsequent to the mortgage were made parties and duly served with process.

35-22-22. Disposition of proceeds of sale.

If after the sale there remains in the hands of the officer making the sale any surplus money after satisfying the mortgage on the real property sold and after payment of the costs and expenses of the foreclosure and sale, the surplus must be held by such officer for a period of thirty days after the sale unless some person who at the time of the sale had an interest in or lien upon the property sold or some part thereof serves a written notice upon such officer of a claim to the surplus or some part thereof. If no notice of claim is served within the period aforesaid, the officer, upon the expiration of the period and upon demand, shall pay over the surplus to the mortgagor, the mortgagor's legal representatives, or assigns.

35-22-23. Payment of surplus into court - Petition for surplus.

If the notice mentioned in section 35-22-22 is served upon the officer making the sale within the time therein provided, such officer forthwith shall pay the surplus into the district court of the county in which the sale was made. Any person claiming the surplus, or any part thereof, as provided in section 35-22-22, at any time before an order for distribution is made as prescribed in section 35-22-25, may file in the office of the clerk of the district court of the county where the sale took place a petition stating the nature and extent of that person's claim and praying for an order directing the payment to that person of the surplus money, or a part thereof.

35-22-24. Application for order directing payment of surplus - Notice - Service.

A person filing the petition as prescribed in section 35-22-23, after the expiration of thirty days from the day of sale, may apply to the district court for an order thereon. Notice of the application must be served either by mail or personally upon each person who has filed a like petition, upon the mortgagor, the person in actual possession of the property, if any, and upon every person having an interest in or lien upon the property sold subsequent to the mortgage

foreclosed and whose interest or lien, at the time of the sale, was recorded in the proper office in the county or counties in which the property sold is situated. The notice must be served at least eight days before the application. If it is shown to the court by affidavit that service upon any person required to be served cannot be made with due diligence, notice may be given to that person in any manner which the court directs.

35-22-25. Order for distribution - Payment.

Upon the presentation of the petition with due proof of the service of the notice of the application, the court shall ascertain the amount due to the petitioner and to each other person whose claim is a lien upon the surplus money and the priorities of the several liens. The court thereupon shall make such order for the distribution of the surplus money as justice requires, and the surplus money must be distributed accordingly.