

LAW OFFICE OF M. SUAREZ, LLC

180 Sylvan Avenue
2nd Floor
Englewood Cliffs, NJ 07632
TEL: (201) 569-1166
FAX: (201) 569-1120

MELISSA SUAREZ, MEMBER NY & NJ BAR

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REAL ESTATE AND THE LAW

Federal Housing Tax Credits

In an effort to support the continued stimulation of home sales, Congress extended the First-Time Home Buyers Credit and created additional incentives for existing home owners.

\$8,000 First-time Home Buyer Tax Credit at a Glance:

The tax credit applies only to homes priced at \$800,000 or less.

The tax credit is equal to 10 percent of the home's purchase price up to a maximum of \$8,000.

The \$8,000 tax credit is for first-time home buyers only. For the tax credit program, the IRS defines a first-time home buyer as someone who has not owned a principal residence during the three-year period prior to the purchase.

The tax credit does not have to be repaid unless the home is sold or ceases to be used as the buyer's principal residence within three years after the initial purchase.

For homes purchased after November 6, 2009 and on or before April 30, 2010, single taxpayers with incomes up to \$125,000 and married couples with incomes up to \$225,000 qualify for the full tax credit.

The tax credit now applies to sales occurring on or after January 1, 2009 and on or before April 30, 2010. However, in cases where a binding sales contract is signed by April 30, 2010, a home purchase completed by June 30, 2010 will qualify.

The \$6,500 Move-Up / Repeat Home Buyer Tax Credit at a Glance:

The tax credit applies only to homes priced at \$800,000 or less.

The tax credit is equal to 10 percent of the home's purchase price up to a maximum of \$6,500.

To be eligible to claim the tax credit, buyers must have owned and lived in their previous home for five consecutive years out of the last eight years.

The tax credit does not have to be repaid unless the home is sold or ceases to be used as the buyer's principal residence within three years after the initial purchase.

The credit is available for homes purchased after November 6, 2009 and on or before April 30, 2010. However, in cases where a binding sales contract is signed by April 30, 2010, the home purchase qualifies provided it is completed by June 30, 2010.

Single taxpayers with incomes up to \$125,000 and married couples with incomes up to \$225,000 qualify for the full tax credit.

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Deducting the Business Use of Your Home

The federal income tax deduction for the business use of a home has a good dollars-and-cents upside for those who qualify. Some detailed questions have to be answered correctly to get to that point, however. Not surprisingly, the IRS publication on the subject makes use of a complex flowchart filled with “yes or no” questions to guide taxpayers to a determination of eligibility for the deduction.

Qualifying for the Deduction

To pass the threshold for use of the home business deduction, a taxpayer must satisfy the following two basic sets of requirements. The first set concerns the nature of the business activities, while the second set relates more to the place itself.

First, the use of the business part of the home must be exclusive (with exceptions to be discussed below), regular, and for the business. Second, the business part of the home must be one of the following: the principal place of business- the place where the taxpayer meets or deals with patients, clients, or customers in the normal course of business-or a separate, detached structure used for business.

The exclusive use factor means that the area only for business, not a mixture of business and personal uses. However, the exclusive use requirement need not be met when a part of the home is used for storage of inventory or product samples, or for a day-care facility. When the IRS says that the use of the home must be for a trade or business, it does not mean any activity that makes money for the taxpayer. If you use a computer in your den for day-trading of stocks or online gambling, do not count on taking the deduction.

As for what a “regular” use for business that essentially means business conducted on a continuing basis not occasionally. Even if a taxpayer has a place in the home used exclusively the deduction is not available if the business activity is sporadic.

As for the requirements relating to the place itself, the area in the home used for the business is a “principal place of business” if it is used exclusively and regularly for the administrative or management activities of the business, and there is no other fixed location where substantial activities of that kind are carried out. If some business is transacted at more than one location determining whether the home location is the principal place for business requires consideration of the relative importance of the activities at each location. If that does not provide the activities at each location. If that does not provide an answer, the time spent at each site should be considered. Remember that the deduction is available if either the home is the place for meeting with patients, clients, or customers, or a separate structure on the premises is dedicated for business.

If the taxpayer is an employee using part of a home for business, the deduction is available if all of the requirements described above are met, plus two additional tests. The business use must be for the convenience of the employer (not just appropriate or helpful), and the employee may not rent all or part of the home to the employer while using rented portion to perform services as an employee.

Ask Mel

The property taxes on my listing are too high – what can I do?

A Property Tax Appeal can increase the marketability of your listing! Appeals must be filed by April 1, 2010. Too late? We may be able to negotiate an informal adjustment with the municipal tax assessor. Contact us today!

REAL ESTATE AND THE LAW

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REAL ESTATE, TITLE INSURANCE & CONSTRUCTION LAW, MARCH 22, 2010

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The Rights and Remedies Available to
A Distressed New Jersey Homeowner

Entitled to receive actual
notice of a sheriff's sale date

By Glenn R. Reiser

In the current mortgage foreclosure crisis, there are multiple factors at play which often create a circuitous series of events leaving distressed New Jersey homeowners in a complete state of confusion about the status of their loan modification applications and sheriff's sales on their properties.

In most situations, the lender usually employs an outside agent to handle the loan servicing, and an attorney to process the foreclosure case. These two factions do not necessarily communicate properly with borrowers, often passing the buck to one another. So for example, if a homeowner calls the bank directly to find out what the status of his or her mortgage loan modification application or the sheriff's sale date, the bank will likely direct the homeowner to contact the loan servicing company. Because most loan servicing companies use automated phone systems, however, it can be extremely difficult for homeowners to reach a live person.

Even when homeowners are fortunate enough to get through to a customer service representative of the loan servicing agent, they are often instructed to call the bank's attorney. This game of "ping pong" in passing the borrower back and forth between the loan servicing company and the bank's attorney can sometimes go on for months, with sheriff sale dates being adjourned from month to month while the borrower patiently waits to receive the lender's final approval or rejection of his or her loan modification application.

So what happens in the scenario when, after numerous months of waiting for an answer on a loan modification application, the bank denies the application, proceeds with a rescheduled sheriff's sale but neglects to provide the homeowner with written notice of the adjourned sheriff's sale, and the property is acquired by the bank or another third-party purchaser at the sale?

Under Jersey law, a homeowner is entitled to receive actual notice of a sher-

iff's sale date, including any postponements or adjournments of the sale. This is an important due process right because a sheriff's sale triggers the 10-day redemption period under New Jersey law for the homeowner to redeem or repurchase the property by paying off the full amount of the foreclosure judgment, or for the home owner to file a Chapter 13 bankruptcy within the same 10-day period which extends the 10-day redemption period for an additional 60 days pursuant to 11 U.S.C. 109(g). Redemption means "paying off the existing obligation." *First Nat'l Bank and Trust Co. v. MacGarvie*, 41 N.J. 151, 157 (Ch. Div. 1956), modified, 22 N.J. Super. 539 (1956).

In the absence of the lender's compliance with this actual notice requirement, the prudent homeowner should consider filing a motion to vacate the sheriff's sale and invalidate the sheriff's deed. But time is of the essence for the homeowner to preserve his or her remedies, especially if an innocent third party has purchased the property at a sheriff's sale and the sheriff is in the process of, or has delivered, the deed, thus consummating the sale. Pursuant to R. 4:65-5, "[A] sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served within 10 days after the sale or at any time thereafter before the delivery of the conveyance."

New Jersey Court Rule 4:65-2 requires that notice of a sheriff's sale be posted by the sheriff in the sheriff's office and also on the property being sold. See also N.J.S.A. 2A:61-1 (requiring posting on the premises of the property being sold at least three weeks prior to the sale). In addition, the party who obtained the order for the sale must serve the owner of the property with notice of the sale at least 10 days in advance of the sale by registered or certified mail, return receipt requested. Rule 4:65-2. The rule is clear — it requires that the property owner receive "actual notice" of the sale. See *New Brunswick Sav. Bank v. Markowski*, 123 N.J. 402, 426 (1991) (Court held that readily identifiable holders of property interests adversely affected by the sale are entitled to actual notice of the sale).

In a case that merits close scrutiny in this current economic crisis, in *First Mut. Corp. v. Samojeden*, 214 N.J. Super. 122

(App. Div. 1986), the Appellate Division extended the actual notice requirement under Rule 4:65-2 to apply to adjourned sheriff sale dates, concluding that effective notice is the guiding principle of procedural due process.

The Appellate Court in *First Mut. Corp.* further explained that Rule 4:65-4 governs adjourned sales, and construed the rule's inclusion of the phrase "public adjournment" to implicitly require that actual notice of the adjourned sale be given to interested parties:

The subject of adjourned sales



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is treated by R. 4:65-4, which provides in this respect only that "[t]he sheriff, receiver or other person may continue such sale by public adjournment, subject to such limitations and restrictions as are provided specially therefore." Although it is thus true that R. 4:65-4 does not expressly require notice of the adjourned sale either, we find that requirement to be implicit in the stipulation that the adjournment be public. We deem it fairly inferable that the requirement of a public adjournment was intended not only to give notice to those attending the sale of the fact of adjournment but also notice of the date of the adjourned sale.

Faced with a circumstance where the notice provisions have not been met, the Chancery Court may either set the sale aside or allow a period of redemption. *Orange Land Co. v. Bender*, 96 N.J.

Super. 158, 164 (App.Div.1967); see *United States v. Scurry*, 193 N.J. 492, 506 (2008) (allowing plaintiff a reasonable period of time to redeem her property, which had been sold at a sheriff's sale, because she had not received the required ten days of notice of the sale).

But, when there is no intervening bidder at a sheriff's sale and the homeowner does not have actual notice of any adjourned sale date, then vacation of the sale is the appropriate remedy. See *First Mut. Corp. v. Samojeden*, 214 N.J. Super. at 128-129 ("We are, however, satisfied that after the passage of the

time here involved, First Mutual was not at liberty to direct the sheriff to sell the property without having made some reasonable communication of that fact to the other parties in interest. Since it did not, and since neither the owner nor the subsequent encumbrancer had any actual knowledge of the sale, and since there were no intervening rights of innocent third persons, we are satisfied that the trial judge should have vacated the sale.")

While every case is decided on its own facts and the Chancery Court has broad discretion in applying the appropriate equitable remedies, the prudent attorney representing a distressed homeowner who has lost his or her house in a foreclosure sale should determine if the lender provided "actual notice" of the sheriff's sale or any adjourned sheriff's sale date. However, there is limited time to act because R. 4:65-5 requires that an objection to a sheriff's sale must be filed within 10 days of the sale or prior to the time the sheriff conveys the deed to the purchaser. ■

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