

Foreclosure

Anyone who rents a house, apartment, or mobile home is a tenant. Renting, also called leasing, is an arrangement by which a landlord gives a tenant temporary possession and use of property for rent. The tenant also agrees to pay rent and to return the property to the landlord at a future time. If a person rents a sleeping, motel or hotel room for four (4) weeks in a row or more, you are a “tenant” under law. The information provided here applies to private, as well as public housing (such as Lakota Homes, Section 8, and HUD housing) landlord/tenant relationships. Public Housing tenants also need to look to their lease, as they have added rights and duties under Federal law.

What is foreclosure?

A foreclosure is when a lender (like a bank or mortgage company) takes the title of your property by starting a lawsuit to forcing force a sheriff's sale (public auction) of your home after you fail to pay part of the debt. If you fall behind on your mortgage payments, insurance, real estate taxes etc., the lender can then sue for foreclosure, and eventually take over your property after a redemption period. If you do not redeem (pay the debt) by the deadline set by the court, you will be required to move out of your home. This will force you to to move out of your home. Losing your home to foreclosure, and could also negatively affect your credit rating and your ability to get loans in the future. Foreclosure rights and processes can be found in the South Dakota Codified Law at Ch. 21-47, 21-49, and 21-51.

What should I do if I receive a letter from my lender about foreclosure?

You need to immediately seek counsel skilled in defending foreclosures and is licensed in the state you live. Your attorney will need to consider if you have any counterclaims or defenses (like a Fair Debt Collection Practices Act claim), eligibility for a federal or private loan foreclosure work out program or decide if you are better off deeding the property to your bank by deed in lieu or as part of a voluntary

foreclosure agreement, or decide if your case is better handled in a bankruptcy proceeding.

What happens during a foreclosure process?

In South Dakota, you are given paperwork by a sheriff or sign an admission of service. Not counting the day you sign or are given paperwork, you have 30 days to file a written answer. If you do not, the bank may seek default judgment. If a default judgment or regular judgment is entered against you, the sheriff in the county where you live will eventually sell the home at the courthouse and from that date or the date certain paperwork is filed or recorded (depending on your mortgage type) you will have a certain period of time (60 days, 180 days or a year) to redeem (buy back) the property from the person or entity that bids the highest amount at the sheriff's sale. If that redemption period expires, the prior borrower may be subject to eviction and damages.

If the bank takes my home in a foreclosure, can they still sue me for money?

In South Dakota, that depends on whether the bank pursued a deficiency judgment hearing before obtaining judgment. If they did not and/or file a satisfaction of judgment before or after the sheriff sale, the bank cannot sue the borrower to recover anything. If, however, the bank obtains a deficiency judgment, they can sue the borrower for the amount the Court determined would be owed once the property is sold at sheriff's sale.

Can I sell my home even if the lender is threatening foreclosure or is it too late?

Yes, you can sell your home but you should be aware that there is typically language in your mortgage called a 'due on sale' clause that states if you sell your home before the mortgage is paid in full and/or while you are in default, the bank has the option of foreclosing the mortgage and that could interfere with your sale efforts.

How can I fight an eviction?

Foreclosure is a long process, but if that process is completed and you are still living in the property that was foreclosed, you would be subject not only to eviction but double damages as a person no longer having a legal right to be present on the property (a trespasser). Unlike foreclosures, evictions are very short term legal proceedings that typically involve a 3 day notice to quit, a forcible entry and detainer lawsuit which requires four business days to answer the complaint and then a trial as to possession and damages to the premises. Some evictions may involve federal rights under the guidelines of FHA, HUD or other entities that offer or supervise subsidized rents.

I received a notice for Termination With Cause. What is this?

A landlord who wants a tenant to move out of a rental unit before a tenant's lease or rental agreement has ended must file an eviction lawsuit against the tenant and the landlord must have legal cause. Legal cause is the basis of the eviction lawsuit, and if the landlord does not have legal cause to evict the tenant, then the landlord will most likely lose the eviction. South Dakota law defines legal cause as failure to pay rent and violation of the lease or rental agreement. The first step in evicting the tenant for one of these reasons is for the landlord to end the tenancy, and in some instances, the landlord will to give the tenant written notice.

I received a Three-Day Notice to Quit. Now What do I do?

Typically, a tenant should respond to the landlord and address all reasons for eviction contained in the notice, whether those are payment related defaults, or other violations of the lease agreement. If a tenant is simply going to leave in response to the notice, the tenant should say so in writing and make sure the premises are left like they were when they moved in, subject to reasonable wear and tear. Any keys should be surrendered to the landlord or property manager and pictures of the premises should be taken to prevent later claims about damages or the condition of the property at or after the tenant leaves.

What is a notice for Termination Without Cause?

If there is no lease, the law presumes a month to month lease length, and a landlord can evict a tenant, typically giving a thirty day notice to end the lease arrangement even if the tenant has paid current and has done nothing wrong.

What if I live in subsidized housing?

Depending on the kind of landlord you have and whether you are receiving HUD subsidized rents or some other kind of rental assistance, your lease rights may be determined by federal and not state law.

What should I do to protect myself?

- Save all documentation and letters you receive or write about the apartment. Save copies of everything.
- Put in writing all “side deals” or agreements outside the original contract.
- Know the terms of the lease.
- Attend all hearings to defend your rights
- **DO NOT COMMIT ANY KIND OF DEFAULT!** That means pay your rent on or ahead of time, do not breach any of your lease agreement provisions or rental rules from your landlord and do not give the landlord a reason to evict you (like have loud guests constantly, smoke in a nonsmoking home or apartment, have pets when prohibited or the like).

Last updated on May 19, 2022.

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