

Article for ASREB

Topic: Release of Liens and Debts Relating to Real Property

ARS 33-707 requires a lender to record a deed of release within thirty days, once a mortgage or deed of trust has been satisfied. If the document is not recorded in time, the ARS 33-712 states that the lender can be held liable for actual damages suffered. When close of escrow occurs, the deed transferring title from the seller to the buyer is recorded immediately. If the seller had a mortgage that was paid off, the seller's lender does not record the release document immediately. The title company will insure the title based on the fact that they obtained the payoff amount and are in fact paying the loan in full. If the transaction is a short sale, the title company must rely on the terms of the approval letter from seller's lender or lenders. This is because the full amount of the debt is not being paid off. The short sale approval letter does one of three things: releases the lien only, releases the lien and the debt, or releases the lien and part of the debt. As far as the Deed of Release and Reconveyance is concerned, I have seen this document release the lien only, release the lien and the debt or release the lien and state that the debt is only partially satisfied. It is important to check the county records and review the Deed of Release and Reconveyance. It should match the approval letter. There are instances when it actually gives more relief than stated in the short sale approval letter. It releases the lien and states that the debt is paid in full even though the approval letter is silent as to the release of the debt. This benefits the seller and can give them peace of mind that the lender will not pursue them later for any deficiency balance. If for some reason, the lender does not record the Deed of Release and Reconveyance, ARS 33-707 allows the title company to do it, as long as the amount of the indebtedness secured was not greater than one million dollars. The statute outlines the steps required in order for the title company to prepare and record this document. In a traditional sale or a short sale, the closing can be delayed if a prior lien has been refinanced but the lender never recorded the necessary release documents.

A Deed of Release and Reconveyance is not prepared or recorded after a trustee sale. The lien is released and the trustee prepares and records a Trustees Deed. The trustee stands in the shoes of the trustor that has defaulted on his mortgage and has the power granted by ARS 33-811 to transfer title to the buyer or the beneficiary. The conveyance by the trustee is absolute, clear of all liens (except those with priority senior to the deed of trust) and without the right of redemption. It is important to note that ARS 33-806 specifically addresses the issue of a trustor buying his property at the trustee sale. Due to the drastic reductions in market value over the last several years, many people wanted to take advantage of the Arizona anti deficiency laws, let the property go to trustee sale and then bid on and buy the property at the sale. Or they had a friend or family member buy the property at the trustee sale for the sole purpose of selling the property back to the trustor. The problem with that strategy is that the lien is not released. The statute addresses it. Also the issue was addressed in *Transamerica Financial Services v. Lafferty*, 175 Ariz. 310, 856 P2d 1188 (App. 1993). In the *Transamerica* case, the court ruled that the junior lien reattached to the foreclosed property subsequent to the trustee sale when the purchaser at the sale sold the property back to the trustor.

Under AZ anti deficiency laws, there are circumstances when a lender can pursue the debtor after the trustee sale. The most common examples are cash out loans in second lien position, land, a home on more than 2.5 acres and property that is more than two units. After foreclosure, the lien is released but the debt is not. Once a settlement is reached and paid, the debt will be released. The terms of the settlement are evidenced by a letter and/or promissory note. Neither of these documents is recorded. If a settlement is reached before the trustee sale, the lender should release the lien and record the necessary document.

In an Agreement for Sale, the Agreement is usually recorded and serves as notice to all that inquire about the owner of the property and the status. There is no Deed of Trust executed or recorded. As a result, in the case of default, the seller does not have the option of foreclosure by trustee sale. Unlike a traditional sale where the buyer has the title transferred into his name, the title remains in the name of the seller until the full amount of the purchase price is paid. At that time, the title is transferred and recorded. Until that time, the buyer has equitable title which means he has an interest in the property but that interest is limited and he cannot sell the property or otherwise transfer title. Seller cannot transfer title to a third party unless buyer defaults. Seller then must proceed with forfeiture or judicial foreclosure. The procedures are outlined in ARS 33-742 – 748.

Homeowners Associations can place a lien on a home for past due assessments. The HOA has the power to foreclose on the home but only if the owner has been delinquent for a period of one year or in the amount of \$1200, whichever occurs first. Once paid, the lien is extinguished. If the home is sold pursuant to trustee sale, the HOA lien does not survive. The only way the HOA can collect is to file a lawsuit.

Federal tax liens must be paid if a home is sold, whether by traditional sale or short sale. If they cannot be paid, the IRS must be contacted and an agreement reached whereby they release the lien prior to the close of escrow. If the IRS is provided documentation that the home is underwater and there is no money to pay the federal tax lien, the IRS will usually agree to release the lien. If the home goes to trustee sale, the IRS loses the lien on the property, assuming that the lien was recorded subsequent to the recording of the Deed of Trust. It does not have to be paid by the purchaser at the auction.

It is important to understand how and when a debt or lien is released or satisfied. It is not uncommon for a lender to sell a debt to a collection company, even though that lender has recorded a Deed of Release and Reconveyance that states the debt is paid in full. You don't want to get stuck with paying part or all of a debt you do not owe.

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