

PUBLICATION

Extraordinary Florida Foreclosure Remedies

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When servicers or lenders think of having to foreclose on commercial property in the State of Florida, what immediately comes to mind is a lengthy judicial foreclosure process, and difficulty in enforcing rights provided in their loan documents. While it is true that the economic crisis created a bottleneck in Florida's judicial systems, all hope is not lost. This article will examine some of the unique remedies that are available with respect to the enforcement of commercial loan documents in Florida courts.

Assignment of Rents

Florida is fairly unique in that it has codified the manner in which to enforce an assignment of rents provision contained in either a mortgage or stand-alone assignment of rents document. See *Fla. Stat.* § 697.07 (the "Rents Statute"). The Rents Statute was enacted into law in Florida 1987 to remedy the situation in which a lender needed to have a receiver appointed to collect rents if the borrower refused to voluntarily tender them to a lender. However, under the Rents Statute, only a default and written notice is required to enforce the remedies provided by an assignment of rents provision. Specifically, the Rents Statute provides that an "assignment of rents shall be enforceable upon the mortgagor's default and written demand for the rents made by the mortgagee to the mortgagor, whereupon the mortgagor shall turn over all rents in the possession or control of the mortgagor at the time of the written demand or collected thereafter (the "collected rents") to the mortgagee less payment of any expenses authorized by the mortgagee in writing." Therefore, it is crucial in Florida that a default letter or separate correspondence contain a written demand for rents, as an assignment of rents provision is not enforceable until this written demand is made. While it is true that a borrower may very well ignore that written demand, the statute also provides for the entry of an order that requires that borrower to account for collected rents from the date the written demand was first made. If a borrower disregards the court order, while not ideal for the lender, such action will provide excellent grounds for the appointment of a receiver, as will be discussed in the next section.

Appointment of a Receiver

Appointment of a receiver as a remedy attendant to a commercial loan default is not unique to Florida. However, as many lenders know, appointment of a receiver in Florida can be more difficult than in other states. Initially, simply because the loan documents state that the lender is entitled to the appointment of a receiver upon the occurrence of an event of default does not mean that the court must appoint one. Relying on case law which developed almost a century ago, Florida courts continue to hold that the right of a lender to obtain the appointment of a receiver must be balanced against the owner's right of possession. Over the years, however, courts have identified factors that will cut in favor of appointment of a receiver, such as likelihood of success in a foreclosure action, physical waste, economic waste, lack of equity in the property, the ability of a receiver to maintain value, non-payment of taxes, and failure to maintain insurance. However, more recently, courts have held that if a borrower refuses to obey a rents order, a court should appoint a receiver unless the borrower proves there is equity in the property (note that demonstrating equity is the borrower's burden of proof). Although there has been no outright pronouncement of a trend in judicial opinions, many practitioners have observed that receivers have been appointed in more cases recently than in the past, perhaps owing to the unique circumstances created by the Great Recession.

Orders to Show Cause for Judgment and Payments During Foreclosure

Although the judicial foreclosure process in Florida may be protracted, particularly in counties with a backlog of foreclosure cases such as Miami-Dade, Broward and Palm Beach counties, in commercial foreclosure cases, the Florida legislature has provided commercial lenders with some relief in the form of Section 702.10 of the Florida Statutes (the "Section 702.10").

Section 702.10 was recently amended to permit a portion of it to apply to non-owner occupied residential properties, but both remedies provided by Section 702.10 have always applied to commercial properties. However, certain provisions of Section 702.10 were also tweaked to make them more favorable to commercial lenders.

Subsection (1) of Section 702.10 permits a mortgage-holder to request the entry of an "Order to Show Cause" directing a borrower and other defendants to show cause why a foreclosure judgment should not be entered at the hearing scheduled by the Order to Show Cause. If a defendant fails to appear at the hearing, or appears and fails to assert any defenses by motion, a verified or sworn answer, affidavits, or other papers, the court will enter a foreclosure judgment at that hearing. However, if a defendant asserts any viable defenses, the hearing will be used to address their validity. In that case, it is unlikely that a foreclosure judgment will be entered, but it is still possible if the court rejects the defenses as not creating genuine issues of fact. This is a change from the previous version of Section 702.10(1), which previously stated that if *any* defenses were asserted prior to the Order to Show Cause Hearing, regardless of their viability, a foreclosure judgment could not be entered, thus limiting Section 702.10(1)'s practical use. Given this recent lender-friendly amendment, lenders should be more inclined to attempt to obtain a quick foreclosure judgment under Section 702.10(1).

Even if a lender is not able to obtain an immediately foreclosure judgment under Section 702.10(1), it should also seek an "Order to Show Cause" requiring a borrower to show cause why it should not be required to make payments to the lender during the pendency of the foreclosure action. Even if a rents order has or will be entered, this relief is "in addition to any other relief that the court may award" under Section 702.10(2). The standard under Section 702.10(2) is a little more relaxed than that in Section 702.10(1), in that a lender is only required show that it is likely to prevail in the foreclosure action, not necessary that all the defenses raised, if any, are meritless. If it does make such a showing, the court will order the borrower to make the same payments required by the loan documents and at the same intervals (e.g., the normal monthly payment), retroactive to the date the motion for an Order to Show Cause under Section 702.10(2) was filed. If the borrower fails to make the required payments or post a bond in the total amount of the debt, the order requiring payments will also provide that the lender will be entitled to "possession of the premises." Possession is not defined in Section 702.10(2), but presumably means that a lender could have a receiver appointed or otherwise take control of the property.

Conclusion

Although Florida is admittedly not one of the more lender-friendly states in which to foreclose on commercial property, the somewhat unique remedies described above can alleviate some issues lenders may encounter as a result of clogged dockets or dilatory tactics utilized by borrowers.