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Should receivers sell property?

I recently attended a hearing on the issue of whether a receiver appointed at the request of a mortgage lender could sell the mortgaged property over the objection of the owner. The judge, after expressing his opinion that the proposed sale was probably in the best interest of all parties, determined that the receiver had no such authority. The ruling is noteworthy because it runs counter to a growing trend of lenders avoiding the foreclosure process by utilization of a court-appointed receiver to sell property. It raises uncertainty not only for lenders and borrowers, but also for purchasers and title companies.

The use of a receiver to sell property can be advantageous to both the lender and the borrower. For example, with respect to a condominium project, the receiver can sell individual units at retail, generating more money for the lender and reducing the borrower's exposure for a deficiency judgment. At a foreclosure sale, by contrast, the lender is likely to receive a distressed property price, significantly increasing the deficiency facing the borrower. The lender also avoids taking title to the property at foreclosure or entering into a contract with the ultimate purchaser, thereby reducing the chances that it will be sued for environmental or construction defect claims. A receiver, as an officer of the court, cannot be sued except with permission of the court.

In development projects, the borrower often has pending contracts at the time a receiver is appointed or foreclosure commenced. If the receiver does not close under those contracts, the borrower faces liability for breach of contract. By allowing the receiver to sell units pursuant to the borrower's contracts, the borrower avoids such liability. With respect to the units that have not been placed under contract at the time a receiver is appointed, the receiver will often allow the borrower to continue its marketing efforts.

Thomas Macdonald
Attorney, Otten Johnson Robinson Neff + Ragonetti PC, Denver

I have been involved in several receiverships, representing both borrowers and lenders, in which the receiver sold individual condominium units to maximize the return to the lender. But in each case, the borrower consented to the arrangement in an effort to minimize its potential exposure for a deficiency judgment and to eliminate liability to parties with whom it had already contracted to sell individual units. In fact, in each of those cases, the borrower continued to work with the receiver to market the property and close the individual sales.

The proposed sale at issue in the hearing I attended in May, by contrast, was a bulk sale of a residential development project. The receiver, with the support of the lender, argued that the sale was in the best interest of all parties because the costs of maintaining the receivership assets were almost $7,000 per day, the receivership assets were not otherwise generating income, and there was some question as to whether the lender would continue to fund such costs. The receiver argued that if the lender decided to not continue funding such costs, the value of the receivership assets would suffer a serious and rapid decline in value. For authority, the receiver relied upon the language in the order of appointment that granted the receiver the power "upon further Court order and with the consent of Lender, to advertise the Collateral for sale or lease and to sell the Collateral or any part of it ..."

The property owner raised a number of objections in response. First, it pointed out that the order appointing a receiver was obtained on an *ex parte* basis, as authorized by the deed of trust, but was inconsistent with the deed of trust. The owner argued that the order was inconsistent with the deed of trust for two reasons. First, the deed of trust only authorized appointment of a receiver during the pendency of a foreclosure, and the lender had not yet instituted a foreclosure. Second, the deed of trust authorized the receiver to take possession of the property during a foreclosure, but said nothing about the receiver selling the property.

The property owner also argued that an order authorizing the receiver to sell the mortgaged property would be inconsistent with the Colorado statute that provides that a deed of trust or mortgage "shall not be deemed a conveyance, regardless of its terms, so as to enable to owner of the obligation secured to recover possession of real property without foreclosure and sale."

Finally, the owner relied upon statutes that make a predefault waiver of cure rights in either a real property or personal property foreclosure void as against public policy.

The judge relied upon the language of the deed of trust in ruling against the receiver and lender. Because the deed of trust did not contain an authorization to the receiver to sell property, the judge found that no such authority existed despite the language of the order appointing the receiver. Because the judge found that the deed of trust did not authorize a receiver to sell the mortgaged property, he did not answer the question of whether a provision authorizing a sale by a receiver would have been enforceable. Arguably, the statute providing that a deed of trust or mortgage, no matter its form, is only a lien, not an conveyance, or the statute prohibiting any predefault waiver of the right to cure may render such a provision unenforceable.▲