REAL ESTATE

MICHIGAN COURT OF APPEALS DECISION MAY PRECLUDE LENDERS FROM FORECLOSING BY ADVERTISEMENT AND SUING GUARANTORS AT THE SAME TIME

by Benjamin J. Dougherty

A recent decision by a panel of the Michigan Court of Appeals has cast doubt on the ability of a lender to pursue claims against loan guarantors during a pending foreclosure by advertisement, at least in transactions where the guaranty is part of the indebtedness secured by the mortgage.

In the case of *Greenville Lafayette, LLC v Elgin State Bank* (No. 308450, April 17, 2012), the mortgagor brought a suit against the bank claiming that its foreclosure by advertisement and concurrent suit against the guarantors of a defaulted loan violated a Michigan statute known as the "single-action rule" (i.e. MCL 600.3204(1)(b)). The "single-action rule" allows a foreclosure by advertisement to proceed only when no other actions to collect on the debt secured by the mortgage are pending. In *Greenville Lafayette*, the bank commenced a suit against the guarantors of the loan and then, a month later, the bank sent notice to the mortgagor that it intended to foreclose by advertisement. The mortgagor then filed a complaint and sought an injunction against the bank's pending foreclosure sale, arguing that simultaneously pursuing the suit against the guarantors and the foreclosure by advertisement violated the single-action rule. The trial court ruled in favor of the bank, holding that the foreclosure by advertisement could proceed notwithstanding the suit against the guarantors. The Michigan Court of Appeals overturned the trial court on appeal.

The Court of Appeals' task was to determine whether the bank's suit against the guarantors constituted another "action on the debt" within the meaning of the single-action rule that would prevent the foreclosure from proceeding. In past cases presenting a similar question, courts had found that a guaranty is a separate obligation, apart from the mortgage securing the debt. That distinction allowed mortgagees to sue on guaranties without prejudicing their efforts in foreclosure. The single-action rule was not violated because the guaranty was treated as an obligation separate from the mortgage note.

In this case, however, the language of the loan documents took that argument out of the picture. As is common, the mortgage defined the indebtedness it secured broadly in this case, including in that indebtedness amounts due under related documents, which included "guaranties." For that reason, the court agreed with the mortgagor that the guaranties were not separate obligations from the mortgage note, and the action pending against the guarantors was an action "to recover the debt secured by the mortgage." Thus, the court deemed the mortgagor's foreclosure by advertisement invalid pursuant to the single-action rule.

While the Michigan Supreme Court may still have the final say in this case, it may cause lenders to review how they define the various components of indebtedness secured by a mortgage. To avoid potential obstacles posed by Michigan's singe-action rule, lenders and their counsel should revisit their standard definitions to consider how an action on a guaranty might be viewed in the event of a challenged foreclosure. Additionally, in light of this decision, lenders may be limited to commencing a suit against guarantors in a loan transaction only *after* a foreclosure by advertisement has been completed.

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