FORECLOSURE IN NEVADA: THE BASICS

BY MARY J. DRURY, ESQ. & JOSHUA D. CORRELLI, ESQ. WITH RESEARCH ASSISTANCE BY SALLY L. GALATI, ESQ.

Introduction/Statistics

Without a doubt, Nevada real estate statistics are grim. For the year 2008, Nevada had the unfortunate distinction of being the nation's highest foreclosure state with 7.29 percent of its housing units, or one out of every 14 housing units, receiving at least one foreclosure notice.[1] A total number of 77,693 residential units received foreclosure filings, which is an increase of almost 126 percent from 2007 and an increase of almost 530 percent from 2006.[2]

Las Vegas documented the second-highest metro foreclosure rate in 2008, with 8.89 percent of its housing units, or one out of every 11, receiving a foreclosure filing during 2008.[3] In January 2009, Nevada residential foreclosure activity decreased 4 percent from December 2008.[4] However, Nevada continued to lead the nation in foreclosure, with one in every 76 residential units receiving a foreclosure filing during the month.[5]

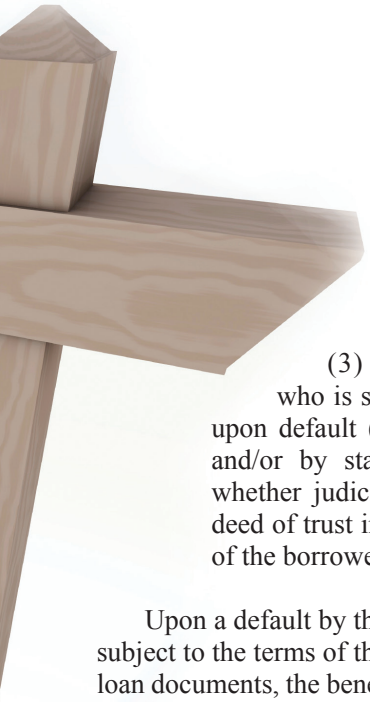
With the high rate of foreclosures in Nevada, many attorneys, regardless of practice area, will find themselves discussing foreclosure issues with their clients. This article will provide a basis for such discussions by providing a general overview of foreclosure-related issues in response to the current state of the real estate market in Nevada. Unless otherwise specified, this article applies to both residential and commercial properties.

Deed of Trust versus Mortgage

It is very apparent that the difference between a deed of trust and a mortgage should be addressed. A deed of trust involves three parties:

(1) a "*trustor*" (which is sometimes called the "grantor" and is usually the same as the "borrower" under the loan[6]) who conveys real property to a "trustee" in order to secure a loan, which is usually evidenced by a promissory note;

(2) a "*trustee*" who acts as an independent third party, accepts title to the subject real property, and agrees to, upon receipt of notification from the beneficiary/lender, conduct a trustee's sale (also known as nonjudicial foreclosure); and



(3) the "lender" or "beneficiary" who is secured by the deed of trust and, upon default (as defined in the deed of trust and/or by statute), is entitled to foreclose, whether judicially or nonjudicially, upon the deed of trust in order to satisfy the obligations of the borrower.[7]

Upon a default by the trustor, pursuant to statute and subject to the terms of the subject deed of trust and other loan documents, the beneficiary may accelerate the entire amount due under the loan and notify the trustee of such default, in which case the trustee is permitted to conduct a trustee's power of sale (nonjudicial foreclosure) in an attempt to make the beneficiary whole.[8]

On the other hand, a mortgage is a two-party instrument whereby the borrower acknowledges an indebtedness to the lender, and, upon recordation, the lender is granted a lien upon the real property security. Unlike the deed of trust, there is no trustee, and therefore the real property collateral is not transferred in trust. Accordingly, a nonjudicial power of sale is not a remedy under a mortgage, and instead, a mortgage must be judicially foreclosed upon. In other words, the lender/beneficiary is required to file suit in order to realize the security.[9]

As current practice indicates, because deeds of trust permit a nonjudicial foreclosure,[10] which is usually swifter and less costly than judicial foreclosure, deeds of trust are more common than mortgages, and will therefore be the focus of this article. As set forth above, the preferred remedy under a deed of trust is a nonjudicial foreclosure, the process for which is specifically set forth in NRS 107.080 to NRS 107.311, inclusive.

Nonjudicial Foreclosure

First and foremost, as set forth in Matthew Watson's article on page 19, attorneys should always be conscious of the implications of the one-action rule as set forth in NRS 40.430. The foregoing applies to both lenders and borrowers, as lenders want to avoid violation of the one-action rule, and borrowers want to avoid waiving any defenses under the one-action rule.

Provided a lender has contemplated the effects of the one-action rule, after a borrower fails to perform or make a payment as provided in the deed of trust, the lender may instruct the trustee to begin the process for the trustee's power of sale.[11] The process is commenced by recording, in the county recorder for which the real property security is located, a "notice of default and election to sell."

Beginning on the day after the notice is recorded, and provided the notice is mailed by registered or certified mail, return receipt requested, postage prepaid to the grantor/trustor and to the person who holds the title of record on such date, and provided such notice describes the deficiency, and, if permitted by the deed of trust, sets forth the beneficiary's intent to accelerate the debt, the grantor/trustor has a period of 35 days[12] in order to make good the deficiency.[13] Thereafter, provided that not less than three months have elapsed after recording the notice, the trustee may exercise its power of sale.[14] Upon expiration of the foregoing three-month period, the trustee must record the notice of sale for 20 days successively and once each week for three consecutive weeks in a newspaper of general circulation.[15]

Alternatives to Foreclosure

Some alternatives to foreclosure include the following:

(i) short sales;
(ii) forbearance agreements;
(iii) modification agreements;
(iv) deeds in lieu of foreclosure;
(v) bankruptcy; and
(vi) statutory remedies or defenses.

With respect to short sales, forbearance agreements, mortgage modifications and deeds in lieu of foreclosure, they are only as helpful as the lender is willing to cooperate, since they all require the lender's consent. Prior to entering into any modification agreements, both borrowers and lenders should consult professional tax advisors in order to ascertain the tax consequences of the subject transaction. Additionally, whenever a lender takes title to the property, it should obtain a title insurance policy. Another consideration for a lender is whether or not it wants the conveyance deed to merge with the deed of trust, which may be avoided by clearly stating the parties' intent.[16]

Furthermore, a foreclosure sale may be enjoined provided there is no adequate remedy at law and good

CONTINUED ON PAGE 8 ▶

FORECLOSURE IN NEVADA

CONTINUED FROM PAGE 7

reason for enjoinment is presented. A preliminary injunction to preserve the status quo is normally available upon a showing that the movant enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, would result in irreparable harm for which compensatory damage is an inadequate remedy.[17] Real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm.[18] However, a court may require a borrower to post an injunction bond.[19]

In addition to some of the remedies described above, NRS 107.080 specifically sets forth some instances for which a foreclosure may be set aside. In the event that:

(i) a lender fails to substantially comply with the nonjudicial foreclosure procedure set forth above;

(ii) a borrower commences an action within 90 days after the date of the sale; and

(iii) a notice of lis pendens is recorded within 30 days after the commencement of the action, a trustee's sale may be set aside.[20]

Additionally, if a person is entitled to receive the notice required by NRS 107.080, and does not receive such notice, such person may commence an action within 120 days of when the person received actual notice of the sale. Finally, if a borrower cures the default within 35 days after notice of the default (and probably until the actual sale), the nonjudicial foreclosure process should not continue.[21]

An alternative for a borrower may be to file bankruptcy, and a lender should be wary of the same. A Chapter 11 reorganization of a single-asset borrower will stay a foreclosure proceeding and may allow the borrower up to 180 days to reorganize and submit a plan. Under Chapter 11 or Chapter 13, guarantors are considered co-debtors and, as such, a stay under either chapter can prevent pursuing a guarantor in lieu of pursuing the borrower.[22] & [23] Additionally, it is anticipated that federal laws may grant residential borrowers, at least as to their primary residences, additional potential benefits under personal bankruptcy filings.

Deficiencies

As set forth in the article on page 19, and pursuant to NRS 40.459, once the real property collateral is foreclosed upon, whether judicially or nonjudicially, a lender may pursue a deficiency judgment against the borrower in the amount of the lesser of the following: 1) the amount of the indebtedness which was secured exceeds the fair market value of the property at the time of sale, with interest from the date of the sale; or 2) the amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale.

Conclusion

Due to the current real estate market (or crisis), attorneys of all focuses are being solicited for advice regarding foreclosures. As briefly set forth above, there are numerous issues to consider, whether an attorney represents the borrower, the lender or the trustee. However, in each instance, the applicable statutes should be reviewed and followed carefully so as to avoid any outcome contrary to the client's intent. As for borrowers, the remedies discussed above are not exhaustive, whether equitable or statutory, especially considering new and pending legislation as a reaction

to the subject market. Whenever confronted with any issues related to foreclosure or foreclosure alternatives, the client should be advised to seek professional tax counsel to determine the tax consequences. NL

MARY J. DRURY is a shareholder at Marquis & Aurbach and chair of the firm's transactional department. She can be reached at mdrury@marquisaurbach.com or (702) 942-2157.

JOSHUA D. CORRELLI is an attorney at Marquis & Aurbach. He can be reached at jcorrelli@marquisaurbach.com or (702) 207-6088.

SALLY L. GALATI is an attorney at Marquis & Aurbach. She can be reached at sgalati@marquisaurbach.com or (702) 207-6093.

Drury, Correlli and Galati all practice in the firm's transasctional department, where they represent clients in real estate and business transactions.

1 RealtyTrac Staff, Foreclosure Activity Increases 81 Percent in 2008, www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5681&accnt=64847.
2 Id.
3 Id.
4 RealtyTrac Staff, Foreclosure Activity Decreases 10 Percent in January, www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5822&accnt=64847.
5 Id.
6 Although the trustor/grantor is usually the same entity as the borrower under the loan, in some instances, the obligor under the promissory note is a different entity than the trustor/grantor. For example, Borrower LLC wants to borrow money from Lender, and Lender will only make the loan provided that it can obtain a first deed of trust encumbering real property containing a substantial amount of equity. Borrower LLC does not own such an asset. Borrower LLC is attempting to obtain the loan in order to develop a project with Trustor LLC, which is an affiliate of Borrower LLC and owns a marketable piece of property with equity sufficient to satisfy the Lender. Lender may agree to allow Borrower LLC to be the obligor under the promissory note; however, the promissory note will be secured by the property owned by Trustor LLC, and therefore, Trustor LLC will be the trustor/grantor under the deed of trust (assuming that all corporate activity is properly authorized). In this case the trustor and borrower would be two separate entities.
7 See NRS 107.015 *et al*.
8 See NRS 107.080 to NRS 107.100, inclusive.
9 See NRS 40.430 to NRS 40.495, inclusive.
10 In addition to a nonjudicial foreclosure, a beneficiary under a deed of trust is also permitted to judicially foreclose. See NRS 40.433.
11 See NRS 107.080.
12 35 day period assumes that the deed of trust was entered into on or after July 1, 1957. See NRS 107.080.
13 See NRS 107.080.
14 Id.
15 Id. The power of sale process may be altered by the applicability of NRS 107.085.
16 See *Aladdin Heating Corporation, et. al. v. Trustees of the Central States and Southeast and Southwest Pension Fund,* 93 Nev. 257, 563 P.2d 82 (1977).
17 *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779 (1978).
18 *Dixon v. Thatcher*, 103 Nev. 414 (Sept. 30, 1987).
19 See *Pickett v. Comanche Constr., Inc.,* 108 Nev. 422, 425 (July 2, 1992) (recounting the district court's issuance of an injunction of a foreclosure sale subject to the plaintiff homeowners posting a bond).
20 See NRS 107.080.
21 Id.
22 See 11 USC 1301 and *In Re Calpine Corp.*, 354 B.R. 45 (Bankr. S.D.N.Y. 2006).
23 When representing lenders, counsel should check whether a bankruptcy filing by the borrower or any guarantor is a default under the loan documents, which may or may not help to avoid a stay granted by the Bankruptcy Court.