

**STATE BAR MEETING
REAL PROPERTY SECTION**

NEVADA FORECLOSURE LAWS – SELECTED ISSUES

Overview of Borrower and Lender Issues

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June 21, 2008

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I. BORROWER OPTIONS

- a. Forbearance Agreement
 - i. Lender allows borrower to reduce or suspend mortgage payment for a defined period of time

- b. Mortgage Modification
 - i. Lender provides borrower opportunity to refinance or extend terms of loan

- c. Deed in Lieu of Foreclosure
 - i. Borrower deeds property to lender in exchange for debt forgiveness

BORROWER OPTIONS, con't.

d. Bankruptcy

- i. Results in automatic stay of foreclosure proceedings
- ii. Chapter 11 reorganization of a single-asset borrower/debtor:
 1. may buy up to 180 days to reorganize and submit a plan if there is proven equity in the property (120 days provided by “exclusivity period” plus additional time if debtor either (a) files a motion to extend; or (b) files a proposed plan before the date of the confirmation hearing)
 - a. exception for Single Asset Real Estate (SARE) entities: if no equity in property, then cause may exist for relief from automatic stay after 90 days. 11 U.S.C. 362(d)(3).
 2. Guarantors are considered co-debtors and as such, a Chapter 11 or Chapter 13 stay can prevent pursuing guarantor in lieu of borrower/debtor.
 - a. Chapter 11: *In re Calpine Corp.*, 354 B.R. 45 (Bankr. S.D.N.Y. 2006) (bankruptcy court would exercise its power to enter “necessary or appropriate” orders in order to extend automatic stay and to preliminarily enjoin litigation in Nevada against Chapter 11 debtor’s surety, where third party’s claims against surety were entirely contingent on debtor’s liability to third party, where allowing litigation to proceed against surety would result in resolution of issues regarding debtor’s liability and defenses that might have collateral estoppel, *stare decises*, or other prejudicial effect on debtor, where surety would have indemnity claim for any judgment entered against it, and where allowing this other litigation to proceed would distract key personnel from debtor’s reorganization efforts); 11 U.S.C. §§ 105(a), 362(a).
 - b. Chapter 11: *Id.* (while automatic stay generally applies only to bar proceedings against debtor, bankruptcy courts may extend automatic stay to enjoin suits by third parties against third parties where they threaten to thwart or frustrate debtor’s reorganization efforts); 11 U.S.C. § 105(a)
 - c. Chapter 13: 11 U.S.C. §1301 Stay of action against codebtor (after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor)

BORROWER OPTIONS, con't.

e. Enjoin Foreclosure Sale

- i. A foreclosure suit may be enjoined provided there is no adequate remedy at law and good reasons for it are presented.
 1. An injunction may be granted ... when it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff. NRS 33.010
 2. A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy. *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779 (1978).
 3. Real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm. *Dixon v. Thatcher*, 103 Nev. 414 (Sept. 30, 1987)
 4. A preliminary injunction enjoining the foreclosure should issue when the equitable remedy is so far superior that the legal remedy may be rendered inadequate. *Nevada Escrow Service, Inc. v. Crockett*, 91 Nev. 201 (March 28, 1975)

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BORROWER OPTIONS, con't.

Enjoin Foreclosure Sale, con't.

- ii. However, the court may require the borrower to post an injunction bond against the later determination that the injunction should not have issued. 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).
 1. Amount of bond determined by judge considering the competing arguments of the parties: the moving party will argue it is likely to succeed, and therefore a small bond should be set; the party to be enjoined will argue that a significant bond should be required to protect its interests.
 2. Significance of Bond Amount: If the bond is set too high, the moving party may not be able to satisfy the bond requirement even though it prevailed on the merits, and the party to be enjoined may escape an injunction even after losing on the merits.

BORROWER OPTIONS, con't.

- f. Grounds for setting aside or avoiding a sale
Material defects in exercise of power of sale may justify setting aside sale. 59A C.J.S. Mortgages §679 (April 2008).
- i. Fraud, concealment, deceit
 - a. *Nevada Land & Mortgage Co. v. Hidden Wells Ranch*, 83 Nev. 501 (Dec. 18, 1967) (trial court may set aside a trustee's sale, under deed of trust, upon grounds of fraud or unfairness)
 - ii. Misconduct
 - a. *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792 (Nov. 28, 1990) (trustee's sale improperly continued and therefore not conducted in commercially reasonable fashion)
 - iii. Unfair or oppressive conduct
 - a. *Brunzell v. Woodbury*, 85 Nev. 29 (Jan. 10, 1969) (stating that there must exist some element of unfairness or oppression along with inadequacy of price to set aside a trustee's sale legally made)
 - iv. Failure to give notice or the giving of a misleading notice
 - a. *In Re Peters*, 198 B.R. 799 (1995) (under Nevada law, to foreclose on deed of trust, secured creditor must, upon default, meet certain notice requirements and time limits)
 - b. *Title Ins. and Trust Co. v. Chicago Title Ins. Co.*, 97 Nev. 523 (Oct. 26, 1981) (trustee's sale was void under foreclosure statute where no notice of foreclosure sale given to vendee under recorded contract for sale of real property)
 - v. Material mistake
 - a. *Home Savers, Inc. v. United Security Co.*, 103 Nev. 357 (Aug. 27, 1987) (where trustee not mistaken about the parcel for sale but notice published by trustee was misleading as to the sale parcel, and buyer mistaken about parcel it purchased, buyer entitled to rescission by virtue of unilateral mistake)
 - vi. Reliance
 - a. *Nevada National Bank v. Huff*, 94 Nev. 506 (Aug. 1, 1978) (court imposed duty on lender, due to lender's course of conduct in permitting debtor to make late payments, to give notice to debtor that strict compliance with the terms of the long-ignored contract would henceforth be required to avert repossession of a vehicle)

II. LENDER CONSIDERATIONS

- a. Review the Loan Documents
 - i. Does a Default Exist? If so, what type of default?
 - 1. Monetary
 - 2. Non-monetary
 - 3. Violation of “due on sale” clause
 - 4. If debt is accelerated as result of default, do prepayment penalties apply?
 - ii. What Notice and Cure Provisions are provided in the DOT?
 - 1. In addition to or concurrent with statutory notice requirements and reinstatement period?

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LENDER CONSIDERATIONS, con't.

Review the Loan Documents, con't.

- iii. Promissory Note
 - 1. Review Choice of Law and whether it impacts or limits available options
 - 2. Does Beneficiary possess original Note?
 - a. Mortgage Electronic Registration Systems, Inc. ("MERS") cases are split:
 - i. some courts have ruled that MERS could not foreclose because it was not in possession of the Note. See, *LaSalle Bank Nat'l Ass'n v. Lamy*, 824 N.Y.S.2d 769 (N.Y. 2006).
 - ii. Other courts have ruled that MERS did not lack standing to foreclose where MERS was the holder (by delivery) of the Note. See, *Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So.2d 33 (Fl. App. 3 Distr., 2007); *In re Huggins*, 237 B.R. 189 (Bankr.D. Mass. 2006).
- iv. Identify Guarantor or Surety
 - 1. Notice of default must be given to a guarantor or a surety. NRS 107.095
- v. Deed of Trust
 - 1. If "All-Inclusive" DOT, affects amount of credit bid at sale

LENDER CONSIDERATIONS, con't.

b. Research the Property

i. Title Insurance

1. If beneficiary did not obtain title insurance at time of loan, check for defects in beneficiary's security interest
2. Pay particular attention to potential community property claims if trustor's spouse didn't also execute the DOT
 - a. In Nevada, all property acquired after marriage is presumed to be community property. NRS 123.220; *Forrest v. Forrest*, 99 Nev. 602 (Aug. 31, 1983).
 - b. Neither spouse may sell, convey, or encumber community real property unless both execute and acknowledge deed. NRS 123.230(3)
 - i. Statute does not apply when spouses hold real property as joint tenants and not as community property. *Allen v. Hernon*, 74 Nev. 238 (1958).
 - ii. Notwithstanding that deed to property owned by husband and wife taken in joint tenancy, NRS 123.230(3) applies when parties intended the property to be community property. *Neumann v. McMillan*, 97 Nev. 340 (June 26, 1981).
 - iii. The words "no deed of conveyance" do not include a sheriff's deed made pursuant to sale on execution. *McGill v. Lewis*, 61 Nev. 28 (Nov. 10, 1941).
 - c. Neither spouse may purchase community real property unless both join in transaction of purchase. NRS 123.230(4)

ii. Additional Advances Priority

1. Does DOT state it is governed by NRS 106.300 to 106.400, to protect the priority of non-obligatory advances?

iii. Leases

1. If there are leases on the property that have been subordinated to the DOT, check whether non-disturbance and attornment agreement exists as well

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LENDER CONSIDERATIONS, con't.

Research the Property, con't.

- iv. Bankruptcy
 1. Check court filings in jurisdiction in which real property is located and jurisdiction of trustor's residence address
 2. Recordation of a notice of default or commencement of judicial foreclosure proceedings will violate the automatic stay provisions of 11 U.S.C. §362
- v. Servicemembers Civil Relief Act
 1. Appendix to Title 50 of the U.S. Code, Sections 501-596 grants servicepersons certain protections
- vi. Environmental Matters
 1. Superfund liens?
 2. Might property be contaminated? Review environmental provision in DOT and any environmental reports prepared during due diligence