

How Not To Foreclose



COUNSEL'S CORNER

Lawrence Mathis owned and operated a commercial laser printing and direct mail business in Austin. In March 2000 he bought a 20,000 SF building, and arranged SBA financing. A first lien Note for \$440,000 (approx. 50% of the purchase price) was given to Norwest Bank, NA, and SBA through its affiliate CenTex Certified Development Corporation accepted a second lien Note for \$365,000 (approx. 40% of the purchase price).

Mathis had difficulty servicing the debts and he started making late payments in 2003. In 2006, CenTex acquired the Norwest Note. At that time, Mathis was still several months behind on his payments.

For years Mathis continued to make late payments, and CenTex continued to accept them. Until 2009. In February 2009 Mathis sent CenTex a check for three installment payments. This was the first time that a payment was rejected, but not until April 2009. Shortly thereafter CenTex sent Mathis a letter of intent to foreclose on the property in May 2009.

Mathis sued to stop the foreclosure, claiming the debt was improperly accelerated. And as a consequence, CenTex had no right to foreclose. The trial court initially granted Mathis' request to stop the foreclosure, but at a full trial in 2010 the court reversed itself and ruled for CenTex.

Displeased with that final Judgment, Mathis appealed.

While Texas law requires notice of intent to accelerate a real estate debt, it can also be waived if done so properly. At least with regard to commercial transactions. The waiver must be *clear and unequivocal*. And from my experience, most commercial loans contain a full waiver clause, giving the lender the option to send a notice of intent to accelerate the debt and opportunity to cure a default, or bypassing it and instead sending a notice of foreclosure.

It is also my experience that many times the notice waiver can be negotiated and eliminated. Then, lenders are forced to give a written notice of intent to accelerate and an

opportunity to cure the default before acceleration. But the loan docs in this case did not contain the type of clause that would have been of great benefit to Mathis. Instead, the scales were tilted in the lender's behalf.

The Texas Court of Appeals looked at the waiver provision in the Note and the waiver provision in the Deed of Trust. They were not the same. The waiver provision in the Note appeared to be 'clear and unequivocal.' But not so in the Deed of Trust. The Deed of Trust stated: "If [Mathis] defaults . . . and the default continues after [Lender] gives [Mathis] notice of the default and the time within which it must be cured, as may be required by law or by written agreement . . ."

Feeling confused by the two clauses, the Court of Appeals concluded that the waiver provisions in the Note and Deed of Trust could not be rectified. Absent clear and unequivocal evidence that the Lender and Mathis intended to waive any formal requirement to send notice of default and intent to accelerate the debt before foreclosure, the Judgment of the trial court was reversed because the attempted Note acceleration was ineffective.

Mathis wins. CenTex loses. Well not really. All CenTex has to do now is to send out a notice of intent to accelerate, then accelerate the debt and foreclose next month. But I digress.

See Mathis v. DCR Mortgage III Sub I L.L.C.; 08-10-00310-CV; Texas Court of Appeals 8th District; October 10, 2012.

Lessons learned:

1. Be wary of commercial loan docs. Yes they are one-sided and intended to be so. But that doesn't mean that Borrowers must be in default the moment they sign the docs. Many lenders are willing to make reasonable accommodations. But you have to know what to ask for. And then ask.
2. Texas law will usually help consumer-borrowers and residential tenants. Not so in a commercial context. Don't count on Texas laws helping you. Many provisions that are non-waivable in Texas consumer and residential law are waivable in Texas commercial law.
3. Exercise your Democratic right / obligation. Even if you are a Republican. **Vote!**

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