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Election of remedies: Lenders choose carefully - by Lindsay Mesh

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Lenders beware; when choosing to sue for a default in mortgage payments, your remedies are limited. In New York, a lender must make an election of remedies. The holder of a note and mortgage may choose to either: (1) proceed at law and recover under the note (money action); or (2) proceed in equity and foreclose on the mortgaged premises (foreclosure action). The lender must choose only one of these remedies since New York law is a one-election rule; and once chosen, the remedy must be exercised to exhaustion. Thus, lenders must ensure they select the correct remedy at the start of the case, as the remedy sought must be stated in the complaint.

If an action in equity to foreclose on a property is chosen, while the foreclosure action is pending or after a final judgment in lender's favor, no action at law may be commenced to recover any part of the mortgage debt without leave of the court. Conversely, if a money action to collect under the note is chosen, until a money judgment is obtained, a foreclosure action is prohibited. Many lenders with a mortgage secured by real property almost automatically choose to foreclose on the premises. If a lender starts a foreclosure action, but due to a loan of equity later determines that a money action would be better, the foreclosure action would need to be discontinued or the court

would need to give permission to commence a simultaneous money action. For example, if the property being foreclosed on lost significant value or is not worth as much as the lender initially thought, the lender would need to discontinue the foreclosure action before commencing a collection action or request leave of the court to amend the complaint to sue on the note instead.

If the lender does not sell the property at auction for an amount greater than the amount owed to them, they may make a motion for deficiency judgment. A deficiency judgment is not a separate action, but incidental relief to the final foreclosure judgment.1 Since the purpose of the one remedy rule is to avoid multiple suits on the same debt, this complies with that principal as the foreclosure process has been exhausted and final judgment has been entered and full relief is being sought.

This is also true of money actions against guarantors. The Appellate Division for the Second Department has held that an action to proceed at law on a corporate note personally guaranteed by an officer and shareholder of corporate mortgagor, which was the subject of a foreclosure action, is barred by the election of remedies.2 In this case, a purchase money mortgage was modified to extend the term and defer some payments and the personal guarantee was added to the loan documents. This personal guarantee was still considered part of the original mortgage debt and not an independent loan; the original loan had only been modified, no new debt was created nor was the debt bifurcated. Once the Lender chose to proceed with a foreclosure, they were confined to the remedies available through the foreclosure process.3

RPAPL 1301(3) does give lenders an option to pursue both causes of action, but special circumstances must be approved by the court to proceed with switching between remedies. Some examples of special circumstances include: Borrower gives consent to simultaneous actions or concurrent relief; a tax foreclosure action has been commenced against the premises and the mortgage foreclosure is subordinate to same; and indebtedness can be bifurcated. What is considered to be a special circumstance is left to the discretion of the court.

If a lender chooses to sue under the note for replevin and a final judgment is not entered, they may also commence a foreclosure proceeding.4 The Appellate Division for the Second Department held that with no final judgment entered on the replevin action, the foreclosure proceeding may commence against the same defendants.5 The replevin action was for collateral under a security agreement signed by guarantors and not the real property secured by the mortgage; additionally the claim for a money judgment in the replevin had been discontinued.6 Had a final judgment been entered for the money judgment or the claim for a money judgment still active, the lender could not have pursued foreclosure, but instead would be required first exhaust its remedies in the money action prior to execution on the replevin judgment.

For the reasons stated above, it is important that, at the start of a case, a lender carefully review which remedy is best for them.

Footnotes:

1. Aurora Loan Servs., LLC v. Lopa, 88 A.D.3d 929, 930, 932 N.Y.S.2d 496, 497 (2d Dept. 2011)

2. TBS Enterprises, Inc. v. Grobe, 114 A.D.2d 445, 494 N.Y.S.2d 716 (2d Dept. 1985) (barred by RPAPL § 1301(3) and 1371).

3. Id., see also, Boyd v. Jarvis, 74 A.D.2d 937, 937, 426 N.Y.S.2d 142, 143 (3d Dept. 1980).

4. VNB New York Corp. v. Paskesz, 131 A.D.3d 1235, 1236, 18 N.Y.S.3d 68, 70 (N.Y. App. Div. 2015)

5. Id.

6. VNB New York Corp. v. Paskesz, 41 Misc. 3d 1221(A), 981 N.Y.S.2d 639 (N.Y. Sup. 2013), rev'd, 131 A.D.3d 1235, 18 N.Y.S.3d 68 (N.Y. App. Div. 2015).

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