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Lenders, Beware: Hidden Mortgagor-Tenants in "Commercial" Properties

No particular notice is required before commencing a mortgage foreclosure suit relating to commercial property, and many of the rules intended to help keep homeowners in their homes do not apply. But what about the odd situation where a commercial property is used by the mortgagee as a primary residence? In a cautionary tale for foreclosing lenders, the Appellate Court of Illinois, First District recently held, in Banco Popular N. Am. v. Gyzinski, 2015 IL App (1st) 142871, that where a borrower utilizes his or her commercial property as a principal residence, he or she is entitled to receive all notices required under Illinois law governing residential foreclosures. Thus, characterizing a property as "commercial," even when it was never intended to serve as a home, will not necessarily save a lender from the notice requirement when the property is utilized as a residence.

On January 26, 2011, plaintiff Banco Popular North America (the *"Bank"*) filed a complaint under the Illinois Mortgage Foreclosure Law (*"IMFL"*) to foreclose on a commercial mortgage relating to property owned by defendant Mark Gizynski (*"Gizynski"*). The complaint, which was captioned as a commercial foreclosure, encompassed four buildings, three of which were strictly "commercial" properties. While the fourth building had second and third floors that were merely built-out as offices with kitchen areas, Gyzinski argued that they were occupied as residences.

Gizynski claimed that the building in question met the statutory definition of "residential real estate," contained in section 15-1219 of the IMFL, and that, therefore, no foreclosure action could be instituted without the Bank mailing the notice required by the IMFL. Gizynski's argument was premised on the IMFL's definition of "residential real estate," which includes structures with six or fewer "single family dwelling units," where one of the units is occupied by the mortgagor as his principal residence. In support of his argument, Gizynski submitted a total of nine affidavits, including four from other residential occupants of the building and business owners who leased office space in the building. In addition, Gizynski also submitted documents from the tax assessor's office showing that a homeowner's exemption had been applied to the subject property.

The Bank disagreed, as did the trial court. In fact, the trial court found Gizynski's arguments unpersuasive no fewer than five times when it: granted the Bank's motion to appoint a receiver, finding that the property was commercial; denied Gizynski's motion to dismiss; denied Gizynski's motion to vacate all orders and dismiss for lack of subject matter jurisdiction; denied Gizynski's motion for summary judgment; and granted the Bank's motion for summary judgment.

On appeal, Gizynski asserted his arguments again, with the Bank claiming that the presence of the two non-residential units prevented the subject property from being considered residential real estate. The appellate court ultimately chose function over form, rejecting the Bank's contention that because a property contained a mix of residential and commercial units it should be considered commercial: "the court does not look at the total project of a multiple-dwelling structure to determine the character of the property for the purposes of determining whether a statutory notice is required." Accordingly, the appellate court reversed the trial court's grant of summary judgment and remanded the case back to the trial court for further proceedings consistent with its opinion, the practical effect of which is likely the unwinding of the entire mortgage foreclosure and sale.

Thus, lenders are well advised to review public records and tax information in order to discern if a property in question is listed as the mortgagor's primary residence. In addition, lenders should require and keep accurate records of the address the mortgagor lists as his, her, or their primary residence. Where a mortgagor lists a commercial property as his, her, or their residence, it may be helpful to ask a receiver to conduct a "pre-suit" check to determine if someone is occupying the premises. The relatively minimal cost of such preventative measures

certainly outweighs the costly unwinding of what would have otherwise been a relatively straightforward commercial foreclosure case.

For More Information

For more information, please contact Jim Sullivan (312.845.3445), Bryan Jacobson (312.845.3407), Sara Ghadiri (312.845.3735), your primary Chapman attorney or visit us online at chapman.com.