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The answer is in the minutes

By Michael G. Cortina

It happens more often in the commercial world, but even residential mortgagors are sometimes willing to give the lender a deed to the property to avoid the expense of a foreclosure. The question then becomes whether the lender should try to obtain a deed in lieu of foreclosure, or if a consent foreclosure is the better route. This article will explore the differences between the two types of arrangements and why one is not always better than the other.

What are they?

Deed in lieu of foreclosure. A deed in lieu is just what it sounds like. It is when the mortgagor (or the borrower) gives the mortgagee (or the lender) a deed¹ instead of forcing the lender to engage in the long and time-consuming process of foreclosure. While there is no absolute requirement that the lender release the borrower from liability on the note that was secured by the mortgage, if the lender does not do so it leaves open the possibility that the borrower could change his or her mind and seek to rescind the deed in lieu because of a lack of consideration (the bank gets everything – a deed and a deficiency, and the borrower gets nothing). A deed in lieu can be accomplished very quickly and can help the lender transform a non-performing loan into OREO (Other Real Estate Owned) property overnight. The major drawback of the deed in lieu is the fact that the lender takes the deed subject to any and all liens, claims and encumbrances on the property. 735 ILCS 5/15-1401.

Consent foreclosure. A consent foreclosure is a creature of statute. 735 ILCS 5/15-1402 is the citation to the consent foreclosure statute, and it is a little more involved than a deed in lieu. In this situation, the lender initiates a judicial foreclosure proceeding, and then makes an offer to the borrower (either in the initial foreclosure complaint or via motion with no-

tice to all parties to the foreclosure) to release any deficiency from the borrower or anyone else obligated under the note that is secured by the mortgagor (i.e. co-borrower, guarantors, sureties, etc.). In exchange for releasing any deficiency, the borrower consents to the foreclosure and the entire process is short-circuited. Once the borrower consents, a stipulation is signed by the borrower and the lender files a motion to enter the foreclosure judgment by consent. If no other party to the foreclosure files an objection, then the court enters the judgment of foreclosure and the judge signs the judicial deed, without a sale, giving the lender title to the property free and clear of all liens (well, almost all liens, but we have not gotten to that part yet).

If another party to the foreclosure objects to the consent foreclosure, the objecting party is required to show "good cause" why the consent foreclosure should not be entered. Of course, there is no ready definition of "good cause" so it must be taken on a case-by-case basis and determined by the court whether the objector has met the burden of proving "good cause." After the hearing on the objector's motion, the court has the option of: a) finding that "good cause" has been shown and refuse to enter the judgment by consent; b) finding that "good cause" has not been shown and vest title in the mortgagee; or c) finding that "good cause" has not been shown, but determine the amount necessary for the objecting party to redeem the mortgage and pay that amount, with additional interest, within 30 days and declare that upon payment of the redemption amount that title to the property will vest in the objecting party.

There are two major drawbacks to consent foreclosures. First, they will not terminate any lien of the United States of America (e.g. tax liens) because they can only be terminated by

a judicial sale, and a consent foreclosure does not have an actual sale. Second, a consent foreclosure takes much longer than a deed in lieu because it requires the filing of a foreclosure case, serving of summonses, filing of motions and the holding of hearings.

While it is not a drawback, another problem with consent foreclosures is that they are nowhere near as common as the ordinary mortgage foreclosure. Therefore, judges are sometimes not aware of the procedures outlined in the statute for consent foreclosures. This could cause a delay in the process of obtaining the judicial deed because a judge who is unfamiliar with the statute may not be willing to sign a judicial deed for the property. Attorneys who wish to use the consent foreclosure statute for their clients need to know and understand the consent foreclosure statute in order to avoid problems such as this.

The question now is: how do you choose which method to use if you have a borrower who is willing to give a deed or sign a consent? The answer is in the minutes.

Before any foreclosure is filed, minutes of foreclosure should always be obtained from a title company. This should cost anywhere from \$300 to \$500. The minutes will tell you the names of any entity that has a legal interest in the property at issue. This will include the owners, the lenders, lien holders, tax sale purchasers and anyone else with an interest that is of record. This information will tell you which method will be best suited for your needs.

If the minutes of foreclosure show no liens other than the lender's mortgage(s) upon which you were hired to foreclose, then there is no reason to foreclose if the borrower is willing to give the bank a deed in lieu of fore-

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closure. However, if there are encumbrances such as judgment liens or junior mortgages, a deed in lieu will not terminate such liens, making the consent foreclosure the appropriate route.

As noted above, neither a consent foreclosure nor a deed in lieu will terminate the interest of the United States of America. So if there is a federal tax lien, a lien from the SBA (Small Business Administration) or some other federal entity, the property must go to a judicial sale to terminate that lien. Because neither a consent foreclosure does not result in a Sher-

iff's sale, this method will not terminate a lien of the United States of America. A deed in lieu of foreclosure does not terminate any liens either, so a lien of the United States of America means that a foreclosure that includes a Sheriff's sale must occur in order for the lender to obtain title to the property free and clear of all liens.

The key to which type of method to use when a borrower is willing to give a deed is what liens exist on the property and in what amounts. Before deciding on the way to go, minutes of foreclosure should be obtained

and reviewed. The minutes of foreclosure will provide you with the necessary information to make an informed decision with your client on the best way to proceed. ■

1. Rather than simply accepting the tender of a deed from the borrower, a lender should always have the borrower sign a deed in lieu of foreclosure agreement in order to protect the lender from unforeseen problems. The focus of this article is not what language should and should not be included in deed in lieu of foreclosure agreements, so such matters will not be discussed.

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