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A Primer on New York's One Action Rule


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2023 has seen higher levels of real estate loan delinquencies[1]. With more headwinds on the horizon, including reduced mark to market valuations for some real estate asset classes and a sustained period of elevated interest rates, delinquencies and defaults are likely to continue to rise. As these defaults mature into events of default, lenders will look to exercise remedies. Remedies typically include suing on the promissory note and/or any applicable guaranties and foreclosing on the underlying security instrument. In most states, lenders may pursue one or more remedies simultaneously. In New York, however, the "one action rule" prevents lenders from pursuing multiple actions simultaneously.

Set forth in Section 1301 of the New York Real Property Actions and Proceedings Law (NYRPAPL Article 13), the one action rule provides that, "While [an] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought"[2]. Practically speaking, this rule limits lenders' debt recovery options to either foreclosing on the mortgage or suing on the note and any applicable guaranty, but not both.

There are three exceptions to the one action rule. First, as provided in the statute, simultaneous actions are permitted where authorized by the court. Second, simultaneous actions are permitted where the same property secures separate debts or where recourse is triggered under a guaranty after a foreclosure action has commenced[3]. Lastly, despite loan documents providing for New York law to govern said documents, courts have held that the one action rule does not apply to properties located outside of New York[4]; however, it is not certain that all courts outside of New York will similarly hold that the rule does not apply.

Because the one action rule prevents simultaneous actions, lenders must carefully consider which path will be most efficient to maximize their recovery. As discussed below, each path has its own set of limitations.

A lender's first instinct might be to accelerate the debt and sue on the note. It's relatively efficient and will result in a money judgment in favor of the lender. But lenders should be mindful of the fact that borrowers are often special purpose entities with limited assets, *i.e.*, the property and the cash flow thereof. So, it is likely that they will not have sufficient funds to satisfy the judgment. In addition, since most commercial mortgages are non-recourse, lenders are limited to recourse to the property in satisfaction of the debt as their sole remedy absent "bad acts" by the borrower or its affiliates. The one action rule provides that, "Where [a] final judgment for the [lender] has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the [borrower]…has been returned wholly or partly unsatisfied"[5]. Requiring the lender to exhaust collection efforts before commencing a foreclosure action is time consuming, which in turn may cause the lender to suffer opportunity costs associated with not being able to redeploy the capital elsewhere. Considering the timing concerns and limited recourse opportunities for the lender, lenders should be certain that there is an upside to pursuing an action on the note before foreclosing on the property.

Likewise, a lender may also sue on an applicable guaranty. Here, just as with the note, lenders would still be required to exhaust collection efforts on any resulting judgments before they can foreclose on the property. For guaranties, it is important to understand exactly what obligations are guaranteed and whether any resulting liability is capped at an agreed amount. Most non-recourse guaranties provide for both full recourse and loss carveouts. Full recourse is typically triggered by certain "bad boy" acts like voluntary or collusive involuntary bankruptcy and impermissible debt or transfers, while loss carveouts have a wide array of triggers like losses from environmental or zoning issues. The most important distinction is that a full recourse breach makes the guarantor liable for the entire amount outstanding under the loan, while a loss carveout limits the lender's recovery to the amount the lender can prove it suffered as a loss as a direct result of the trigger event. In addition to understanding what is covered by the guaranty, it is also important for lenders to analyze the economic viability of the guarantor. Is the guarantor viable on the eve of foreclosure – and will they still be viable after a protracted foreclosure battle? Before electing to sue on any guaranties, lenders and their counsel should critically analyze both the economic viability of the guarantor and the recourse opportunities provided by the guaranties.

The last option lenders have at their disposal is to foreclose on the property with the recovery being equal to the proceeds from the foreclosure auction. This option is likely the first choice barring extenuating circumstances, so the lender is looking to the property to recover a large portion of the outstanding debt. As one might expect, the foreclosure process is not an exhaustive remedy. Foreclosure auctions often yield less than the amount outstanding, so lenders will need to seek a deficiency judgment within 90 days of the confirmation of the foreclosure sale[6]. Otherwise, the proceeds of the sale will be deemed to have fully satisfied the obligation. It is also important that lenders name – in addition to the borrower – any guarantors in the initial foreclosure action in order to preserve the lenders' ability to collect on a resulting deficiency judgment should that recourse be available[7]. It is also worth noting that in New York, foreclosure is not particularly efficient. Lenders can expect the foreclosure process to take at least 12 months, and during that time, lenders are barred from simultaneously pursuing an action on the note or guaranty.

The one action rule unearths a new appreciation of the popular legal phrase "one bite at the apple." Typically reserved for the estoppel doctrine, it fits nicely as a metaphor for lenders exercising remedies. It takes more than one bite to finish an apple. Likewise, it typically takes more than one action for a lender to fully recover an outstanding debt. Regardless, the one action rule presents numerous opportunities for lenders to foot-fault during their collection efforts. Because each case is unique, lenders must diligently evaluate the circumstances for each loan and fully appreciate the consequences presented by each possible path.

[1] Trepp, "CMBS Delinquency Rate Shoots Up in May 2023 – Biggest Jump Since June 2020: Overall Rate Hits 14-Month High."

[2] N.Y. Real Prop. Acts. Law § 1301(3).

[3] *See* 172 Madison LLC v. NMP-Group LLX, et al., 977 N.Y.S.2d 688 (N.Y. Sup. 2013).

[4] *See* Wells Fargo Bank Minnesota, N.A. v. Cohn, 771 N.Y.S.2d 649 (1st Dept. 2004).

[5] N.Y. Real Prop. Acts. Law § 1301(1).

[6] N.Y. Real Prop. Acts. Law § 1371.

[7] *See* Cent. Mortg. Co. v. Davis, 53 N.Y.S.3d 325 (App. Div. 2017).