



Defaulted Mortgagee Saved By Distinction Between Note and Mortgage Claims

Nov 18, 2019

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Previously, I wrote blog posts on planning commercial litigation and the considerations involved in voluntarily bringing claims in one lawsuit as a plaintiff. See [Planning Commercial Collection Litigation: A Primer](#) and [Joinder of Claims in Commercial Foreclosure Litigation is a Choice](#). The lessons of those posts were applied to save a mortgage lender in *Villas at East Pointe Condominium Association v. Strawser*, 2019-Ohio-3554, 2019 WL 4165069 (Franklin County, Ohio App., Sept. 3, 2019). The Strawser case has a few lessons that deserve your attention.

In *Strawser*, the condo association initiated a foreclosure case against the condo owner (Ms. Strawser) to collect unpaid condo assessments. The litigation included Mr. Strawser's mortgagee (Carrington Mortgage Services, LLC) as a defendant. So far, the case is not unusual. The property owner, Strawser, failed to answer – again, not unusual; if the property owner cannot pay the condo assessments, it is common that she cannot afford a lawyer or mount a viable defense.

Carrington's response to the foreclosure complaint was more unusual. Carrington also failed to answer the complaint despite a lien on Strawser's condo that was senior to the condo association's lien. Hence, a default judgment was entered against both of those defendants. At the condo association's request, the trial court entered a default judgment that included foreclosure of the association's lien. The default judgment specifically included this:

- A "bar to any equitable interest" that I suspect was requested by the plaintiff to eliminate any right to redeem the property; and
- "IT IS THEREFORE ORDERED ADJUDGED AND DECREED that all claims of [Carrington], having failed to appear herein, be and the same are hereby forever barred against the premises."

A sheriff sale was held at which a third-party purchaser bid substantially more than the amount owed to the condo association. The trial court's sale confirmation order directed the clerk to hold the excess sale proceeds after payment of court costs, property taxes, and the condo association's debt. At this point, Carrington entered the fray.

Carrington moved for relief from the default judgment against it under Ohio R. Civ. P. 60(B). In this motion, Carrington stated that Ms. Strawser had been current on debt payments secured by Carrington's mortgage and that the amount owed on that debt exceeded the remaining sheriff sale proceeds. Carrington recognized that its failure to answer the complaint timely caused it to lose the sheriff sale proceeds that were collected by the condo association; hence, in the Rule 60(B) motion, Carrington did not assert its mortgage's priority over the condo association's lien. Rather, Carrington only sought the sale proceeds held by the clerk of court. Despite this concession to the condo association, the trial court denied Carrington's motion for relief from the default judgment because Carrington could not meet the requirements of Rule 60(B).

In response, Carrington filed a different motion. Carrington asked for distribution to it of the sheriff sale proceeds held by the clerk of court. This motion included an affidavit that included the new assertion that Ms. Strawser defaulted on her periodic payments to Carrington before the foreclosure case was initiated. In this motion, Carrington asserted some of the same legal principles discussed in my prior blog posts. According to the Strawser appellate court:

Carrington's [distribution] motion further acknowledged the judgment entry, in this case, prevented it from enforcing the mortgage. But, Carrington argued that [the default judgment] entry did not prohibit it from enforcing the note. . . . Carrington asserted the trial court's decision denying its Civ.R. 60(B) motion did not preclude the distribution it now sought because the confirmation entry noted that the remaining funds were to be held pending further court order.

The trial court also denied Carrington's motion seeking distribution of the remaining sheriff sale proceeds. Happily, for Carrington,

however, that is not the end of the story. The Strawser appellate court said:

As noted above, the trial court's second ground for denying Carrington's motion for distribution is that the judgment [the default foreclosure] entry ordered "all" of Carrington's claims "against the premises" barred. Carrington, however, is not attempting to proceed against the property. Nor could it. The judgment entry clearly struck Carrington's lien on the property. As a result, Carrington argues it is moving forward against Strawser based on her alleged default on the note.

After those procedural discussions, the Strawser appellate court gave a good clue to their coming decision and echoed the legal maxims discussed in the above-mentioned blog posts. The appellate court said:

we note that in foreclosure cases "the first part of [the mortgagee's] action, concerning the note, is brought according to law and is based in contract * * *." U.S. Bank Natl. Assn. v. George, 10th Dist., 2015-Ohio-4957, 50 N.E.3d 1049, ¶ 11. The second part is the action on the mortgage which is equitable. Hence, a foreclosure "involves a legal action against the maker of a note who has defaulted on payments" and an "equitable action on the mortgage to force a sale of the property based on the lender's secured position." (Emphasis added.) Deutsche Bank Natl. Trust Co. v. Holden, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 5. According to Holden, Carrington is proceeding against Strawser based on the note and not against the property for the mortgage. Because the judgment entry prevents only claims against the property, we find that the trial court erred in holding that the judgment entry barred Carrington's claim against Strawser premised on the note.

Implicit in the appellate court's determination to assert and then apply those legal principals is recognition of the fact that the excess sheriff sale proceeds held by the clerk of court belonged to Ms. Strawser and that if Carrington could get a judgment against her, Carrington could collect the funds owned by her.

The Strawser appellate court followed two prior decisions and held that equitable principles applied to permit the trial court to fashion the relief requested by Carrington. The Strawser court cited and relied on cases that both permit an inattentive mortgagee to enter the litigation after suffering a negative judgment and still collect a portion of the property's sale proceeds.

The lessons from Strawser for commercial litigators are:

- A default judgment against your client does not mean all hope is lost even if you cannot fit your request for relief within the requirements of Rule 60 and win relief from the default judgment;
- Read the default judgment entry closely with a complete understanding of your client's claims; and
- Take an expansive view. Just because the expected debt collection source (the mortgage lien) is now unavailable does not mean that different collection opportunities are not available.

The fundamental task of litigation counsel is to discover existing facts, understand your client's rights, and fashion winning legal arguments. The Strawser case is one more reminder that litigation counsel needs an expansive and informed view of both the facts and law.

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