

## DEVELOPMENT NEWS

## Rules of the Road for the Appointment of a Receiver in Illinois

Prior to the completion of a mortgage foreclosure, many mortgagees seek the appointment of a receiver to manage and operate the mortgaged property. A receiver can be a valuable tool for the mortgagee to: (i) collect rents; (ii) manage existing tenant relationships; (iii) negotiate and find new leases; (iv) handle the day to day operations; and (v) avoid waste, loss or destruction. This article outlines the basic law and procedures that govern the appointment of a receiver in Illinois prior to a foreclosure judgment.

The rights of a mortgagee to appoint a receiver in Illinois are governed by 735 ILCS 5/15-1701 and 735 ILCS 5/15-1702, which are included in the Illinois Mortgage Foreclosure Law (collectively, the "Receivership Provisions"). Under the Receivership Provisions, prior to a judgment of foreclosure a mortgagee has the right to possession of the mortgaged property if: (i) the mortgagee is so authorized by the terms of the mortgage; and (ii) the court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing for cause, provided, however that if the mortgagor objects and shows good cause, the court is required to allow the mortgagor to remain in possession. Whenever a mortgagee is entitled to possession under the preceding sentence, the court is required, pursuant to Receivership Provisions, to appoint a receiver. Based on the text of the Receivership Provisions and the interpretation of the Illinois courts, it is the burden of the mortgagor to demonstrate that a receiver should not be appointed for a commercial mortgaged property.

It should be noted that a mortgagee is not required to appoint a receiver for a mortgaged property and that a mortgagee's failure to make an application for the appointment of a receiver does not preclude the mortgagee from making such application at a later time. Consequently, the mortgagee is not under any specific time pressure to request the appointment of a receiver at the mortgaged property.

Recent decisions by the Illinois courts have supported the presumption that the mortgagee is entitled to the appointment of a receiver if the mortgagee otherwise meets the requirements of the Receivership Provisions, and have clarified that the burden is on the mortgagor to demonstrate "good cause" that the appointment of a receiver is not an appropriate remedy.

Before a mortgagor needs to demonstrate "good cause" that the appointment of a receiver is not an appropriate remedy, the mortgagee must prove that there is a "reasonable probability that the mortgagee will prevail on a final hearing for cause." In *Mellon Bank, N.A. v. Midwest Bank & Trust Co.* (265 Ill.App.3d 859), the court stated that "whether a default in fact exists will typically turn on the interpretation of documentary evidence – a non-discretionary function." In order to determine whether a default exists, the court will examine the loan documents and other supporting evidence, such as default letters. For example, in *Mellon*, the court relied on an affidavit from an officer of the mortgagee setting forth the various defaults of the mortgagor in order to establish that the mortgagor was in default.

In *Centerpoint Properties Trust v. Olde Prairie Block Owners, LLC* (398 Ill.App.3d 388), a receiver was appointed for the commercial property pursuant to the Receivership Provisions. The mortgagor argued that a receiver was not appropriate because appointment of a receiver would hurt the mortgagor's efforts to find new tenants, investors for the development of the mortgaged property and a new lender to refinance the defaulted loan. In other words, the mortgagor claimed that there was "good cause" not to appoint a receiver.

The court began its analysis by stating that the Receivership Provisions, "create[s] a presumption in favor of the mortgagee's right to possession of nonresidential property during the pending of a mortgage foreclosure proceeding." Next, the court outlined several failed arguments made in other cases by mortgagors attempting to show "good cause" not to appoint a receiver. Specifically, the court stated that the qualifications of the current property manager hired by the mortgagor (vis-à-vis the qualifications of any property manager appointed as a receiver) are irrelevant, and that a showing by mortgagor that it is better able to manage the property would not be adequate to overcome the presumption that a receiver should be appointed. In addition, any subsequent obstacles for the mortgagor to obtain new tenants, investors or lenders as a result of the presence of a receiver are also insufficient to overcome the presumption for a receiver.

The court, however, did note that if the appointment of a receiver would impede the investment by an investor that had already provided a commitment for additional funds, or a lender that had already committed to refinance the defaulted loan, then "good cause" to deny the appointment of a receiver might exist. The court further noted that it would likely have to find that the transaction is, "imminent and not merely a possibility at some unknown time in the future."

In summary, the Receivership Provisions create a strong presumption in favor of a mortgagee attempting to appoint a receiver for a commercial mortgaged property. In addition, a mortgagor will have to overcome a substantial burden in order to establish that there is "good cause" under the Receivership Provisions that a receiver should not be appointed. Given the legal complexities and potential issues associated with a mortgage foreclosure, it is important that mortgagees and mortgagors work closely with their attorneys to insure that their rights and remedies are fully protected.

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