Emilie Cooper in Law360: Do Dual Collateral Loans Impair NY Borrower Protections'

July 7, 2020

RELATED PRACTICES Commercial Real Estate Leasing, Real Estate

In recent years, commercial real estate lenders have increasingly relied on dual collateral loan structures, where a loan is secured by both a mortgage lien on real property and a pledge of the equity interests in the borrower.

By taking two types of collateral, lenders ostensibly have a choice in pursuing remedies in the event of a default. They can proceed by a judicial foreclosure on the mortgage, which can take years to complete, or a Uniform Commercial Code foreclosure on the equity interests, which can be accomplished in a matter of weeks or months.

Despite the increasing prevalence of dual collateral loans, because a UCC foreclosure cuts short a borrower's equitable right of redemption, i.e., a borrower's right to redeem the mortgaged property by paying off the outstanding mortgage debt, some practitioners remained concerned that this structure violated long-standing New York law that a borrower's right of redemption cannot be clogged or impaired.

Further, this uncertainty lingered because there was a dearth of case law applying the centuries old anti-clogging doctrine in the modern commercial real estate financing context.

In June 2018, many thought they had received an answer to the clogging question when the New York Supreme Court for New York County allowed a lender holding both a mortgage and a pledge of equity interests to move forward with a UCC foreclosure sale. However, any comfort afforded by the trial court's decision was temporary.

Almost exactly two years later, in a subsequent decision involving the same loan, the same New York trial court clarified that it had not, in fact, substantively determined whether the dual collateral loan clogged the borrowers' right of redemption. Moreover, the court allowed the borrowers to proceed with a claim that the loan documents, including a guaranty, were invalid because the dual collateral structure violated the borrowers' and guarantors' equity of redemption.

Excerpted from *Law360*. To read the full article, click here. (Subscription required)

© 2026 Haynes and Boone, LLP