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Authored by Scott D. Rogers

WRONGFUL FORECLOSURE – VERBAL ASSURANCE THAT FORECLOSURE SALE WILL BE POSTPONED MAY BE ENFORCEABLE

Deliberate and Effective External and Internal Communication is Critical

The latest case following the mortgage meltdown underscores the need for lenders to be deliberate and clear in both their external and internal communications. In *Garcia v. World Savings*, FSB, 183 Cal. App. 4th 1031 (2010), the appellate court determined that the lender's verbal agreement with the borrower to postpone a foreclosure sale could be enforceable, even absent consideration for the lender's promise to postpone. The appellate court found that the loan officer's telephonic assurance to the borrower that he could, and would, briefly extend the pending foreclosure sale under certain conditions was reasonably relied upon by the borrower.

Facts and Circumstances

In 2004, Garcia acquired a residential property with a loan from World Savings. After several years, Garcia failed to make the required payments. World Savings commenced a non-judicial foreclosure by recording and serving its Notice of Default. After expiration of the statutory three-month notice period, World Savings recorded, served, and published its Notice of Trustee's Sale. World Savings voluntarily postponed the trustee's sale on several occasions.

At Garcia's request to allow time to complete refinancing of other property owned by Garcia, World Savings again postponed the trustee's sale to August 29, 2007. On August 27, 2007, Garcia contacted World Savings' foreclosure department and requested a further extension until the first week of September. World Savings agreed only to extend the trustee's sale for one additional day to August 30, 2007. In response to Garcia's inquiry as to what would happen if Garcia's refinance did not close by August 30, 2007, the World Savings representative told Garcia that the property, "won't go to sale because I have the final say-so and as long as I know that you could close it the first week of August [sic], I'll extend it." The reference to August in the trial transcript was acknowledged to have been meant to refer to September.

On August 29, 2007, Garcia called the World Savings representative several times and left messages advising that the refinancing would not close until the following week. World Savings did not return any of the calls or otherwise respond to any of the messages.

The trustee's sale was completed on August 30, 2007. Unaware that the foreclosure had been completed, on September 7, 2007 Garcia closed the refinancing of his other property and tendered a check to World Savings for the reinstatement amount previously quoted by World Savings. World Savings returned Garcia's check uncashed.

HRO CONTACTS California Real Estate

Scott D. Rogers
Partner
scott.rogers@hro.com
415-268-1990

Dena M. Cruz
Senior Counsel
dena.cruz@hro.com
415-268-1975

Kenneth R. Whiting Jr.
Partner
ken.whiting@hro.com
415-268-1976

Norman Cruz
Senior Counsel
norman.cruz@hro.com
415-268-1940



Holme Roberts & Owen LLP
Attorneys at Law

Garcia filed an action against World Savings for “wrongful foreclosure” alleging violations of the statutory foreclosure procedure, breach of oral contract (to postpone the sale) and promissory estoppel. The trial court granted World Savings’ motion for summary judgment finding that the foreclosure sale procedure was valid and rejecting Garcia’s claims based on breach of oral contract and promissory estoppel. The trial court found that there was insufficient consideration to support the claimed oral contract to postpone the foreclosure sale and that World Savings’ promise to postpone was conditional and thus not sufficiently clear to support a promissory estoppel claim.

Legal Analysis

The major issues on appeal were (i) the sufficiency of the consideration to support the creation of the alleged oral contract to postpone the sale; (ii) reasonable detrimental reliance of World Savings’ promise to postpone the sale; and (iii) the sufficiency and clarity of the promise by World Savings to postpone the sale. The appellate court upheld the trial court’s grant of World Savings’ summary judgment motion on all counts except for the count setting forth a claim for promissory estoppel. The appellate court agreed with the trial court that Garcia’s promise to continue making principal and interest payments on the loan and Garcia’s obtaining a new, high cost loan on other property did not constitute consideration sufficient to establish a contract between Garcia and World Savings. Notably, however, the appellate court found that notwithstanding the inadequacy of the consideration, Garcia’s actions in closing the high cost refinancing transaction demonstrated reasonable and justifiable reliance on World Savings’ promise to postpone the foreclosure sale. The appellate court specifically held that the fact that the promise was conditional (closing of the refinance the following week) did not render the promise unenforceable or ambiguous. The case was remanded back to the trial court to continue to trial on the promissory estoppel claim.

Take Away

This case highlights the need for lenders to be clear and direct in their communications with borrowers particularly with regard to matters relating to enforcement of remedies upon default. Lenders need to recognize that verbal agreements, if reasonably relied upon by borrowers to their detriment, can be as binding as written contracts. Not only must lenders take care to precisely communicate with borrowers, it is crucial that lenders communicate effectively internally so that actions, decisions, or promises by one department or employee are consistent with those of other employees or departments. Failure to communicate effectively externally or internally can result in failed expectations, inconsistent actions, and potential liability.

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