

# Preparing for a Foreclosure: A Checklist for Commercial Real Estate Lenders

4/16/2020

While lenders and borrowers have largely struck a cooperative tone in addressing the myriad issues caused by the COVID-19 pandemic, a spate of foreclosures is likely, especially with respect to loans secured by assets that were underperforming before the effects of the pandemic were felt. Depending on the jurisdiction, the foreclosure process can be lengthy and byzantine, so it is imperative that a foreclosing lender be well prepared, particularly when there may be a high volume of simultaneous foreclosure actions. The following foreclosure checklist gives an overview of the preparations that a lender will need to undertake in effectuating a foreclosure or exercising other remedies.

## Preparation and Review of Loan Documents (preferably in advance of an event of default)

1. Assemble fully executed copies of all loan documents. It is especially important to locate the original promissory notes, as some jurisdictions require depositing the original promissory note with the court as a prerequisite to a foreclosure proceeding. In the case of a mezzanine loan, it is critical to locate the original membership or share certificate along with the endorsement in blank.
2. Assemble all correspondence between lender and borrower during the term of the loan. In particular, identify any communications from borrower that purport to change its notice address and any communication from lender that could be construed as a waiver or modification of loan terms. If it does not already exist, an index of this correspondence should be created. Going forward, all communications with borrower should be carefully considered so as to avoid a later assertion that lender has waived or modified any of its rights or borrower's obligations, and all such communications should be vetted with counsel.

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3. Ascertain that lender has received all of the most recent financial and property information to which it is entitled under the loan documents.

### **Diligence and Searches**

4. Order UCC, lien, bankruptcy and litigation searches on borrower in its jurisdiction of formation and in each of the jurisdictions where collateral properties are located to confirm that (i) lender's security interest is perfected and that no other party purports to have a security interest in the collateral and (ii) there are no contingent liabilities for which lender would become liable as a result of foreclosing on the collateral.
5. Order a title report (including departmental searches) for each collateral property to ascertain any encumbrances that could potentially prime the lien of lender's mortgage.
6. Confirm notice addresses of all parties (borrower, guarantor, co-lenders and relevant third parties, such as lockbox bank, cash management bank, property manager, franchisor and cap counterparty).
7. Determine whether and to what extent there is a need to notify third parties of the event of default, and prepare a checklist of third party notices to be delivered with confirmed addresses.
8. Determine whether declaration of event of default or exercise of remedies by lender triggers cross-default under any material agreements (e.g., property management or franchise agreements).
9. If there are multiple lenders, determine actions to be taken by agent or lead lender pursuant to any applicable co-lender or intercreditor agreement in connection with an event of default and any related consent requirements.
10. Determine amounts on deposit in all cash management, lockbox, escrow and other collateral accounts controlled by lender. Consult the applicable lockbox and cash management agreements and determine the steps to be taken to

redirect funds that would, in the normal course, flow to borrower.

11. If collateral properties are in multiple jurisdictions, retain local counsel in each jurisdiction and seek advice regarding single-action rules, timelines for foreclosure and general advice regarding foreclosures in each jurisdiction. All local counsel should be jointly consulted to advise on an appropriate foreclosure sequence so as not to inadvertently trip single-action rules.

### **Event of Default Procedures**

12. Deliver notice by lender to borrower declaring an event of default, acceleration of the loan, commencement of a cash sweep period and reservation of rights.
13. If acting as lead lender or agent where there are multiple lenders, deliver to co-lenders copies of all notices sent by agent or lead lender to borrower, as well as copies of all written communications received from borrower, as required pursuant to any applicable co-lender or intercreditor agreement (and take such other actions as may be required under the applicable co-lender or intercreditor agreement, such as delivery to co-lenders of a decision notice regarding the exercise of remedies or the preparation of an asset report).
14. Draft and deliver notices of event of default to applicable third parties.
15. Calculate amounts owed by borrower as of the date of default, which amounts should include principal, accrued interest and accrued fees, expenses and enforcement costs.

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