

Resources

Michigan Court of Appeals Broadens Scope of Michigan's Non-Judicial Foreclosure "One-Action Rule"

May 15, 2012

In a significant decision published on April 17, 2012, the Michigan Court of Appeals ruled that a mortgagee was precluded from pursuing an action for foreclosure by advertisement while simultaneously maintaining a collection action against a guarantor. *Greenville Lafayette, LLC v. Elgin State Bank* (Mich. Ct. App. Case No. 308450). The case involves the so-called "one-action rule" set forth in MCL 600.3204(1)(b), which provides, as one of the conditions to pursuing non-judicial foreclosure in Michigan, that "an action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage." Before publication of the Greenville opinion, the most influential case on this subject was *US v. Leslie*, 421 F.2d. 763 (6th Cir. 1970). In *Leslie*, the Federal Court of Appeals observed that the purpose of the one-action rule is to prevent a mortgagee from pursuing double recovery against a borrower (e.g., pursuing foreclosure by advertisement while also maintaining a collection action on the note secured by the mortgage). The *Leslie* court determined that a guaranty, however, constituted a separate obligation from the mortgage note, and therefore a mortgagee could simultaneously maintain actions against the mortgaged property and the guarantor.

In *Greenville*, the borrower sought to enjoin the lender from pursuing foreclosure by advertisement because the lender had already commenced an action seeking to collect on the guaranty agreement. Distinguishing *Leslie*, the Michigan Court of Appeals found that the language used in the loan documents prevented the guaranty indebtedness from being construed as an obligation separate from the mortgage debt. Specifically, the mortgage defined the "Indebtedness" secured by the mortgage to include all amounts due under "the Note or Related Documents..." and defined "Related Documents" to include "all promissory notes,...*guaranties*,...and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with Indebtedness." The court found that, because the mortgage directly secured the guaranty, the mortgagee could not claim that the guarantor's obligations constituted a separate obligation from the mortgage debt. Therefore, the simultaneous non-judicial foreclosure proceeding was precluded.

Greenville provides important guidance for mortgage lenders in Michigan, both from the loan document drafting and loan enforcement strategy standpoints in that a lender may be precluded from pursuing an action against the guarantor until the foreclosure by advertisement proceedings have concluded.

If you are interested in the impact of the Greenville decision on your specific loan or circumstances, you may contact **Adam Fishkind** at 248-203-0749, **Brian Page** at 616-776-7509, **Anthen Perry** 313-568-6899 or your regular Dykema contact. As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please contact us if you would like to be added to our distribution list. Your comments are always welcome. © 2012 Dykema, LLP.

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