ANTHONY & PARTNERS
Attorneys At Law
Business Advocacy | Creditors Rights | Complex Litigation | Bankruptcy
813.273.5616 | *www.anthonyandpartners.com* December 2011

Digging into the "Eat Dirt" Defense — *By Attorneys Frank Lafalce and Allison Doucette*

As the economy and property values have declined, more principals are pursuing the "Eat Dirt" defense, attempting to force banks to take ownership of collateral first, before seeking recovery from principals. If they're successful, they reduce their liability by the amount they convince the court the property was worth – even if the bank can prove a lower market value at the time of foreclosure sale.

Creditor Weapons to Counter

Creditors have several ways to thwart claims that they must recover collateral before pursuing individuals.

Loan Documents

Properly drafted notes, guarantees and mortgages should include language stating that the creditor may choose the remedy it desires, without waiving its right to later resort to one not originally chosen. In addition, the guaranty should:

- State that it is one of payment and not collection, and that the bank can abandon or release any collateral or obligors for the loan without limiting its rights against the guarantor.
- Include a waiver by the guarantor of any right to require the creditor to elect a remedy.
- State that the creditor has the right to collect from the guarantor without foreclosing on the collateral, as well as the right to pursue several remedies at the same time.

Case Law

Florida law distinguishes between a guaranty of payment and a guaranty of collection. It does not require lenders to look to collateral before exercising rights against a maker or guarantor. Relevant cases include Williams, et al. v. Robineau, 168 So. 644, 646 (Fla. 1936); Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C., 438 So. 2d 408, 409 (Fla. 2d DCA 1983); and Syfrett v. AmSouth Bank of Fla., 588 So. 2d. 46, 47 (Fla. 1st DCA 1991).

Recent case law, however, has fanned the flames on arguments that a bank receiving judgment for both foreclosure and on guaranty or note must first sell the property before executing the judgment on principals individually.

In Farah v. Iberia, 47 So. 3d 850 (Fla. 3d DCA 2010), the defendant appealed a foreclosure judgment that contained the words "for which let execution issue." The Court struck the offending words and noted that the purpose of the current form foreclosure judgment, which does not contain the words "for which let execution issue," is to prevent circumvention of the deficiency judgment process. Farah can be distinguished when the intention of the parties is not to skirt the deficiency judgment process, but to obtain a judgment on the full relief requested in the complaint, both money and foreclosure, either of which can satisfy the judgment.

Litigation Strategy

In a typical loan enforcement action, our firm files suit on the note, guaranty, and for foreclosure of the collateral, all in one action. If the creditor perceives more value in the individual's ability to pay than the collateral, it may make sense to go directly for personal judgments and leave out foreclosure. It is more difficult for principals to claim a bank should foreclose first if the bank hasn't requested that relief. The foreclosure can always be instituted later, if desired.

Anthony & Partners: Strategy in Action

Anthony & Partners has had success against the Eat Dirt defense. In a recent matter, a bank brought suit against a borrower and numerous guarantors, some with significant assets. The bank also brought a foreclosure count against a failed development loan and the borrower attempted to force the bank to proceed first to foreclosure. The collateral had declined by almost 70%. The trial judge ruled in our client's favor, finding that while the bank is entitled to only one recovery, it was not required to elect, nor could it be forced to pursue, one course of action over another.

A more unusual case involved a failed subdivision that also had Community Development District ("CDD") bonds of several million dollars. The owner filed an assignment for benefit of creditors ("ABC") in state court, which transferred ownership of the debtor's assets to a court-appointed assignee (much like a trustee in bankruptcy). The assignee attempted to abandon the collateral to the bank, which would have made the bank liable for millions in taxes and CDD obligations. Our firm convinced the court that the assignee's right to abandon did not require the bank to accept ownership.

Cleaning Up Against the Eat Dirt Defense

It is a sign of our troubled real estate market that borrowers are trying to force banks to take back collateral that banks don't want to accept. Fortunately, proper planning and strategic litigation tactics may be used to prevent an unwanted result. Contact us at 813.273.5616 to learn more.

HEADLINES

Summary Judgment Affidavits
A case decided on September 7, 2011, by the Fourth District Court of Appeal, Glarum v. LaSalle Bank, National Association, reversed a final summary judgment in favor of the bank. The Court found that the affidavit of indebtedness constituted inadmissible hearsay, holding that the bank had provided no competent evidence to show the amount of the obligation at issue. The Court held that the "specialist" loan servicer who executed the affidavit did not have personal knowledge of amounts due, as he did not know who entered the data found in the bank's records and could not verify that the entries were correct at the time they were made.

Foreclosure Backlog Down Sharply
Statistics from the Office of State Courts indicates that as of June 30, 2011, 201,524 foreclosure cases were disposed of in fiscal year 2010-11. A total of 117,000 new cases were filed in that time frame, leaving approximately 176,000 cases pending at June 30, 2011. This compares with 260,000 pending cases at June 30, 2010. These figures are somewhat misleading in that approximately 100,000 of the disposed cases were voluntarily dismissed, many due to the large bank's documentation problems. These cases could be filed again at a later date.

Clarification of the Olmstead Ruling
House Bill 253, recently signed into law, clarifies that the sole remedy of a judgment creditor against a member of a multi-member Florida LLC is a charging order. This gives the judgment creditor the right to receive distributions, but does not entitle the creditor to become, or exercise any right of, a member. While the Olmstead ruling concerned a single-member LLC, it left the door open to an interpretation that might apply to multi-member LLCs.

STAFF MEMBER PROFILE

Meet Attorney Wade Stidham

Wade Stidham is an Associate Attorney at Anthony & Partners, with a professional focus on civil litigation and trial work. He received his Bachelor of Arts, with honors, from University of Florida and his J.D. from Vanderbilt University Law School, where he served as Executive Articles Editor for the Vanderbilt Journal of Transnational Law.

Before attending law school, Wade assisted with commercial litigation and trial work at the Polk County law firm of Stidham & Stidham, P.A. He also interned for the Honorable Steven D. Merryday, United States District Court Judge for the Middle District of Florida.

Wade is a third-generation lawyer in the Tampa Bay area. His father and grandfather practice in Bartow, Florida. He can be reached by email at wstidham@anthonyandpartners.com or by calling 813.273.5616.

Professional Associations
The Florida Bar
Hillsborough County Bar Association
Tampa Bay Bankruptcy Bar Association
Polk County Bar Association
Lakeland Bar Association

RECENT CASE

Home Equity Loans in Bankruptcy

In the case of In re Steinberg, decided recently in the Bankruptcy Court for the Southern District of Florida, the court found that a Chapter 7 debtor must affirmatively elect to (1) reaffirm the debt, (2) redeem the property by paying the debt in full, or (3) surrender the collateral. Furthermore, the court held that the debtor cannot modify the loan unilaterally nor force the lender to take back the property if it elected to surrender.

UPCOMING EVENTS

Discovery Compliance Seminar
Attorneys John Anthony, Frank Lafalce and Allison Doucette recently hosted a live and virtual seminar entitled "Discovery Compliance for Financial Institutions in Loan Enforcement Litigation" to a regional bank client. Over 50 bank officers attended in person and via the web. Could your institution benefit from a FREE presentation on this topic? Contact us at 813.273.5616.

Interested in a seminar on a recurring legal issue confronting your company? Contact our event coordinator, Cindy Klosicki, to learn more about our educational workshop options.

ANTHONY & PARTNERS
Attorneys At Law

Tampa:
813.273.5616

Bartow:
863.537.8025

Web:
anthonyandpartners.com

Email:
info@anthonyandpartners.com

Tampa Office
201 North Franklin Street
Suite 2800
Tampa, FL 33602

Bartow Office
415 East Main Street
Bartow, FL 33830