REAL PROPERTY

Consent to Foreclosure or Deed in Lieu as Mortgage Workout Options: Which is Better?

By Andrew Lieb

According to Attom Data Solutions, foreclosures are down year-over-year 83 precent, but "nearly one in 10 Long Island homeowners have fallen behind on their mortgages" according to Newsday. Stated otherwise, foreclosures are going to rocket up throughout the island as soon as we reach the end of the federal and state moratoriums on foreclosure in reaction to Covid-19. Are you ready to litigate these matters in 2021?

Litigating foreclosure matters should always have a lens towards settlement in the form of a mortgage workout. While the plaintiff's and defendant's litigation proficiencies will impact the terms of such workout, and jumping to workout without leveraging / mitigating exposure is only for fools, you should start by understanding the options in settlement before you get into the intricacies of litigation practice, particularly if you plan to refer cases to competent litigating counsel while appearing professional. In settlement, there are two-tracks for a mortgage workout including, retention and exit. As to exit, there are four possibilities, including short sales, surrender in bankruptcy, consent to foreclosure, and deed-in-lieu of foreclosure. This article is concerned with the distinctions between the exit strategies of a consent to foreclosure and a deed-in-lieu of foreclosure. While each has the same main result, which is to have the property owner forfeit title to the home in consideration of a waiver of a deficiency judgment, the process and each's attenuate advantages and disadvantages vary drastically.

Andrew Lieb

A consent to foreclosure means that the borrowers/defendants agree to waive all of such borrowers'/defendants' litigation defenses and have a foreclosure entered against such borrowers/defendants in a judgment of foreclosure and sale in consideration of a waiver of a deficiency judgment application being brought pursuant to RPAPL §1371 (i.e., to the extent that such borrowers/defendants didn't previously file a Chapter 7 bankruptcy and receive a discharge on the note or receive such discharge only to reaffirm the note thereafter) plus minor payments in the form of moving expenses and the like. A deed-in-lieu of foreclosure means that the borrowers/defendants transfer their deed to their property to the lender in consideration of a waiver of the deficiency judgment plus the same minor payments together with the parties executing a stipulation of discontinuance to end the litigation.

Generally, the preferred course between a consent to foreclosure and a deed-in-lieu of foreclosure, for borrowers/defendants, is to pursue the deed-in-lieu over the consent to foreclosure. The reason that the deed-in-lieu is preferred is because it's quicker, quieter, and less offensive. For lenders/plaintiffs, the preferred course is dependent on two factors, to wit: primarily, whether there are junior lienholders on the property; and, secondarily, whether such lender wants to take ownership of the property.

The key distinction between a consent to foreclosure and a deed-in-lieu is that under a consent to foreclosure, the junior lienhold-

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REAL ESTATE DEVELOPMENT

Recent Land Use, Zoning and Environmental Real Estate Decisions

By Jason A. Stern

As shown in our previous columns, clients can face a variety of real estate development issues, the answers to which depend on land use, zoning, environmental and municipal laws, rules, and regulations, which vary among the counties, towns, villages and cities across Long Island and New York state. However, there are certain overarching legal principles that guide these answers and this column reviews recent court decisions on such principles to give practitioners a framework for understanding the issues and how the courts address them, with an emphasis on decisions from the Appellate Division, Second Department:

Cemetery "abandoned" pre-existing nonconforming use by selling portion of property

In *Ferncliff Cemetery Association v. Town of Greenburgh*, 124 N.Y.S.2d 61 (2d Dep't 2020), petitioner Ferncliff Cemetery Association ("Ferncliff Cemetery") was granted permission by Westchester County to operate a cemetery on a certain 101-acre parcel in the Town of Greenburgh ("Town") in 1902. In the 100-plus years since permission was granted, the bulk of the property was continuously used for cemetery purposes; however, in approximately 1908, 33 acres of the property were sold to a private third-party, which subdivided that parcel for a housing development. In 1963, the Town Board adopted a zoning regulation prohibiting cemeteries from increasing their "land area." In 1971, Ferncliff Cemetery reacquired 12.5 acres of the 33-acre parcel, and in 2001, applied to the Town for permission to construct a 5,000 square foot "caretaker cottage" to store "equipment and material" associated with the cemetery on such 12.5 acres. The Town denied permission and Ferncliff Cemetery appealed to the Town Zoning Board of Appeals ("ZBA") on the ground that its proposal constituted a "pre-existing nonconforming use" of that parcel. The ZBA upheld the Town's denial and Ferncliff Cemetery commenced an Article 78 proceeding in the Supreme Court, Westchester County, challenging the ZBA, which was dismissed. On appeal, the Second Department affirmed the ZBA's decision, holding a "nonconforming use" that predates the enactment of a zoning

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VETERANS – HAVE YOU SERVED?

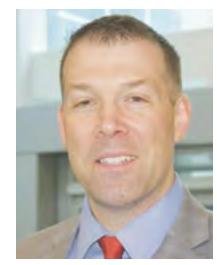
Veterans Docket in Suffolk County Traffic Court

By Chad H. Lennon

In July of 2017 Suffolk County Executive Steve Bellone directed the Suffolk County Traffic and Parking Violations Agency to establish a specialized docket for veterans. The Veterans Docket takes place on the third Friday of each month at 2 p.m. at the H. Lee Dennison Building. Veterans with an honorable discharge and current service members who have not been on the docket previously are eligible.

Suffolk County has the largest population of veterans in New York state and the loss of a driver's license can be catastrophic. Veterans could face outlandish fines or license suspension and may not even be aware. The Department of Veterans Affairs conducted a study a few years ago that resulted in proving one of the top 10 needs for a veteran is unpaid traffic and/or parking tickets. When the court was first established, Steve Bellone stated the purpose of the Veterans Docket was to help veterans who have possibly accumulated fines for traffic violations while being overseas or could possibly face a license suspension for their violations. He further stated a major goal was to prevent veterans from having to appear in criminal court for minor infractions. The veterans are supposed to receive consideration based upon his or her military status, medical status (mental and/or physical) and financial situation.

The Veterans Docket is conferenced, with prosecutors allowing veterans more time to discuss his or her case. Officials previously stated there is accountability for the infraction(s), however, it is done with empathy for the service the veteran has provided to the country. Prosecutor's will assess the penalties based upon the veteran's ability to pay fines and alternatives to fines. The court previously considered red light camera and parking violations, but a recent trend is those cases are no longer being held during the Veterans Docket Day. It is important this program sustains for the longer-term because veterans can fall into a downward spiral with issues like this. Eventually a veteran may be facing homelessness and susceptible to suicide, which is already an epidemic in the veteran community.



Chad H. Lennon

How does a veteran accumulate so many traffic violations? While in service a veteran will undergo training to be aware of anomalies around the "road," which may be an Improvised Explosive Device (IED). Further, a service member may undergo evasive driving training to avoid potentially fatal conditions. Post-Traumatic Stress Disorder is one of the signature injuries of the recent wars. One of the symptoms is flashbacks, which could occur on the road while driving. Moreover, standard infrastructure when driving may be indicators for a veteran driving. Overpasses, bridges, and slow-moving vehicles are indicators of a potential IED or ambush.

This unique program is at no-cost to taxpayers as the judge, prosecutor, and court staff are already working. Further, these cases are already in the court and may cost more taxpayer money without the Veterans Docket finding a quick resolution. Moreover, the public is benefited when a veteran has a driver's license because there is no longer a barrier to finding gainful employment.

To submit a veteran for the Veterans Day Docket the court will need a copy of the DD-214 (the discharge paperwork) that exhibits an honorable discharge. The clerk at the window will than check that the veteran has not been previously placed in the Veterans Docket Day. Usually, the court will take that information and review the case to be placed on the docket. Recently cases involving speeding over 90 mph have not been accepted as well as when a veteran has been issued a warning for the same alleged infraction. The reviewing process can take weeks, so be sure to follow up with the court that the case is being accepted.

Note: Chad H. Lennon is the Director of the Veterans and Servicemembers' Rights' Clinic at Touro Law Center. He is also the co-chair of the Suffolk County Bar Association Committee on Military and Veterans Affairs and the Secretary for the New York State Bar Association Committee on Veterans. He continues to serve in the Marine Corps as a major in the reserves.

Transactional (Continued from page 5)

cess capacity to accommodate a higher usage (perhaps for a future planned expansion of the condominium project) and any Board of Health approval for the client will require connecting to the existing STP.

A meeting is scheduled amongst the client, the seller and you to discuss the transaction. At that time, you are forwarded certain pages from the condominium Offering Plan which clearly states that the seller was entitled to have the excess STP capacity transferred to him or an entity to be created by him.

In fact, the language indicates "excess capacity shall be transferred via a quitclaim instrument." For the transactional attorney this is a start. After some google searches and some phone calls to the county board of health, negotiating any "Agreement" involving excess capacity would be contingent on a successful board of health application.

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Armed with a proper strategy for the negotiation (subject to Board of Health approval) you soon have a flash back to your law school real property class and when you first heard the term "quitclaim."

Can such a right be subject to a quitclaim deed to be recorded of record? Do the usual TP 584 and RP 5217 need to accompany the quitclaim? Will there be a transfer tax paid in the transaction? Remember the original offering plan mentions the excess capacity to be transferred via a quitclaim instrument (not necessarily a deed) so can such a document be drafted, recorded and not recite the consideration being paid for this "asset?"

Is a license agreement better suited for the purpose intended? Furthermore, the condominium complex is required to grant an easement on the STP connection if so requested. Things are looking promising for the client. Negotiating with the existing condominium board for the permission and legal terms of the connection are either undertaken by the transactional attorney as part of the negotiations or by the client directly. Formalizing the easement and STP maintenance agreement between the condominium and your client is additional legal work to be performed and should be taken into consideration for billing purposes. In all likelihood the client will be picking up all the connection expenses incurred on his as well as the condominium's end, OUCH !

The legal work will also entail an easement through the adjacent complex so as to connect to the STP. Tax classification for this asset is left for the client's accountant but for purposes of identifying the asset and its possible cost basis and or depreciation is beyond the scope of this article. Of course, how the purchaser client handles this asset purchase may be different than how the seller wants to handle it so being as familiar with the asset classification and its potential treatment is an added bonus.

Another sometimes difficult asset sale is when the "main" asset are accounts such as in the insurance book of business sale. While the classification of the asset is intangible, unlike trade fixtures and other tangible assets, a sales price has been negotiated for the "book of business" and those accounts.

Do such accounts represent property owned or open sales leads that can be cultivated or discontinued? Just like any other solicitation list purchased by companies identifying leads. The goodwill associated with long term customers is what has value to any prospective purchaser particularly when a continued income stream is contemplated. If the seller intends to "come on board" for a transition period to smooth over the customer transfer, then this asset sale is usually tied to an employment agreement and restrictive covenant/non solicitation agreement, more work for the transactional attorney to perform. Reviewing and filing the bulk sales notification and remitting the appropriate sales tax is a collaborative process amongst the parties, their counsel and accountants.

Where an established customer list is on the books with a proven track history, executing a simple asset purchase agreement and the accompanying documentation makes for a very routine transaction, but what if the customer list consists of the customer's existing contract work in progress due to unforeseen circumstances.

Being a minority or WBE for the incoming client is a windfall and can go a long way to maintaining those contracts and continuing the "work in progress."

Case in point. Due to a governmental raid (the aforementioned unforeseen circumstances), your client has been thrust into a business opportunity to take over all existing contract work from the "ousted" company. Of course, the owner of the "ousted" company is not going to give it away despite the raid. Shutting down of all existing contractual work is being threatened and the parties are moving quickly to negotiate the client taking over all existing contract work.

While it sounds like a well-orchestrated transition, it is not. The client needs to quickly form a new entity (Corp., or LLC), fund the operations and obtain the requisite liability insurance ASAP to demonstrate the client's company is a capable successor, or the work in progress will be stopped. This of course presumes the customers will want to continue working with the client and not look to terminate the existing work in progress, so further dissociation with and disavowing the ousted company is damage control. Time and making an efficient transition so that the work in progress continues uninterruptedly gives the client a leg up in the negotiations.

Being a minority or WBE for the incoming client is a windfall and can go a long way to maintaining those contracts and continuing the "work in progress."

But what about the asset sale? What are the assets being sold when your client is taking over the business operations on such short notice?

The usual APA with schedules of equipment, accounts and existing contracts will be forthcoming. Pursuant to the APA the seller will be holding a promissory note for the purchase price and will be filing a UCC 1 against the existing accounts and all after acquired accounts as security for the business sale.

The UCC-1 will be filed against your client's new entity name in any jurisdiction where the existing work in progress is located.

The UCC-1 filing will suffice for security purposes but be wary of such a filing if and when your client would go to finance any of those existing contracts and or otherwise look to secure future lending. Secondly in the original negotiations, knowing that UCC-1 financing will likely be involved, the transactional attorney will be better served to negotiate a "subordination" option for any UCC-1 seller financing or to negotiate such a scenario as not triggering a default under the APA and of course, to make it the secured party's obligation to file the UCC termination upon the repayment of the promissory note.

Being familiar with the asset while trying to anticipate legal challenges to assets not normally thought of as such is your Action in the TransAction.

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ers rights are expunged, which does not occur in the deed-in-lieu and therefore, the deed-in-lieu causes a priority of lien problem for a lender when there are junior lienholders unless a subordination agreement can be had with such junior lienholders, which generally requires consideration to be paid to such junior lienholders to motivate their cooperation. Moreover, such subordination agreements require efforts on behalf of borrowers/defendants, which are generally unrealistic to occur in the residential setting, such as paying counsel to negotiate and draft documents to effectuate a settlement. In the commercial setting, the same is more realistic because of sophisticated clients with long-term business goals.

Another distinction is that under a consent to foreclosure an auction must be had whereas under a deed-in-lieu the lender/plaintiff automatically becomes the titleholder. Therefore, the desirability of real estate ownership becomes a factor in the decision process for the parties. For the institutional lender/plaintiff, the auction is generally preferred because otherwise such institutional lender/plaintiff winds-up needing to maintain property and then, market such property towards a post-auction sale situation called a Real Estate Owned (REO) sale. However, for the private lender/plaintiff, ownership of the property is often their goal and therefore, the deed-in-lieu can prove advantageous. From the borrower's/defendant's perspective, the deed-in-lieu avoids shame that can result from a public property auction being advertised and effectuated because a deed transfer is quite and only can be deduced from a search in the chain of title or court records.

As to the borrowers/defendants ability to obtain future loans, there is no real distinction between a consent to foreclosure and a deed-in-lieu because the Uniform Residential Loan Application, inquires of both in the same questions as follows: "c. [h]ave you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years?" and e. "[h]ave you directly or indirectly been obligated on any loan which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment?" That being said, the longer the foreclosure occurs, the longer there is credit impact on borrows/defendants and therefore, the deed-in-lieu is the preferable option because it's immediate, not subject to the timeline of the courts and the referee.

With this knowledge, counsel should now be prepared to engage with clients seeking direction between these two exit strategies in mortgage workouts. However, litigation counsel is always prepared to assist in consultations and to make you look good.

Note: Andrew M. Lieb is the managing attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property for The Suffolk Lawyer for years.