New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

An ALM Publication

©2010 ALM

WEDNESDAY, JULY 14, 2010

FORECLOSURE LITIGATION

Consider Pursuing Guarantors in State Court

By **Raymond N. Hannigan** And **Ross Hirsch**

During the recent downturn, numerous practice areas have been experiencing a slowdown, but one area that is booming is debt enforcement and foreclosure. While most New York practitioners are aware of New York's "One Action Rule" or "Election of Remedies Rule" found in RPAPL §1301—the rule that prevents an action to be commenced on a note or guaranty while a foreclosure action is pending—some practitioners and many lending clients are unaware that the rule does not apply where the foreclosure action is out-of-state, involving non-New York real property.[1]

Indeed, the rule is clear that RPAPL §1301's "One Action" rule protects only owners of New York real property. Where the property is out of state, guarantors and makers under notes had better watch out: they can be sued in New York, even before the foreclosure action concludes.[2]

And for those representing mortgage lenders, this is a crucial right: In recent times, many mortgage loans have been made by lenders based in New York, with the mortgage being subject to local state law (as it must), but with the loan agreement, note and payment guaranties all being subject to New York law and with venue agreed to be laid in the New York courts.

Which raises the question at the heart of this article: Assuming that a guarantor of a foreign mortgage loan executes a guaranty agreeing to venue in New York, where should lender's counsel bring the action? Should the action be brought in federal court, with all the benefits found in that august venue? Or should it be brought in the New York Supreme Court, with its crowded docket and assumed shortcomings?

RAYMOND N. HANNIGAN *is a partner and* ROSS HIRSCH *is an associate at Herrick Feinstein. The firm represented the lender in 'Garrison' mentioned in this article.*

Over the years, we have seen many sophisticated practitioners, representing sophisticated banks and other lenders, opt to sue in federal court with all of its obvious benefits. But there is one very good reason why this may be a mistake, and that the answer to the question, in many cases, is that the action against the guarantors should be brought in New York state court.

That reason is CPLR §3213, which allows the lender to seek summary judgment in lieu of complaint. No complaint, no answer, no discovery, a simple motion for summary judgment and many times a quick judgment, far quicker than one could ever hope to obtain in federal court.

> CPLR §3213 allows the lender to seek summary judgment in lieu of complaint. No complaint, no answer, no discovery, a simple motion for summary judgment and many times a judgment far quicker than in federal court.

CPLR §3213 is available where the instrument at issue is "an instrument for the payment of money only":

> When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.[3]

CPLR §3213 clearly applies to many guaranties, as numerous New York courts have found, and as the appellate divisions have consistently upheld.[4] But one case, recently decided by Justice Barbara R. Kapnick illuminates this point clearly.[5] The lender, commenced a foreclosure action in Florida on July 21, 2009. Simultaneously, the lender, represented by this firm, moved in Supreme Court for summary judgment in lieu of complaint against the guarantors. The borrower, together with the guarantors, commenced a separate Florida action against the lender and also defended the Florida foreclosure alleging all types of claimed misdeeds by the lender.

These same issues were also raised in New York proceeding as a defense to summary judgment and in support of a cross-motion to stay the New York proceeding pending the resolution of the Florida actions.

The New York court had none of it, ruling that CPLR §3213 clearly applied and rejected the guarantors' defenses under a clear and unconditional guaranty:

> Summary judgment in lieu of complaint [is] appropriate where "[t]he guaranty was absolute and unconditional, expressly waived demand or presentment and was expressly made a primary obligation of the defendant, so that no formal demand, beyond the motion in lieu of complaint itself, [is] necessary to state a cause of action on the guaranty (citation omitted)."[6]

Not really a surprising result. But what is noteworthy is the time to decision: from the commencement of the action (i.e., bringing of the motion for summary judgment), until the issuance of the decision— just eight months (and that, after a month-long delay to accommodate a change in counsel for the guarantors).

Which raises the question: What if that same claim against the guarantors had been brought in the federal court for the Southern District of New York?

First, unlike New York practice, under the Federal Rules of Civil Procedure there is no similar process through which to bring a motion for summary judgment in lieu of complaint. Thus, right off the bat, lender's counsel must draft, file and serve the complaint and the defendant has its customary time, which is often extended, to submit its answer, containing its litany of defenses and

counterclaims. And what follows in federal court? Pretrial conferences, mandatory initial discovery and disclosures, comprehensive discovery plans, including electronic data collection, etc.[7]

And while it might be possible to move for judgment on the pleadings, in federal court, those are often converted to motions for summary judgment. Anyone who practices regularly in federal court knows that federal judges are fairly liberal in permitting discovery to take place before permitting the summary judgment motion to be made.

Thus, lender-plaintiffs in federal court can often face months of burdensome discovery—document production, depositions, etc.—before even being permitted to move for summary judgment, and then a court ordered briefing schedule that is often far longer than found under state procedure.

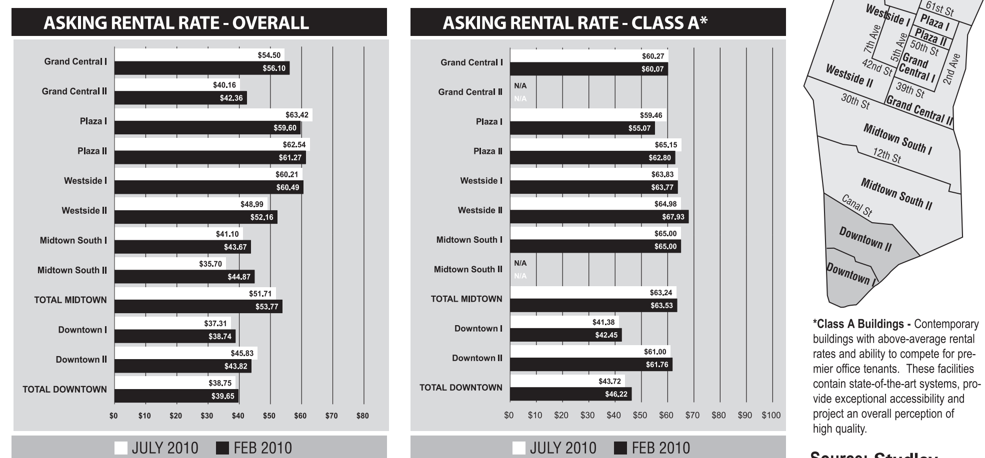
On that point, we have surveyed the docket of several recent guaranty cases commenced in federal, rather than state court. What jumps out is the number of discovery conferences, and discovery challenges, appearing in the docket, and most importantly, the time to decision.

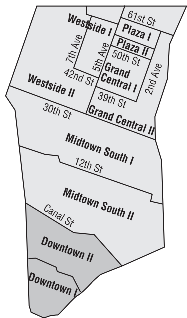
Even in the most straightforward of guaranty actions, summary judgment was not rendered until, on average, one and a half years after the action was commenced. In some cases, the federal court proceeding took several years to reach completion. Compare that with the eight months to decision under CPLR §3213 in the recent proceeding in state court.

That is not to say that CPLR §3213 and the state court will always lead to such a swift result. There are a number of New York decisions declining to apply CPLR §3213. In some, the debt instrument did more than merely require the "payment of money only," thus requiring the court to analyze the underlying factual circumstances and/or extensive and complex provisions in the loan documents or other instruments incorporated by reference into the guaranty, thus rendering the instrument not subject to treatment under CPLR §3213.

In another recent case, the IAS court refused to grant judgment under CPLR §3213 finding that certain issues, that had been raised by the defendants in a Florida foreclosure action, should be resolved in Florida first, before judgment on the New York guaranty.[8] That case, however, is an outlier and appears to fall outside of the large body of New York law which will grant judgment on a clear and unconditional guaranty, despite such borrower made defenses.

One additional caveat is worth noting: a party considering bringing a motion pursuant to CPLR





§3213 should take into account whether the statute of limitations for its claim may be nearing and about to run. If a court denies a motion for summary judgment in lieu of complaint, CPLR §3213 provides that "the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." The "otherwise" may, in the court's discretion, include dismissal of the action; the plaintiff may then be barred from commencing a new action if the statute of limitations had expired since moving for relief under CPLR §3213.[9]

Time is clearly "of the essence" for a lender in obtaining judgment against guarantors. The longer the delay, the longer that the guarantors' financial position might deteriorate, or their assets might be dissipated. While seeking summary judgment in lieu of complaint in New York state court under CPLR §3213 may not be right in every instance, practitioners who are ordinarily more comfortable in federal court should think twice before running into that forum. In many instances, your lending clients will be better served by a quick motion in state court, rather than protracted litigation in federal court.

1. N.Y. RPAPL §1301.

2. See *Chase Manhattan Bank, N.A. v. Antonio Reale,* 92 Civ. 1042 (JSM), 1992 WL 297576, *3 (S.D.N.Y. Oct. 7, 1992) ("It is well settled, however, that [the RPAPL §1301] election need not be made where the property at issue is located without the state"); *F.D.I.C. v. De Cresenzo*, 207 A.D.2d 823, 824, 616 N.Y.S.2d 638, 639 (2d Dept. 2004) (RPAPL §1301 "has no application to property located outside New York State").

3. N.Y. C.P.L.R. §3213 (McKinney 2009).

4. See, e.g., *Bank of America, N.A. v. Solow,* 59 A.D. 3d 304, 304-05 (1st Dept. 2009); *Steve Young Int'l, Ltd. v. Barnes,* 699 N.Y.S.2d 282, 283 (1st Dept. 1999); *SCP (Bermuda) Inc. v. Bermudatel Ltd.,* 638 N.Y.S.2d 2 (1st Dept. 1996); *European American Bank v. Lofrese,* 586 N.Y.S.2d 816, 818 (2d Dept. 1992); *Key Bank of Long Island v. Munkenbeck,* 556 N.Y.S.2d 702, 702 (2d Dept. 1990).

5. *Garrison Special Opportunities Fund LP v. Brenner, et al.*, No. 650464/09 (Sup. Ct. N.Y. Co. March 24, 2010)

6. Id. (quoting *Bank of America, N.A. v. Solow*, 59 A.D. 3d 304, 304-05 (1st Dept. 2009))

7. Fed. R. Civ. P. 16(c), 26(a)(1), 26(f).

8. Star *Financial Inc. v. Mase,* No. 600772/09 (Sup. Ct. N.Y. Co. July 17, 2009) (Transcript and Order).

9. See *Schulz v. Barrows,* 94 N.Y.2d 624, 730 N.E.2d 946 (2000) (recognizing authority of trial court to dismiss as part §3213 adjudication, even if such dismissal prejudiced commencement of plenary action due to statute of limitations).

Reprinted with permission from the July 14, 2010 edition of the NEW YORK LAW JOURNAL. © 2010 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-07-10-33