

BANKING ALERT

May 2024

First Department Affirms Order Granting Summary Judgment in Foreclosure Action

In *U.S. Bank, N.A. v. 1226 Evergreen Bapaz LLC*, Case Nos. 2023-06397 and 2023-06413 (N.Y. App. Div. 1st Dep't May 2, 2024), the First Department rejected a borrower's contention that the trial court erred in granting a lender summary judgment in a commercial mortgage foreclosure action.

The defendant-borrower, 1226 Evergreen Bapaz LLC ("Borrower"), obtained a commercial loan that was secured by a mortgage on commercial property located in Bronx County (the "Property"). Borrower's principal, defendant Shabab Berokhim, also provided a personal guaranty for the loan. Plaintiff U.S. Bank, N.A. (the "Bank") acquired the loan from the original lender by way of assignment in 2018. Borrower defaulted on its obligations on the loan and the Bank commenced a foreclosure action. While Borrower interposed a timely answer, Berokhim failed to file a response. The Bank subsequently moved for summary judgment, which Borrower and Berokhim opposed. Borrower and Berokhim also cross-moved to dismiss the foreclosure action on the grounds that the Bank lacked standing to enforce the loan documents. The trial court rejected the defendants' arguments, finding that the Bank had standing to prosecute the foreclosure action and established by way of competent proof that Borrower was in default of its obligations under the loan documents.

On appeal, the First Department affirmed the trial court's decision, finding that the Bank had demonstrated by affidavit and documentary evidence, i.e., the note allonges and recorded mortgage assignments, that it had acquired the loan from the original lender. The First Department also held that the defendants had failed to raise a triable issue of fact as to any of its affirmative defenses, which the First Department noted were waived in any event by a forbearance agreement executed in 2020. The First Department further rejected the defendants' contention that the statutory defenses concerning notice requirements in residential foreclosure actions were applicable.

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First Department Enforces Arbitration Provision Against Lender in Foreclosure Action

In *First Commerce, LLC v. St. Mark's Property Acquisition LLC*, Case No. 2023-05501 (N.Y. App. Div. 1st Dep't May 23, 2024), the First Department affirmed an order compelling a lender that had filed a foreclosure action to arbitrate its dispute with the borrower.

After plaintiff First Commerce, LLC ("Plaintiff") initiated a foreclosure action to foreclose on commercial property in Manhattan, the defendants, which included the borrower and guarantor, filed answers to the complaint and served written discovery. Thereafter, Plaintiff filed a motion for summary judgment and seeking an order of reference. In opposition, the defendants filed a motion to stay the foreclosure action and compel arbitration. The trial court, relying on the arbitration provision contained in the loan agreement, agreed, and granted the cross-motion.

The First Department affirmed the trial court's decision, finding that the "loan agreement contains a clear and enforceable provision" to arbitrate and that the defendants had timely requested binding arbitration as part of their cross-motion. The First Department noted that while the arbitration clause provided that the parties could proceed in court by, among other things, filing a foreclosure action, the provision stated that the filing of a court action was not a waiver of the right of any party to submit the parties' dispute to arbitration. The First Department also rejected the contention by Plaintiff that the defendants had waived their right to arbitrate by participating in the court action, stating that Plaintiff was not prejudiced by the defendants' limited participation of filing an answer and serving written discovery.

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