Avoid Foreclosure - Right to Reinstate Loan

In the recent decision in *Taniguchi v. Restoration Homes, LLC*, a case of first impression, the California Court of Appeal held that if all or part of the principal secured by a mortgage or deed of trust becomes due as the result of the borrower's default in paying interest or installments of principal, Civil Code § 2924c allows the borrower to pay the amount in default, plus specified fees and expenses, and thereby cure the default, reinstate the mortgage loan, and avoid foreclosure.

The borrowers in *Taniguchi* missed four monthly payments on a mortgage loan that had been modified after an earlier default. The modification deferred certain amounts due on the original loan, including principal, and provided that any default would allow the lender to void the modification and enforce the original loan terms.

The question before the Appellate Court: Must the borrowers pay the amount of the earlier default on the original loan, which had been deferred under the modification to the end of the loan term, as well as paying the missed modified monthly payments that caused the default on the modified loan, in order to cure the default and reinstate the loan under section 2924c?

The Court of Appeal answered the question "No", and reversed the decision by the trial judge.

In 2006, the Taniguchis obtained a home loan of $510,500, secured by a deed of trust. In 2009, they agreed to a loan modification that adjusted the principal amount, reduced the interest rate and monthly payments, and deferred until the maturity of the loan approximately $116,000 of indebtedness, including accrued and unpaid interest and principal, fees, and foreclosure expenses.

The modification provided that failure to make modified payments as scheduled would be an event of default, and that in the event of a default the modification would be null and void at the lender's option, and the lender would have the right to enforce the loan and associated agreements according to the original terms.

The modification left unchanged certain provisions of the original loan documents, including acceleration clauses authorizing the lender to require a defaulting borrower to immediately pay the full amount of principal not yet paid and all interest owed on that amount, and to invoke the power of sale.

The Taniguchis defaulted on the modified loan, which was eventually assigned to Restoration Homes, LLC. Restoration Homes caused a notice of default to be recorded in 2013.

The Taniguchis were informed that to reinstate their loan and avoid foreclosure, they would be required to pay their four missed monthly payments and the associated late charges specified in the modified loan (totaling about $11,000) and $4,500 in foreclosure fees and costs, plus all the sums that had previously been deferred under the loan modification. By then, the deferred amount was over $120,000 in principal, interest and charges (deferred amounts).

The Taniguchis took exception to the amount Restoration Homes required for reinstatement of the loan and filed suit in superior court. Shortly after that, Restoration Homes caused a notice of trustee's sale to be recorded, which led the Taniguchis to file a second suit and seek a temporary restraining order to prevent the foreclosure sale.

The temporary restraining order was granted; the two lawsuits were consolidated; and the consolidated matter was stayed for approximately a year as a result of Charles Taniguchi filing for bankruptcy. Eventually, the Taniguchis filed a third lawsuit, and all three superior court cases were consolidated.

The Taniguchis alleged four causes of action against Restoration Homes:

1. violation of section 2924c by demanding excessive amounts to reinstate the loan,

2. unfair competition,

3. breach of contract, and

4. breach of the covenant of good faith and fair dealing.

The unfair competition cause of action alleged that Restoration Homes' violation of section 2924c constitutes a violation Business and Professions Code section 17200 et seq. (the UCL).

Like the Taniguchis' loan documents, the typical form promissory note and deed of trust provide that upon any default in the trustor's obligations, the beneficiary may elect to accelerate the payment of all sums of principal and interest and commence foreclosure proceedings. The statutory right of reinstatement, set forth in section 2924c, effectively modifies the contract provision which permits acceleration upon default.

Section 2924c, subdivision (a)(1) provides that when a mortgage loan is accelerated as a result of a borrower's default, the borrower can reinstate the loan by paying all amounts due, "other than the portion of principal as would not then be due had no default occurred." That is, the borrower can cure the default and reinstate his or her loan by paying the amount of the default, including fees and costs resulting from the default, rather than the entire accelerated balance. The mortgage lender must inform the borrower of the correct amount due to reinstate the loan.

Once a notice of default is recorded, the borrower can reinstate the loan until five business days before the date of sale set forth in the notice of sale. (§ 2924c, subd. (e).)

The right to reinstate a loan under section 2924c cannot be waived. Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privilege conferred upon him by Sections 2924, 2924b, 2924c of the Civil Code shall be void and of no effect. (Section 2953)

The Taniguchis contended that under section 2924c, Restoration Homes could not lawfully condition reinstatement of their loan on the payment of amounts that were deferred in the loan modification. They argued that requiring them to pay the deferred amounts, instead of just the missed modified payments plus costs, essentially required them to waive their right of reinstatement with respect to the modified loan, in contravention of section 2953.

Restoration Homes argued that the loan modification gave it the option to enforce the original loan terms if the Taniguchis defaulted on the modified loan, and since under the original loan—pre-modification—the deferred amounts were due and owing, they could properly be required as a condition of reinstatement under section 2924c.

The Appellate Court concluded that the Taniguchis had the better argument. When principal comes due as the result of a default, section 2924c allows a borrower to cure that precipitating default and reinstate his or her loan by paying the amount of the default, plus fees and expenses.

In the Taniguchi case, the default was the failure to make payments on the modified loan. Accordingly, section 2924c gave the Taniguchis the opportunity to cure their precipitating default (that is, the missed modified payments) by making up those missed payments and paying the associated late charges and fees, and in that way to avoid the consequences of the default on the defaulted loan.

Those consequences, of course, would include the demand for immediate payment of the deferred amounts. Restoration Homes' position had the effect of depriving the Taniguchis of any opportunity to cure the precipitating default and reinstate the modified loan. Restoration Homes points to nothing in the loan modification documents to suggest that the Taniguchis had forfeited such an opportunity, nor to anything in section 2924c to suggest that such a forfeiture would be enforceable even if it were reflected in the loan documents.

In sum, on the undisputed facts, Restoration Homes failed to demonstrate that the Taniguchis could not prevail on their claim that Restoration Homes violated section 2924c, and the trial court erred in granting summary adjudication to Restoration Homes.

LESSONS:

1. Loan agreements, including modification agreements, should be carefully reviewed because the lender may assert a legal position that is not supported by the applicable statute.

2. Timely assistance of legal counsel can often provide the legal expertise necessary to avoid significant adverse events and results that may have been avoided.