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Real e-State

Summer 2012
Vol. 9 Issue 3

An electronic newsletter for real estate professionals

LISTED IN Best Lawyers® THE WORLD'S PREMIER GUIDE

From the Desk of

The Real e-ditor
Steven D. Sallen

The Ant at the Picnic

Last month I had the opportunity to speak at the Annual Summer Workshop conference of the Michigan Local Government Management Association, in Traverse City. The event was attended by hundreds of small and mid-size city mayors, managers and supervisors from all over Michigan. The basic program theme was entitled *Making our Communities Stronger with Tools We Already Have.* This presented me with an opportunity to discuss how Michigan cities can think and act differently in order to grow and prosper again.

Michigan Local Government Management Association

Starting with the basic premise that the source of local government's power stems from its ability to tax and regulate the use of real property, my remarks were intended to suggest new ways of dealing with business owners and developers. I suggested that cities and towns need to treat their interactions with these constituents as "negotiations", by figuring out what the developer needs, separate those needs from wants, and comparing their needs, to the needs of the community. Where the needs of the two sides are compatible, they can and must work together to achieve mutually satisfactory results; but focus on *needs*, not *wants*. Only by doing that, can we, as a State, promote renewed growth, and regain lost population.

I went so far as to suggest that municipalities must think and act like a for-profit enterprise. The main difference between non-profit and for-profit enterprises is the uses to which each enterprise puts its profits. In the case of municipalities, their "profits" go towards improving public amenities, adding programs, services and staff, and raising wages. I explained that capital, like water, takes the path of least resistance. Michigan's communities must lower their resistance to new opportunities, in order to cause capital to flow through, and not around, their cities and towns.

Most of my readers know that I am fairly blunt (albeit, polite). So I am sure my message was clear, but politely, delivered. But, I have to admit to feeling like the proverbial ant at the picnic. A few questions, and polite applause followed my remarks, but not one person made an effort to speak to me, or even make friendly eye-contact afterwards; an experience I've never encountered after public speaking. I hope the audience realized that my remarks were intended not as criticism, but as a rallying cry for all of us to work together for the betterment of our State.

Steve Sallen

The Ability to Have Concurrent Actions Against Guarantors and Foreclosure By Advertisement after *Greenville Lafayette, LLC vs. Elgin State Bank*

By:
James M. Reid, IV

After the Michigan Court of Appeals rendered its decision on *Greenville Lafayette, LLC v. Elgin State Bank* on April 17, 2012 (hereinafter, "*Elgin*"), lenders must document their mortgage secured loans carefully in light of MCL §600.3204 (part of Michigan's Revised Judicature Act of 1961) which contains provisions governing foreclosure by advertisement. *Elgin* presents opportunities for borrowers and their counsel to challenge the concurrent prosecution of foreclosure by advertisement and lawsuits against guarantors of the indebtedness secured by the mortgage under certain circumstances.

MCL §600.3204(1)(b) provides in part that a party may foreclose a mortgage by advertisement if, among other things, "*an action or proceeding has not been instituted, at law, to recover* ***the debt secured by the mortgage*** *or any part of the mortgage…*" [***Emphasis Added***]. This provision is sometimes referred to as Michigan's one-action rule.

Prior to *Elgin*, it was well established law that the Michigan one-action rule did not bar a lender from foreclosing a mortgage by advertisement and concurrently pursuing a guarantor of the indebtedness secured by the mortgage. In *United States v. Leslie (6th Cir. 1970)*, the Sixth Circuit Court of Appeals considered a lawsuit by the United States government against guarantors of a promissory note made by a corporation after the corporation defaulted under the note. The corporation had also given the United States government a mortgage against certain real property. After filing the lawsuit against the guarantors, the United States government instituted foreclosure by advertisement against the real property subject to the mortgage. At trial the guarantors argued that the applicable Michigan statute prohibited maintaining an action against the guarantors once foreclosure by advertisement was commenced. The Court of Appeals held that the government was permitted to maintain both actions. The Court reasoned that a guaranty is an obligation separate from a mortgage note and the obligations of the guarantors under their guaranty did not constitute "debt secured by the mortgage." Accordingly, there having been no action or proceeding instituted, at law, to recover the ***debt secured by the mortgage*** or any part of the mortgage, the foreclosure by advertisement and the lawsuit against the guarantors were allowed to proceed concurrently.

In *Elgin*, indebtedness owed by the borrower to the bank in the amount of $1,800,000.00 was secured by a mortgage from the borrower to the bank and a portion of the indebtedness was secured by two separate guaranties. The loan matured in June, 2011 and was not timely repaid. In August, 2011 the bank commenced an action to collect from the guarantors. Shortly thereafter, while the action on the guaranties was still pending, the bank commenced a foreclosure by advertisement. The mortgage provided that it was given to "secure" payment of "indebtedness" and the mortgage defined indebtedness to mean "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents …". The term "Related Documents" was defined to mean "all promissory notes, credit agreements, loan agreements, environmental agreements, ***guaranties*** [emphasis added], security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness".

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Public Acts 139 and 140 of 2012: Recent Changes to Michigan's Landlord-Tenant Law

By: Jason M. Fisher

Michigan law provides for expedited eviction procedures, called summary proceedings. Summary proceedings allow landlords to quickly recover possession of leased premises when a tenant refuses to vacate premises after being served with a notice to terminate the tenancy.[1]

Previously, a landlord could institute summary proceedings to evict a tenant only under the following nine circumstances:

1. Failure to pay rent;
2. Holding over after the natural expiration of the lease term;
3. Illegal drug activity on the leased premises with both a formal police report ***filed by the landlord*** [emphasis added] and a provision in the lease allowing for such termination;
4. Creating or permitting extensive and continuing physical injury to the premises;
5. Creating or permitting a serious and continuing health hazard on the premises;
6. Violation of a lease provision when that provision allows for such termination;
7. Forceful entry to the premises or peaceful entry to the premises but remaining on the premises by force or trespass;
8. Just cause for terminating a tenant in a mobile home park; and
9. Just cause for terminating tenant in government-subsidized housing.

On May 22, 2012, Governor Rick Snyder signed Senate Bills 64 and 65 into law as Public Acts 139 and 140 of 2012. The Acts amended MCL §600.5714 and MCL §554.134 and makes it easier for landlords to evict tenants engaged in criminal activity in and around their leased premises.

First, both Public Act 139 and 140 make it easier for a landlord to evict a tenant who is engaged in illegal drug activity. MCL §600.5714(b) provides that a landlord may institute summary eviction proceedings after giving the tenant 24 hours notice in writing that the tenant must quit (*i.e.*, vacate) the premises where (1) the tenant, or member of the household, or a person under the tenant's control is engaged on the leased premises in the manufacture, delivery, possession with intent to deliver, or possession of controlled substances or counterfeit controlled substances; (2) the lease contains a clause providing for termination under such circumstances; and (3) a formal police report by anyone alleging the illegal drug activity is filed. Similarly, MCL §554.134(4) provides that a landlord may terminate a tenancy under such circumstances as described above.

Public Acts 139 and 140 are designed to provide additional tools to landlords to evict tenants engaging in drug or violent activity.

Pursuant to these amendments, the landlord no longer is required to file the formal police report concerning the illegal drug activity of the tenant. Now, it is sufficient that a police report is filed by anyone concerning the tenant's illegal drug activity. Thus, if another tenant in the building, or the police, file a police complaint regarding the tenant's illegal drug activity, the landlord has grounds to terminate the lease and institute eviction proceedings, provided that there is a provision in the lease stating that the tenant may be evicted for such activity.

Secondly, Public Act 139 also establishes an additional basis for instituting summary proceedings. Specifically, a landlord may now institute summary proceedings where a tenant remains on the premises for seven days following service of a notice to quit after the tenant, a member of the tenant's household, or a person under the tenant's control causes or threatens physical injury to the landlord, another tenant or occupant of the premises, a guest, or an agent or employee of the landlord, and the police have been notified that such person caused or threatened the physical injury. Previously, landlords were required to wait thirty days after delivering a notice to quit to the tenant to begin eviction proceedings.

This additional basis for instituting summary proceedings is intended to protect landlords, their agents, and other tenants or occupants from violent or hostile tenants. To protect the interests of innocent bystanders, this provision does not apply in situations involving domestic violence where the individual who is physically injured or threatened is the tenant or a member of the tenant's household. In addition, this provision does not apply if its application would result in a violation of Federal housing regulations. Furthermore, there is no requirement that the lease include a specific provision granting grounds for termination where a tenant causes or threatens physical injury to the landlord, another tenant or occupant of the premises, a guest, or an agent or employee of the landlord.

Public Acts 139 and 140 are designed to provide additional tools to landlords to evict tenants engaging in drug or violent activity. By allowing landlords to serve a notice to quit after a public report relating to the drug activity is filed or to commence summary proceedings seven days (instead of 30 days) after a notice to quit has been served on a tenant named in a police report as a person threatening physical injury, landlords are provided with quicker means to evict difficult tenants.

[1] Mich. Comp. Laws § 600.5714 (2012).

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By virtue of the manner in which the terms "indebtedness" and "Related Documents" were defined in the mortgage, the obligations under the guaranties were held by the Michigan Court of Appeals to be ***debt secured by the mortgage*** with the result that the requirement under MCL 600.3204(1)(b) that there be no action or proceeding instituted at law to recover the debt secured by the mortgage was not met. Accordingly the bank's foreclosure was held invalid.

After *Elgin*, it is important to carefully review loan documents, both from a drafting and enforcement perspective, to determine whether the lender may be precluded from foreclosing by advertisement while concurrently bringing a lawsuit on a guaranty. A review of the debt secured by the mortgage is now critical in terms of the order of steps a lender will take to enforce and collect on its debt.

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On November 10, 2012, Maddin Hauser Wartell Roth & Heller, P.C., will be holding its ***Twenty-First*** Annual Tax Symposium at the Sheraton Detroit-Novi Hotel located at 21111 Haggerty Road, Novi, MI 48375.

Registration begins at 8:00 a.m., the Symposium will begin at 8:30 a.m. and will conclude at approximately 12:30 p.m.

If you would like to attend or for more information, please contact Ms. Sandy Wolfe at swolfe@maddinhauser.com.

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