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Foreclosing on multiple security:
Dreyfuss v Union Bank, 2000
Roger Bernhardt

Lender can nonjudicially foreclose serially on multiple items of real property pledged as collateral for debt without crediting debtor with fair market value of each item sold.

Dreyfuss v Union Bank (2000) 24 C4th 400, 101 CR2d 29

Plaintiffs (borrowers) obtained an \$8.7 million loan from Union Bank (bank) to purchase and develop a large parcel of property (Peppertree). The loan was secured by a deed of trust on the property. After the borrowers defaulted, they added collateral consisting of two parcels of real property, the Clinton property and a lot (lot 66), as part of a modified agreement that extended the maturity date of the loan. When the borrowers again defaulted, the bank commenced a series of nonjudicial foreclosures, starting with Peppertree, that concluded with successful credit bids on the three properties; the bank did not seek a judicial determination of fair market value on the properties or purport to credit those amounts to the debt.

The borrowers sued, contending that the foreclosures of the Clinton and lot 66 properties constituted wrongful attempts to obtain deficiency judgments after foreclosure of Peppertree, in violation of CCP §580d. Alternatively, they urged that the bank was required to credit them with the fair market value of Peppertree, pursuant to CCP §580a, before foreclosing against the additional properties. The trial court granted the bank's motion for summary judgment and the court of appeal affirmed.

The supreme court affirmed. The court stated that there is no requirement under §580a that a creditor, after foreclosing on one item of real property security, must obtain a judicial determination of any unpaid balance remaining on a debt before resorting to additional security; no further steps are required under §580a to determine the fair market value of any real property security sold in nonjudicial foreclosure before the creditor is entitled to resort to any additional security for an obligation. Thus, after the bank conducted a nonjudicial foreclosure sale of Peppertree, it was under no obligation to seek a judicial determination of the unpaid balance remaining on the debt or otherwise credit the borrowers with the fair market value of Peppertree before resorting to a forced sale of the Clinton property or lot 66.

Plaintiffs also asserted that the bank improperly demanded that the Clinton property and lot 66 be pledged as security for any deficiency in the event that a foreclosure of the Peppertree deed of trust did not satisfy the balance of the debt. They contended that the arrangement was the functional equivalent of prearranged security for a deficiency recovery and, because the bank was precluded from seeking a deficiency judgment, it was therefore barred by §580d from foreclosing on the Clinton and lot 66 properties. The court rejected these arguments, reasoning that §580d does not apply; it applies only when a money judgment is sought against the debtor for the balance due on a note secured by a deed of trust. That was not the case here, and the court noted that there is a significant difference between selling additional security that has been pledged for a loan and recovering a deficiency judgment against the borrower's personal assets.

The court further rejected plaintiffs' claims that the bank violated the covenant of good faith and fair dealing by underbidding at the foreclosure sale. Under settled principles of law, the bank was entitled to make a credit bid in whatever amount it thought the property was worth.

►**THE EDITOR'S TAKE:** A unanimous pro-creditor decision written by the court's most pro-debtor judge that affirms a 60-year-old decision to the same effect means that this rule is about as solid as any mortgage rule can ever be. Debtors are not likely to get around it, and creditors need not worry about the pitfalls that surround, *e.g.*, the one-action rule. Because nonjudicial trustee sales are not actions, the multiply-secured creditor can have as many sales as it finds it advantageous to conduct.

(There is one caution, however: Don't think that this means multiple foreclosure actions are permitted. In that context, the one-action rule really does apply, and any security omitted from the first foreclosure is permanently lost. See *Walker v Community Bank* (1974) 10 C3d 729, 111 CR 897. The judicial tolerance of multiple foreclosure sales occurs only when all of them—except possibly the last one—are nonjudicial.)

Of course, the lender and the borrower may bargain at the outset over how much security the lender will get. They can also bargain over the order in which the separate securities will be sold in the event of default, although that seems uncommon and unlikely. So it will probably be left entirely to the creditor's discretion as to how to sell the various securities. Bidding advice in that context seems fairly simple: (1) start the bidding at each sale as low as possible; (2) raise your bid to outbid a third party only if you are still below market value; (3) once the bidding goes above market value, allow someone else to purchase. The lower your successful bid on the first parcel is, the more leverage you have for bidding on the second parcel and additional parcels.

Whether there is any preferred order of sale is less predictable. That will often depend on the kind of external considerations that apply to any "bulk" sale (*e.g.*, which parcel is worth more, which is easier to sell, which is more central to the entire deal). There may also be some legal restraints, such as marshalling requirements arising because some of the parcels are subject to junior liens or have been subsequently transferred by the debtor. If the multiple security consists of separate deeds of trust given by different parties, similar considerations may apply. Indeed, it may even be possible to find a court requiring a fair value hearing after some sales and before some others in such a context! See *Sanders v Palmer* (1986) 507 NYS2d 844, 499 NE2d 1242.

Advice to the debtor? Keep your fingers crossed and hope the market doesn't go down. *Roger Bernhardt*