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Choosing the Right Mortgage Enforcement Remedy in Ontario

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In the realm of mortgage enforcement, lenders who are faced with a borrower's default have an array of remedies at their disposal. Lenders can either: (1) opt to sell the mortgaged property, by virtue of either the power of sale process at law and provisions contained in the mortgage or pursuant to a court order in a judicial sale, or (2) obtain title to the mortgaged property through a foreclosure or by accepting a quit claim deed to the mortgaged property.

In addition, to preserve the value of the secured assets, the lender may also wish to sue the borrower and any guarantors to recover payment of all the debt or the portion that remains unpaid. Thus, which mortgage enforcement remedy should a lender choose?

Power of Sale, Foreclosure, and Judicial Sale

In Ontario, lenders will often leverage the "private power of sale" provisions contained in the mortgage, which allows the lender to sell the mortgaged property to a third party, subject to the statutory notice requirements set out in Part III of the *Mortgages Act*, R.S.O. 1990, c. M.40 (the "*Mortgages Act*").

However, in circumstances where selling the mortgaged property may be challenging due to the absence of a readily available market, the lender may decide to realize on its security by foreclosing the equity of redemption to become the registered owner of the mortgaged property. Furthermore, if the lender has reservations about being sued by the borrower or subsequent encumbrancers, for selling the mortgaged property at an improvident price, the lender can seek refuge in the court process of a judicial sale pursuant to Rule 64 of the *Rules of Civil Procedure*, R.R.O., Reg. 194.

Advantages of Power of Sale

- 1. Shorter Timeline for Resolution:** Under a power of sale, the borrower is generally required to pay the money due under the mortgage within 35-45 days after the issuance of a notice of sale, compared to 60 days after a reference in a judicial sale or foreclosure. Continually, the average duration of a power of sale is approximately six (6) months, whereas the average judicial sale or foreclosure may take up to two (2) years to complete.
- 2. Cost-Effectiveness:** A notice of sale is inexpensive to produce and can be served by email, courier or registered mail. In comparison, a judicial sale or foreclosure is commenced by a statement of claim, which must be personally served on the defendants, and typically requires multiple court attendances.
- 3. Legal Recourse:** After selling the mortgaged property under the power of sale and the debt has not been fully satisfied, the lender is entitled to sue the borrower and any guarantor to recover a shortfall. However, a lender under a foreclosure is precluded from proceeding with an action against the borrower or any guarantor for any deficiency.

4. Tax Exemptions: Land transfer tax is not payable by the lender when exercising a power of sale, whereas under a foreclosure, land transfer tax is payable by the lender when it becomes owner of the property by registering a final order of foreclosure.

5. Abandonment: A lender is generally entitled to abandon a power of sale proceeding pursuant to Section 42 of the *Mortgages Act*. Under a foreclosure or judicial sale, the lender cannot abandon the action and then commence a power of sale without leave of the court, which is granted sparingly.

Advantages of Foreclosure and Judicial Sale

1. No Borrower Surplus: In a depressed real estate market, where an immediate sale will not generate sufficient funds to repay the mortgage debt, obtaining possession of the property could in the long-term increase in value and the mortgage debt will not have to account for borrower surplus.

2. Supervision: In a judicial sale or foreclosure action, the proceedings are court supervised and the lender is protected from improvident realization claims. Under a power of sale, the lender has the responsibility to conduct the sale of the property, observe all technical requirements, sell the property for fair market value, and account for borrower and encumbrancer surplus.

3. Availability: The court is always available for the disposition of complex issues, a forum which is not available under a power of sale.

4. Claims: A claim for possession and recovery of mortgage debt may be combined with a judicial sale or a foreclosure proceeding. In contrast, a separate action must be commenced for possession and/or payment of the mortgage debt under a power of sale.

5. Liability: Liability: Lenders who acquire title by foreclosure under a subsequent mortgage will not be exposed to personal liability to pay a prior lender pursuant to Section 20 of the *Mortgages Act*.

In conclusion, selecting the appropriate mortgage enforcement remedy is a critical decision for lenders. Each option comes with distinct advantages and considerations, emphasizing the need for a well-informed strategy aligned with the specific circumstances of the mortgaged property, current market conditions, and exposure to liability.

If, as a lender, you are experiencing any borrower related issues and are contemplating enforcement or pre-enforcement proceedings, please do not hesitate to reach out to the writer who would be happy to provide guidance.

To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at <https://www.grllp.com/profile/zevzlotnick>

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