

## Receivers make comeback in troubled market

**M**ore and more commercial real estate owners in the Atlanta metro area are defaulting on their loans. According to a recent report by Realpoint LLC, more than 10 percent of the loans secured by commercial property in the Atlanta area which were securitized (with a total balance of more than \$1.8 billion) are delinquent.

Because most commercial property is income-producing, when a borrower defaults, the lender will want to take control of the property as quickly as possible. One way to do so is non-judicial foreclosure.

Fortunately for lenders, commercial foreclosures in Georgia can be done very quickly. If the loan documents are properly drafted, the lender can hold a special "non-judicial" foreclosure sale on the courthouse steps in as little as four weeks after the borrower's default. At the foreclosure sale, which happens on the first Tuesday of the month, the lender's counsel auctions the property to the highest bidder (which is most often the lender).

However, foreclosures are rarely completed in just four weeks.

Before taking back the property, a lender often wants to conduct its due diligence: update the property's title, perform a survey, conduct environmental tests, review tenant lease files and analyze operating income.

Because of the time and expense of performing this due diligence, a lender may want to negotiate a modification of the loan with the borrower or permit the borrower to pay off the loan at a discount.

Alternatively, the lender may want to market the loan (by itself or as a part of a pool of loans).

For these reasons, it may take several months for the lender to complete its due diligence and be in a position to conduct the foreclosure sale. In the meantime, the borrower keeps receiving the rents and other income from the property, remains in charge of operating and maintaining the property, has the responsibility for paying taxes and insurance and continues to lease the property. If the borrower is not performing these duties, the

value of the property securing the loan can suffer significantly. Even with the existence of so-called "non-recourse" or "springing" guarantees, a lender may be wary of allowing the borrower to retain complete control over the property.

One remedy typically available to a lender under the loan documents is to have a court appoint a receiver for the property. The appointment of a receiver will help to alleviate the lender's concern that the property is not being properly managed and maintained during the period prior to

the lender conducting a foreclosure sale of the property. For this reason, lenders have sought the appointment of receivers for many commercial properties in Georgia.

A receiver is an individual or company appointed by a court to take charge of the property that secures the loan. The receiver does not own the property and the receiver's powers and obligations are limited by the order of appointment and by Georgia law. Typically a receiver will be granted the power to collect rents, pay taxes and utilities, execute leases, maintain insurance and perform necessary maintenance of the property.

The receiver's ultimate responsibility is to maintain the property until the lender can exercise the remedies granted to the lender under the loan documents, including conducting a foreclosure sale of the property. Once the lender has conducted a foreclosure sale of the property, the lender will ask the court to dismiss the receiver and provide a final accounting of the receiver's work.

Given how quickly a receiver can be appointed in Georgia and the benefits to the lender of having a receiver protecting the collateral from further deterioration, it is little wonder that lenders are increasingly making use of this remedy as they deal with the consequences of plunging real estate values and an overall weak economy.

.....

**Kirkham** is an attorney with Sutherland Asbill & Brennan LLP. **Anderson** is an executive vice president and partner at Ben Carter Properties LLC.



**Jason Kirkham**



**VIEWPOINT**  
**Quito Anderson**