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Nebraska Bankers Association
LEGAL CORNER

Farm Mediation Act

The Nebraska Supreme Court recently issued a decision in the case of *First National Bank North Platte v. Cardenas*, 299 Neb. 497; __N.W.2d__ (2018), interpreting provisions of the Farm Mediation Act and addressing issues relating to trust deed notices of default and the right to cure.

In *Cardenas*, after a bank lender exercised powers of sale under deeds of trust, it sought to recover a deficiency owed by the borrowers. The borrowers obtained a loan from First National Bank North Platte (FNBNP) for the purchase of 127 acres of land. The 127 acres were ultimately divided into three parcels: a 57-acre tract (the pasture tract), a 20-acre tract (the house tract), and a 50-acre tract (the barn tract). After purchasing the land, a loan was obtained from FNBNP for the construction of their house.

The borrowers formed a Nebraska limited liability company to conduct their horse business (the LLC). Christina Cardenas was the sole member of the LLC. Jose, Christina, and the LLC (collectively the Cardenases) constructed on their property a barn, indoor stable, and horse breeding area, financed by FNBNP. The Cardenases also financed the purchase of Andalusian breeding stallions and a horse trailer.

In February 2013, the president of FNBNP demanded that the Cardenases pay their loans in full within 10 days due to their failure to make installment payments. As a statutory prerequisite to exercising its power of sale under the trust deeds that secured the Cardenases' real property, FNBNP sent them a notice of default in March. This first notice of default pertained to the trust deeds securing the house tract. It provided the Cardenases 1 month to cure the default by repaying their debt in full. In May, FNBNP sent a second notice of default to the Cardenases with regard to the trust deeds securing the barn tract and the pasture tract, giving them 2 months to cure the default.

In May 2013, FNBNP exercised its power of sale as trustee under the trust deed and sold the house tract at auction. The bank bid $380,000 and was the only bidder. The bank issued itself a trustee's deed from the sale. In September 2013, FNBNP sold the barn tract and the pasture tract. The bank purchased the property at auction for $100,000.

While the decision in *Cardenas* also involved issues relating to the determination of the amount of the deficiency judgment to which FNBNP was entitled, the courts review of the Farm Mediation Act and the lender's compliance with the notice of default and right to cure requirements under the Trust Deed Act were of particular interest.

FNBNP filed an action for deficiency judgment with a jury returning a verdict in favor of the bank. The Cardenases assigned that the district court "erred by failing to instruct the jury on [FNBNP's] duty to comply with the Farm Mediation Act." Specifically, they claimed that the court should have given the jury their requested instruction on

FNBNP's alleged failure to provide them notice of the availability of mediation as required by § 2-4807(1).

In determining that the Cardenases did not meet the statutory definition of "[b]orrower." The court referenced the provisions of section 2-4807(1), which provide:

> At least thirty days prior to the initiation of a proceeding on an agricultural debt in excess of forty thousand dollars, a creditor, except as provided in subsection (2) or (3) of this section, shall provide written notice directly to the borrower of the availability of mediation and the address and telephone number of the farm mediation service in the service area of the borrower

The court further noted that while creditors subject to § 2-4807 are required to provide notice of the availability of mediation, participation in mediation is optional. The Farm Mediation Act at § 2-4808(2) provides in part:

> The parties shall not be required to attend any mediation meetings under this section, and failure to attend any mediation meetings or to participate in mediation under this section shall not affect the rights of any party in any manner. Participation in mediation under this section shall not be a prerequisite or a bar to the institution of or prosecution of legal proceedings by any party.

While not essential to its decision, the court noted "We have never held that the failure to provide notice of the availability of mediation as required by § 2-4807(1) is an affirmative defense to enforcement of agricultural debt subject to this notice requirement."

Because the FNBNP notes at issue included Jose and Christina Cardenas as borrowers, the court held that they did not meet the definition of "borrower" for purposes of § 2-4807(1), because they do not "derive more than fifty percent of [their] gross income from farming or ranching."

The Cardenases also argued that the district court erred by refusing to give their proposed jury instructions on the affirmative defense that FNBNP refused to allow them to cure their default. The court concluded that the Cardenases requested instructions were not correct statements of law and that they were not warranted by the evidence.

The Cardenases requested jury instructions were not correct statements of law, because they required the Cardenases to prove only that they "were willing and able to exercise their right [to] cure the default." However, § 76-1012 provides that in order to cure a default, the trustor must "pay to the beneficiary . . . the entire amount then due." Thus, a default must be cured by paying the beneficiary, i.e., by tendering payment.

A tender of payment is more than being "willing and able" to pay. It is "an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made."

And even if the Cardenases requested instructions correctly stated the law, they were not warranted by the evidence. The Cardenases do not claim that they did, in fact,

tender payment to cure the default, but only that they desired and intended to do so. But a desire is not a tender.

The Cardenases argued that FNBNP did not allow them the right to cure based on the notices of default, which they argue showed a "firm resolve" to accelerate the debt and deny them the right to cure the default by paying the amount due "other than such portion of the principal as would not then be due had no default occurred," (i.e., the nonaccelerated amount due).

Section 76-1012 provides a trustor the ability to cure a default on an obligation secured by a trust deed prior to a trustee's sale and have the trust deed reinstated. This section contemplates and references the filing of a notice of default, but does not itself require the notice of default or specify the necessary contents of a notice of default. These requirements are set forth in § 76-1006. Section 76-1012 adds no additional requirements for notices of default to those in § 76-1006.

The notices of default satisfied the requirements of § 76-1006. The first notice stated that a default had occurred, that the nature of the default was "[f]ailure to pay installment payments when due," and that FNBNP had elected to sell the property to satisfy the obligation. We have held that under § 76-1006(1), "for nonagricultural property, the notice of default need not contain information on how to cure the default."

The second notice of default met the additional requirements of § 76-1006(2), which applies to property used for farming operations. It included "[a] statement of the amount of the unpaid principal which would not then be due had no default occurred." Thus, the district court was correct to instruct the jury that the notices of default were made in accordance with the Act.

Accordingly, the judgment of the district court was affirmed.