

On October 1, 2019, Maryland commercial lenders added another instrument to their tool kit when dealing with delinquent commercial property loans. The Maryland Commercial Receivership Act (the “Act”) became effective October 1, 2019, an act designed to provide a more cost effective and perhaps more efficient alternative to a federal bankruptcy proceeding .

The Act, contained under the Corporation and Associations Article, applies to receivership(s) relating to an interest in real property and any personal property related thereto; and, any other receivership(s) in which a receiver is appointed to take control over the liquidation of the owner's property to wind up its affairs. The Act does not apply to a receivership for an interest in real property improved by 1 to 4 dwelling units, with certain exceptions including, but not limited to, if the owner is planning to sell or lease the units in the ordinary course of business, or, the owner is collecting rent from a party other than an affiliate.

Under the act the court may appoint a receiver: (a) before judgment, if the moving demonstrates that it has a right to property and the property or revenue-producing potential of the property is in danger of waste, loss or impairment; or, has been or is about to be subject of a fraudulent conveyance; (b) after judgment, to effectuate the judgment or preserve non-exempt property; (c) when a corporation is being dissolved; or, (d) to, take control over the liquidation of the owner's property to wind up its affairs.

Under the new act, a mortgagee is entitled to nominate a receiver for a foreclosure or anticipated foreclosure¹. The Act permits the appointment of a receiver solely for mortgage real estate if there is a default under the mortgage and the appointment of a receiver is necessary to protect the property; the mortgagor agreed in writing to such a default remedy; the mortgagee is under-secured; the mortgagee fails to turn over rent to the mortgagor; or, the holder of a subordinate lien obtains a receiver.

Once appointed, the receiver does not need Court approval to take certain actions such as: manage the receivership property; operate the business; use, sell or lease property; incur unsecured debt in your ordinary course of business; employ agents; bring causes of action; bring avoidance actions permitted under the bankruptcy code if the receivership relates to a corporate dissolution or otherwise is one in which a receiver is appointed to take control over the liquidation of the owner's property. Other actions are not permitted without court approval, including, but not limited to, incurring debt relating to existing liens other than in the ordinary course of business; using or transferring property other than in the ordinary course of business; assuming, rejecting and assigning executory contract(s); and making distributions.

The power to sell the property held by the receiver is of great import to any lender. Subject to the following to two circumstances, with court approval, the receiver may, under the Act, sell property out of the ordinary course of business. The court may approve the sale and authorize a

¹ A person will be disqualified from serving as a receiver if the person (1) is an affiliate of a party; (2) has a material financial interest in the outcome; (3) has a debtor-creditor relationship with a party; (4) has an equity interest in a party; (5) is or was a director, officer or employee of the owner within the last two years; (6) has been convicted of a felony; (7) has been found liable in civil court for fraud or similar misconduct; or (8) otherwise has a material adverse interest to a party or the estate. The person moving the court for the appointment of receiver may nominate a receiver, but the court is under no obligation to accept or appoint the recommended party.

sale free and clear of liens or other interest including the lien of the party which initiated the receivership, any subordinate lien, any right of redemption, and any other legal or equitable interest. One exception would be in a real estate receivership where the receiver can sell property free and clear of the lien of the party who requested the receivership or of a senior lien or only with the consent of the lienor, provided, however, that the transfer property will not be free and clear of a residential lease or commercial lease if a foreclosure would not have terminated such lease. The second exception would present itself in a corporate dissolution of a receivership in which a receiver is appointed to take control over the liquidation of the owner's property. In such an circumstance, the property may only be sold free and clear of liens, if the receiver obtains the consent of the party who obtained the receivership or a senior lienholder, or the sale price is greater than the amount owed to the party that obtain the receivership plus any senior lien.

Worth noting under the Act is the imposition of an automatic stay, as provided for under the bankruptcy code, which operates to bar any act to collect a debt created pre receivership, obtain possession of receivership property, or create, perfect or enforce a lien or claim that are rose prior to the receivership. The court under the Act may also order a stay of proceedings as to the owner of the real estate if the stay is needed to protect receivership property and/or facilitate the receivership. However, under the act, the automatic stay provisions will not stay a foreclosure by the party who sought the receivership, or an act to perfect, maintain or continue the perfection of an interest in receivership property, set off, or any act which would not be stayed if the preceding was one of the under the bankruptcy code. A party may, however, apply to the court for relief from the stay for "cause".

Although the Act should be welcomed by lenders as it addresses an area of law not previously addressed specifically by statute, and provides another remedy for lenders in securing and selling real property, the Act appears to be short on what happens in the event that the property does not realize the monies due and owing. The Act provides that in the event the receivership does not produce sufficient revenue to reimburse the receivership for its reasonable and necessary fees and expenses the court may order such fees to be paid by the party who requested the receivership, or a person whose conduct would have justified the appointment of the receiver based on. the owner's property being in danger of waste, loss or impairment or a fraudulent conveyance having occurred or being about to occur.

The failure of the Act to address these problems and the very real possibilities of short sales begs the question as to what, if any, barriers or limitations are in place to discourage the filing of petitions by lenders, with the exception of sanctions available under Maryland Rule 1-341.