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Foreclosing Mortgages on Multiple Parcels Securing a Single Debt

An Update on Sanders v. Palmer

By Joel David Sharrow

A procedural minefield must be negotiated by a lender seeking to foreclose one or more mortgages on multiple parcels securing a single debt, with each parcel being sold separately for less than the full amount of the debt. The problem, as dealt with by the Court of Appeals in *Sanders v. Palmer*,¹ arises out of N.Y. Real Property Actions & Proceedings Law § 1371 (RPAPL), our deficiency judgment statute. Pursuant to RPAPL § 1371(2), the amount of any deficiency judgment, the proceeding for which is deemed a part of the underlying foreclosure action,² is the difference between the amount due (as determined by the order and judgment of foreclosure and sale) less the higher of either the judicially determined fair market value of the mortgaged and sold realty or the proceeds of the foreclosure sale. To obtain a deficiency judgment, the mortgagee must make and serve its motion therefor within 90 days of delivery of the foreclosure referee's deed. The failure to timely do so means, as a matter of law, that the proceeds of the foreclosure sale constitute full satisfaction of the mortgage debt.³ Consequently, when multiple parcels secure

a single debt and the parcels are sold separately, must the lender seek a deficiency judgment after the sale of each parcel or, as suggested by the earlier decision of the Appellate Division in *Bodner v. Brickner*,⁴ may the lender abide the sale of all parcels?

This article addresses how a number of courts have applied *Sanders* to various factual scenarios when no deficiency judgment is sought between seriatim sales of mortgaged realty.

The *Sanders* Case

In *Sanders*, a commercial debt was secured by several parcels and personal guarantees, one of which was further secured by a mortgage on guarantor Palmer's separate realty. *Sanders* stands for the proposition that where a single debt is secured by a mortgage of the borrower's realty and by another mortgage given by a guarantor on realty owned by the guarantor (with both parcels being subject to the jurisdiction of the same court (CPLR 507)), the failure to obtain a deficiency judgment after sale of the borrower's realty in the foreclosure action against it

and the guarantor, precludes foreclosure or any further proceedings as against the guarantor or the guarantor's separately pledged realty "unless the court orders otherwise."

In *Sanders*, there was a default. The lender commenced two foreclosure actions. One was brought to foreclose the mortgage upon one of the corporate borrower's pledged parcels – joining as a defendant guarantor Palmer who, as noted, had hypothecated her own realty to secure her guaranty. Shortly after bringing suit against the borrower and Ms. Palmer, and while that initial action was pending, the lender brought its second foreclosure action to foreclose upon Ms. Palmer's mortgaged parcel. The first action proceeded through sale of the corporation's pledged realty while continuing the second action against the Palmer parcel. The lender, however, did not seek a deficiency judgment in the first action, although such judgment would have determined the amount still due to be realized in whole or in part out of the later sale of the Palmer parcel. That was a fatal error.

Ms. Palmer argued that the amount realized from the sale of the borrower's realty constituted full satisfaction of the debt.⁵ Thus, there no longer was any guaranteed debt, and without a debt to secure, the lender could not foreclose on the Palmer parcel. The courts agreed with Ms. Palmer's position. The Court of Appeals, holding that a guarantor is entitled to the protection afforded mortgagors under the deficiency judgment statute, set forth the procedure to be followed. Albeit *dicta*, the Court iterated the following:

That several mortgages have been given to secure a single debt does not authorize separate foreclosure actions when the properties involved are all *subject to the jurisdiction of one court*. What is required, rather, is that, *unless the court orders otherwise*, there be separate sales of the security in such order as the court may fix, and an application after each sale and before the next occurs for determination of the deficiency resulting from the sale, for otherwise what remains due and payable from the additional security provided cannot be known. Were no deficiency application made after such sale, a guarantor who has provided security additional to that given by the debtor and who, like the debtor is entitled to the protection of RPAPL 1371(3) when no deficiency judgment is obtained would be deprived of that protection.⁶

The Court went on to conclude

[t]hat the deficiency in a multiple security situation is determined following sale on foreclosure of the security first sold does not affect the applicability of the statute [RPAPL § 1371] or permit the institution of separate proceedings without permission of the court.⁷

The Application of *Sanders*

Despite the seeming generality of the stated rule in *Sanders*, a number of decisions have discerned ways to restrict *Sanders* to its specific facts or otherwise find it distinguishable.

Guarantor's Property Sold First; Impact of Bankruptcy

In *Joseph Parisi TTEE Parisi Enterprises, Inc., Profit Sharing Trust v. Black Meadow Estates*,⁸ a corporate debt was secured by a mortgage on the corporation's property, personal guarantees, and the hypothecation of realty owned by the guarantors. The similarity to *Sanders* ends there.

A number of decisions have discerned ways to restrict *Sanders*.

Upon default, the lender brought one action to foreclose both the corporate mortgage and the guarantors' mortgage. The judgment of foreclosure and sale provided for the sale of both pieces of realty "in one parcel." The day prior to the scheduled sale, the corporate borrower filed a bankruptcy petition thereby invoking as to it the automatic bankruptcy stay.⁹ Nevertheless, the lender foreclosed on the guarantors' pledged realty and did not thereafter seek a deficiency judgment against the guarantors. Subsequent to an order of the bankruptcy court granting relief from stay, the lender foreclosed on the corporate borrower's mortgaged realty, and the guarantors moved to set aside that sale of the borrower's property. The I.A.S. Court granted the motion, but the Second Department reversed. The Appellate Division concluded that because the guarantors' parcel was sold first, the case was distinguishable from *Sanders*. Further, the court concluded that since the foreclosure judgment directed that all of the realty be sold "in one parcel," the general rule suggested by *Bodner* applied – i.e., that the right to apply for a deficiency judgment does not arise until all of the mortgaged parcels have been sold.

Parcels in Different Counties

In *Steckel v. Tom-Art Associates, Ltd.*,¹⁰ the corporate loan was secured by a mortgage on its realty (located in Queens County), personal guarantees, and a mortgage on the guarantors' property (located in Nassau County). The guarantors' property was foreclosed upon, and no deficiency judgment was sought before the lender brought an action to foreclose upon the corporation's pledged realty. Citing its previous decision in *Parisi TTEE*, the Second Department again distinguished *Sanders* as an exception and chose to follow *Bodner*.

In *Steckel*, there was an additional basis for distinguishing *Sanders* but which the Appellate Division did not iterate. The *Sanders dicta*, as quoted above, speaks to where the multiple parcels "are all subject to the jurisdiction of one court." In *Steckel*, however, the multiple parcels secured by different mortgages were in Nassau and Queens counties. Thus, arguably, they were not "subject to the jurisdiction of one court" since an action to fore-

close a mortgage is to be brought in the county wherein the property is situated.¹¹

Separate Debts

*Bank Leumi Trust Co. of N.Y. v. Andrews*¹² concerned a guaranteed corporate loan in the sum of \$3 million. To increase it to \$6.25 million, a mortgage on the corporate borrower's realty was given but limited to repayment of the amount of \$499,000 of the \$6.25 million debt. Upon default and in connection with an extension of time to pay, the guarantors subsequently granted a mortgage on their home to the extent of \$1.2 million of the \$6.2 million debt. After another default, the lender foreclosed on the corporate borrower's realty, obtaining a foreclosure judgment in the sum of \$499,000, the maximum amount payable under the borrower's mortgage. It is not clear from the reported decision, but presumably the guarantors were joined as defendants to that foreclosure action.¹³ The lender did not seek a deficiency judgment against the guarantors in that first action before bringing a separate foreclosure action against the guarantors' mortgage on their realty. Notwithstanding *Sanders*, the Appellate

hearing in which the mortgagors actively participated, it was agreed to amalgamate all of the pledged realty into four large tracts designated as parcels 1, 2, 3 and 4. The amended judgment provided for a single sale of the four parcels and permitted the lender to abide the conclusion of such sale before having to move for a deficiency judgment. After the four parcels were sold, the lender moved for a deficiency judgment against Mr. and Mrs. Farone; they cross-moved to extinguish the debt and to set aside the sale of parcels 2, 3 and 4 because the lender had not sought a deficiency judgment after the sale of the lots comprising parcel 1. The Appellate Division held in favor of the lender and against the Farones on three separate grounds:

- distinguishing *Sanders* in that the *Farone* case involved realty securing only the primary obligation of the borrower and not that of a guarantor;
- implicitly applying *Sanders* in that the *Farone* case amended judgment of foreclosure provided for a single sale of and permitted the lender to wait until concluding the sale of all four parcels before moving for a deficiency judgment; and,

The rule in *Sanders* may, or may not, be applicable to a multi-parcel secured mortgage or set of mortgages.

Division concluded that the failure to obtain a deficiency judgment in the foreclosure action on the corporate borrower's mortgage and sale of its realty did not bar the lender from commencing a separate foreclosure action on the guarantors' residence. That court so held because:

- “[u]pon the [lender’s] foreclosure of the corporate property, it realized the maximum amount that mortgage had secured”; and,
- “[c]ontrary to the [guarantors’] assertion, their personal obligation under the guaranty and the debt secured by the mortgage on their residence were separate and distinct from the debt secured by the mortgage on the corporate property.”¹⁴

Unless the Court Orders Otherwise

Giving effect to the “unless the court orders otherwise” language in *Sanders*, the Third Department, in *Adirondack Trust Co. v. Farone*,¹⁵ found ways to avoid the harsh result emanating from *Sanders*. To secure various loans, Mr. Farone, the borrower, mortgaged multiple parcels he owned, property owned by his mother, and a parcel owned by a corporate entity; lastly, he mortgaged a parcel jointly owned by the entirety with his wife, who also guaranteed payment of the loans. Upon default, the lender foreclosed upon all of the parcels. At the referee’s

- finding that the Farones had waived application of the holding in *Sanders* by agreeing at the referee’s hearing to the method and mode of the sale, and thus they were estopped from relying upon the *Sanders* holding.¹⁶

Multiple Debts; Collateral in More Than One County

In *Volpe v. National Bank of Geneva*,¹⁷ the plaintiff and related entities obtained several loans from the defendant, secured by various mortgages on realty situate in Ontario County. Thereafter, the plaintiff executed and delivered to the defendant a mortgage to secure all of his debts including then newly created ones; the pledged realty for that mortgage was located in Monroe County. The plaintiff filed for bankruptcy; the defendant obtained relief from the bankruptcy stay to foreclose on the properties in Ontario County. Judgment of foreclosure was entered providing that the Ontario County properties be sold in a single parcel and any deficiency be determined pursuant to a deficiency judgment under RPAPL § 1371. The Ontario County properties were sold, but no deficiency judgment was obtained. The plaintiff, relying upon *Sanders*, unsuccessfully brought a declaratory judgment action to declare null and void the mortgage on the Monroe County properties. The court denied such relief

because it found *Sanders* distinguishable in that: (1) *Volpe* involved numerous debts; (2) *Volpe* involved mortgages on parcels in different counties – thus, all of the pledged realty was not under the jurisdiction of just one court; and, (3) relief from stay was granted to foreclose on only the Ontario County properties. The court held that such “peculiar facts” brought the *Volpe* case outside the parameters of RPAPL § 1371 and *Sanders*.¹⁸

Continuing Viability of *Sanders*

Despite the foregoing cases, *Sanders* is alive and well.

In *United States v. Levine*,¹⁹ as in *Sanders*, there was a note which was secured by the corporate borrower’s realty and a personal guaranty secured by a (junior) mortgage on the guarantors’ realty. The secured party accelerated the debt but then an involuntary bankruptcy petition was filed against the corporate borrower. After the debtor’s bankruptcy estate was closed, the secured party foreclosed upon the corporation’s realty – the secured party, however, unlike the situation in *Sanders*, did not join the guarantors as defendants to that action. After the foreclosure sale, the secured party sought to foreclose on the guarantors’ residence but without having sought and obtained an interim deficiency judgment. The court found the case before it to be “indistinguishable” from *Sanders*. It concluded that the secured party had “lost the right to obtain a deficiency judgment and to enforce the guaranty [against the guarantors and the (junior) mortgage on their realty].”²⁰ No deficiency judgment against the mortgagor could be sought because of the bankruptcy discharge, and none could be sought as against the guarantors due to their non-joinder in the initial foreclosure action and the *Sanders* rule.

In *Goldberg Stillman Co., P.C. v. Bardey*,²¹ Ms. Bardey granted a security interest on her cooperative apartment (situate in New York County), the instruments for which were to be returned to her upon the lender’s receipt of a mortgage note and recorded mortgage on Ms. Bardey’s Ulster County property. The mortgage documents were received by the plaintiff so that the security interest documents were to be returned to the defendant. The Appellate Division held, therefore, that there was no longer a valid security interest in the cooperative which could be enforced; and, further, that the failure of the lender to have obtained a deficiency judgment after the foreclosure sale of the Ulster County property barred any further proceedings to foreclose the security interest on the New York County cooperative.²²

In *Mariani v. J.K.F.I. Management, Inc.*,²³ the plaintiff-guarantor mortgaged realty and delivered an affidavit for a judgment by confession to be entered at any time for the debt guaranteed and secured by the guarantor’s mortgage. Unlike the situation in *Sanders*, though, the borrower itself had not given any mortgage to secure its loan, and a monetary judgment on the confession was entered against the guarantor and executed upon before

the mortgage foreclosure began. The lender pursued the foreclosure action but did not seek a deficiency judgment. On motion by the guarantor/judgment debtor, the court directed that the judgment earlier entered pursuant to the confession be discharged. Citing *Sanders*, the court held that guarantors are entitled to the same protection under RPAPL § 1371(3) as are borrower/mortgagors; and that

[t]o permit enforcement [of the monetary judgment] would allow [the lender] to circumvent the statutory protection intended to be afforded mortgagors by RPAPL § 1371 . . . as it would enable [the lender] to enforce the full guaranteed obligation without having a court determine the true value of the mortgaged property. . . . That [lender] had entered the judgment against movant prior to the commencement of the foreclosure action gives [lender] no further rights.²⁴

Mariani was followed in *Putnam County Savings Bank v. Bagen (In re Bagen)*.²⁵ There, a monetary judgment was entered against the borrowers, prior owners of realty who subsequently filed for bankruptcy protection. The lender/judgment creditor then moved in state court for leave to commence an action to foreclose the mortgage previously given to secure it as against the entity then owning the realty, to wit: the successor-in-interest to the original borrowers, which entity took title to the realty subject to the mortgage. In that foreclosure action, the lender did not name or serve the bankruptcy/money judgment debtors. The Court, pointing out that no application for the right to seek a deficiency judgment had been timely made, concluded that *Mariani* and RPAPL § 1301 rendered the monetary judgment voidable.²⁶

In *Wydra v. Chai*,²⁷ four Kings County parcels were directed to be sold in a particular order, whereafter the deficiency judgment could be sought. Although all of the realty was sold, the sale of one of the parcels was rescinded per stipulation. That left title in the name of the mortgagor. A deficiency judgment was entered. Almost 10 years later, the parcel that had its sale rescinded was conveyed by the mortgagor to a third party (the “grantee”). Nevertheless, the plaintiffs later obtained appointment of a substitute referee, who ultimately re-sold that parcel – at a much increased sales price. The Appellate Division granted the grantee’s motion for leave to intervene and set aside that second foreclosure sale of its parcel. The court held that the plaintiffs’ failure to have proceeded against the grantee’s parcel promptly after the first sale of it was rescinded, and the lien thereon of the deficiency judgment having lapsed, called for application of the general rule that “failure to proceed against all the security is an abandonment of the lien on the portion omitted,” citing, among others, *Bodner* and *Sanders*.

Conclusion

The rule in *Sanders* may, or may not, be applicable to a multi-parcel secured mortgage or set of mortgages. Prudence dictates, though, that in any Order and

Judgment of Foreclosure and Sale, careful attention be paid to inserting a provision that the varied pledged realty be sold as a single parcel. Therefore, the need to seek a deficiency judgment would abide a sale of all the mortgaged realty – presuming that the referee has so determined they may be – and, in any event, a deficiency judgment would be made only after all of the mortgaged parcels have been sold. Furthermore, all of the mortgaged parcels should be foreclosed upon in the same or simultaneous actions (if the realty is located in several counties). Otherwise, the lender runs the risk of some court concluding that the mortgage debt has been satisfied out of the sale of the first sold parcel so that later sold or unforeclosed-upon parcels are discharged from the lien of the foreclosed mortgage, thus precluding the lender from seeking to enforce any money judgment against the borrower and any guarantors. ■

1. 68 N.Y.2d 180 (1986).

2. *Steuben Trust Co. v. Buono*, 254 A.D.2d 803, 804 (4th Dep’t 1998) (citing *Sanders*, 68 N.Y.2d at 182–83; *In re Tyler*, 166 B.R. 21, 25 (Bankr. W.D.N.Y. 1994)).

3. RPAPL § 1371(3).

4. 29 A.D.2d 441, 445 (1st Dep’t 1968).

5. See RPAPL § 1371(3).

6. *Sanders*, 68 N.Y.2d 180 (1986) (emphasis added) (citation omitted).

7. *Id.* at 187 (citation omitted).

8. 208 A.D.2d 597 (2d Dep’t 1994).

9. See 11 U.S.C. § 362.

10. 228 A.D.2d 429 (1st Dep’t), *lv. to appeal denied*, 88 N.Y.2d 1065 (1996).

11. CPLR 507.

12. 254 A.D.2d 445 (2d Dep’t 1998), *appeal denied*, 93 N.Y.2d 806 (1999).

13. See RPAPL § 1301.

14. *Andrews*, 254 A.D.2d at 446 (citations omitted).

15. 245 A.D.2d 840 (3d Dep’t 1997), *appeal dismissed*, 91 N.Y.2d 1002 (1998).

16. *Id.* at 842 (citation omitted).

17. 171 Misc. 2d 948 (Sup. Ct., Monroe Co. 1997), *aff’d on opinion below*, 249 A.D.2d 896 (4th Dep’t 1998).

18. *Id.* at 955.

19. 902 F. Supp. 367 (S.D.N.Y. 1995).

20. *Id.* at 370.

21. 277 A.D.2d 62 (1st Dep’t 2000).

22. *Id.* at 63 (citation omitted).

23. 158 Misc. 2d 938 (Sup. Ct., N.Y. Co. 1993).

24. *Id.* at 941.

25. 185 B.R. 691 (Bankr., S.D.N.Y. 1995).

26. *Id.* at 696, 697.

27. 50 A.D.3d 779 (2d Dep’t 2008).

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