Florida's Uniform Commercial Real Estate Receivership Act

A Lexis Practice Advisor® Article by Meghan O. Serrano, Shumaker, Loop & Kendrick, LLP

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The economic impacts of the COVID-19 pandemic have yet to be fully realized. Many Florida businesses took advantage of the Small Business Administration's various loan programs, but eradication of the virus and economic recovery are still far off. For many practitioners who represent lenders and lienholders, the governor's moratorium on foreclosures hit the pause button on seeking recovery through the courts, and meanwhile, the tidal wave of evictions and foreclosures is steadily building up. It is likely that when the restrictions on foreclosures are lifted, the courts will be inundated with foreclosure claims as borrowers struggle to meet their debt obligations. This article discusses Florida's newly enacted Uniform Commercial Real Estate Receivership Act (UCRERA). Practitioners representing lenders and other lienholders should familiarize themselves with this act in light of the expected surge in foreclosures.

For further guidance on commercial foreclosures in Florida, see Commercial Mortgage Foreclosure (FL).

Background

UCRERA was signed into law as Chapter 714 of the Florida Statutes by Governor DeSantis and took effect on July 1, 2020, (and does not apply to any receiver appointed prior to that date). H.B. 783, 122nd Leg., Reg. Sess. (Fla. 2020). This uniform act as already been adopted in several other states, and others are currently considering it.

Pre-UCRERA, appointment of a receiver was governed by caselaw. While nothing requires that the party seeking the appointment of a receiver demonstrate that the property is going to waste, any practitioner will tell you that without evidence of actual waste, and not just the risk of waste, the court would be unlikely to appoint a receiver, even if the property owner had expressly agreed to such a remedy in the governing loan documents. This high bar was applied to protect the rights of the property owner to maintain exclusive possession of the property. During the Great Recession, when many courts were overwhelmed with foreclosure cases, many practitioners sought the appointment of a receiver to prevent waste during protracted litigation. The duties of the receiver were limited by the terms of the order which appointed him or her, which was generally derived from the terms of the contract between the property owner and the party seeking to appoint the receiver. Some cases rejected the notion that the party seeking appointment of a receiver was required to demonstrate waste by the borrower or impairment of collateral and instead focused on the likelihood of success on the merits. Keybank, N.A. v. Kauth, Ltd., 15 So. 3d 939 (Fla. Dist. Ct. App. 2009). In *Keybank*, the court rejected the borrower's argument that the lender was obligated to demonstrate that the value of the property was insufficient to cover the debt secured by the mortgage, stating "this places the burden on the wrong party." In Shubh Hotels Boca, LLC v. FDIC, the appellate court quashed an order appointing a receiver which had granted the receiver authority to sell the mortgaged property, noting that the mortgage "between the parties failed to grant an explicit power to sell the mortgaged property during foreclosure proceedings before judgment," and "the general Florida rule is that the mere appointment of a receiver does not itself confer any of the owner's power or authority to sell such property." 46 So. 3d 163, 166–67 (Fla. Dist. Ct. App 2010).

Instead, the court noted that "the general Florida rule is that the role of a receiver in a foreclosure action is *only* to preserve the property's value." Shubh Hotels Boca, LLC, 46 So. 3d at 167 (emphasis added).

Provisions of UCRERA

While UCRERA upholds the general principle stated in *Shubh Hotels Boca, LLC* that the primary purpose in appointing a receiver is to preserve the value of the property, it has also expanded this notion and expressly authorized the receiver to take certain actions consistent with this principle of preservation. UCRERA has also codified many principles governing receiverships which have been part of Florida's jurisprudence for many years, including (1) the requirement that the receiver be appointed only after "notice and opportunity for hearing appropriate under the circumstances" (Section 714.03), (2) the requirement that the receiver post a bond with the court (Section 714.08), (3) the ability to appoint the receiver before judgment if the property "is in danger of waste, loss, substantial diminution in value, dissipation or impairment" (Section 714.06(1)(a)), and (4) the receiver's status as a lien creditor (Section 714.09). However, there are also some new provisions under UCRERA which are important to note:

- **Receivership applies to personal property.** Under Section 714.04, Florida Statutes, the receivership applies to not only an interest in real property, but also "any incidental personal property related to or used in operating the real property." Pursuant to this provision, a receiver appointed to take over an operating commercial enterprise such as a hotel would also have authority over the personal property incidental to the real property—an important point, given that this personal property will be critical to the hotel's ongoing operations. Under Section 714.12(1)(b), the receiver can operate a business constituting receivership property.
- **The owner is required to assist and cooperate with the receiver.** The owner's obligations to "assist and cooperate with the receiver" include the fundamental obligation to turn over "all receivership property," as well as any property necessary "to obtain or maintain access to or control of the receivership property," including records, passwords, and other authorizations (Section 714.14). The owner may also be subjected to questioning under oath for "any matter relating to the receivership property or the receivership" (Section 714.13).
- **The receiver may make improvements to and sell receivership property.** With court approval, a receiver can incur debt for the use or benefit of receivership property other than in the ordinary course of business (Section 714.12(1)(a)), make improvements to the real property (Section 714.12(1)(b)), use or transfer receivership property, again, other than in the ordinary course of business (Section 714.12(1)(c)), and adopt or reject an executory contract of the owner pursuant to Section 714.17 (Section 714(1)(d)).

Pursuant to Section 714.06:

> [i]n connection with the foreclosure or other enforcement of a mortgage, the court shall consider the following facts and circumstances, together with any other relevant facts, in deciding whether to appoint a receiver for the mortgaged property:
>
> (a) Appointment is necessary to protect the property from waste, loss, substantial diminution in value, transfer, dissipation, or impairment;
>
> (b) The mortgagor agreed in a signed record to the appointment of a receiver on default;
>
> (c) The owner agreed, after default and in a signed record, to appointment of a receiver;
>
> (d) The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation;
>
> (e) The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect; or
>
> (f) The holder of a subordinate lien obtains appointment of a receiver for the property.

In light of the statute's mandate that the court consider these facts and circumstances, it is implicit in the statute that an order appointing the receiver include detailed findings of fact addressing these considerations. Under Section 714.06(4), "[a] party adversely affected by an order appointing a receiver may move to dissolve or modify the order at any time." A motion to dissolve an order appointing a receiver or modify the order "must be heard within 5 days after the movant applies for a hearing on the motion or at such time as the court determines is reasonable and appropriate under the circumstances after the movant applies for a hearing on the motion. After notice and a hearing, the court may grant relief for cause shown." Note also that an order appointing a receiver is subject to direct appellate review under both Florida Rule of Appellate Procedure Rule 9.130(a)(3)(C)(ii) (as a non-final order providing for immediate possession of property) and Florida Rule of Appellate Procedure Rule 9.130(a)(1)(D) (as a non-final order granting or denying the appointment of a receiver).

Foreclosure practitioners seeking the appointment of a receiver will be well served by becoming familiar with the burdens of proof and other features of UCRERA as a wave of foreclosures appears to be another likely consequence of COVID-19 related shutdowns and economic difficulties. UCRERA provides a straightforward framework for the appointment and term of a receiver, and trial judges should be more likely to grant a request for an appointment of a receiver with a clear statutory framework for doing so.

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Board certified in business litigation by The Florida Bar, Meghan is considered an expert in her field, practicing in all phases of civil and business litigation, including performing and analyzing discovery; drafting motions; attending mediations, hearings, and motion sessions; conducting witness depositions; and preparing for trial and appellate proceedings. Meticulous and hardworking, Meghan regularly represents businesses, employers, banks, and landlords in both state and federal court at the trial level and on appeal.

Meghan collaborates with her clients and colleagues to develop the strongest possible strategy to achieve client objectives, whether defensive or offensive, before disputes erupt into expensive and protracted litigation. She has extensive experience representing employers in disputes with former employees, including claims involving theft of trade secrets and violation of non-compete agreements; disabled insureds in claims against disability insurers, lenders in title claims, foreclosures, deficiencies, workouts, and REO matters; and landlords in eviction actions and other lease disputes. She also regularly handles trusts and estate litigation, real estate broker deposits and commission disputes, and Florida Real Estate Commission complaints.

With a passion for sharing her knowledge, Meghan is a contributing author to the 2016 and 2018 supplements to *Foreclosures in Florida* (Lexis Nexis), which contains information she gained during the Great Recession while working with banks on loan defaults and foreclosure. In addition, she was selected by Lexis Nexis to author their *Commercial Mortgage Foreclosure (Florida), Residential Mortgage Foreclosure (Florida), Commercial Eviction (Florida)* and *Residential Eviction (Florida) Practice Notes*. Recently, in light of the COVID-19 pandemic, Meghan was again selected by Lexis Nexis to author a *Florida Practice Alert: Does the Coronavirus Excuse Contract Performance*.

Outside the courtroom, Meghan is passionate about the Boys & Girls Clubs of Sarasota County, and currently serves as its incoming chair.

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