Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwsh-law.com

Atlanta Office
1201 Peachtree St., N.E.
400 Colony Square
Atlanta, Georgia 30361
Telephone: (404) 874-9588

GARDNER WILLIS SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

February 4, 2013

FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law. Please contact us for more information or e-mail us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

Visit our website at: www.gwsh-law.com

At Gardner, Willis, Sweat & Handelman, we offer a wide range of services including Banking; Bankruptcy; Business Law; Construction Law; Employment Law; Estate and Tax Planning; General Litigation and Appeals; Governmental Law; Real Estate; Trucking Litigation, and Workers' Compensation. Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in these and other areas. For a consultation with Sherman, please call at 229-883-2441, or e-mail him at: sherman.willis@gwsh-law.com

All inquiries are confidential.

Can a Lender Conduct a Second Foreclosure?

On October 22, 2012, the Court of Appeals of Georgia decided Howser Mill Homes, LLC et al. v. Branch Banking & Trust Co., 318 Ga. App. 148 (2012). The issue before the Court was whether Branch Banking & Trust Co., the lender, was required to obtain a court order before conducting a second non-judicial foreclosure sale after the lender purchased the property at the first foreclosure sale and then voluntarily dismissed the confirmation petition due to a defect in the Notice of Sale. The Court of Appeals ruled in favor of the lender, finding that because the lender was the purchaser of the property at the first foreclosure sale, which was later deemed void due to defects in the advertisement, the lender could treat the sale as void and proceed to resell the property by properly advertising and conducting a second sale. In conclusion, when a lender purchases property at a non-judicial foreclosure sale and the sale is later deemed void, the lender may re-initiate foreclosure proceedings, with the defect remedied, and purchase the property without approval from the court. The lender can then proceed with a confirmation action of the second valid foreclosure sale.

"Stripping" Junior Liens in Bankruptcy Cases

Pursuant to 11 U.S.C. §506(a) and (d), a bankruptcy debtor may "strip off" or avoid a junior lien when a senior lien exceeds the fair market value of the property at issue. However, the Debtor's ability to strip junior liens has been limited by the United States Supreme Court in Chapter 7 bankruptcy cases. In Dewsnup v. Timm, the high court refused to allow the stripping of a junior lien, holding that in Chapter 7 cases, a Debtor cannot lien strip real estate collateral if there is any equity to which the lien attaches. 502 U.S. 410 (1992). The 11th Circuit Court of Appeals dealt with a similar issue in the Chapter 7 bankruptcy case In re McNeal, but distinguished Dewsnup, finding that its holding was only limited to disallowing "strip downs" versus "strip offs" of junior liens. 477 Fed. Appx. 562 (11th Cir. 2012). Thus, where an otherwise secured claim is wholly unsecured due to a senior lien exceeding the fair market value of the real estate collateral, the Eleventh Circuit has held that the junior lien may be stripped in its entirety. Id. However, if there is any equity to which the second lien attaches, the lien could not be stripped off or stripped down under Dewsnup, supra. Upon receipt of an Order avoiding the lien, do not cancel the Security Deed before obtaining a Discharge Order. If the case is dismissed or converted to a Chapter 7 bankruptcy, the prior Order avoiding the lien would become void.

"Cash for Keys" Programs for Tenants After Foreclosure

Because of the Protecting Tenants at Foreclosure Act of 2009, a federal law that grants tenants the right to remain in foreclosed property for a period of ninety (90) days after foreclosure or longer if there is a written lease for a longer term, many lenders have enacted a "Cash for Keys" program. Currently, "Cash for Keys" programs are offered by Fannie Mae, Freddie Mac and the FDIC to Georgia homeowners or tenants occupying foreclosed property. The programs provide financial assistance to foreclosed homeowners or tenants in exchange for a clean departure from the home prior to 90 days or termination of the lease. As many lenders know first-hand, a formal eviction can be very expensive and difficult; and lenders often assume a landlord relationship after the foreclosure. By negotiating incentives with homeowners or tenants, lenders can avoid unnecessary hardship and expense for themselves, as well as the occupants. Most "Cash for Keys" programs require occupants to execute documents waiving any legal claims they have against the lender and forfeiture of security deposits they might otherwise receive. Additionally, occupants must complete an IRS W-9 prior to receiving payments. The primary incentive to the occupant is the receipt of cash upon departure. And, in order to get the cash, the occupant must give proper notice to the lender and maintain the property in good condition.

Post Foreclosure Eviction- What To Do With A Tenant's Personal Property

Lenders often purchase real property at a foreclosure sale, rendering them the sole owner of the real property. If the previous homeowner or tenant is still in possession of the property, the lender may seek a writ of possession and carry out a formal eviction after compliance with the "Protecting Tenants at Foreclosure Act of 2009". At times, personal property of the homeowner or tenant remains on the real property after the foreclosure sale and eviction. Under Georgia law, the purchaser is required to place all of the tenant's personal property on some portion of the property, such as a sidewalk or public right-of-way. O.C.G.A. §44-7-55(c). Once a writ of possession is executed, the tenant's personal property is deemed abandoned and the purchaser is no longer responsible for its welfare. Id. Strict compliance with the statute is required; meaning, if the purchaser does not adhere to each provision of the statute, it could be liable for conversion of the personal property. Washington v. Harrison, 299 Ga. App. 335 (2009). Often times the purchaser and the tenant may work together to arrange a time for the tenant to remove his or her personal property; however, if said agreement is entered, the personal property is not deemed "abandoned" by law and the lender could be held liable for conversion if the tenant pursues such a claim. Further, certain classes of personal property should not be placed on the public right-of-way. These classes include animals, medical or financial records, and perishable food items. Certain local ordinances may specify further requirements such as time limits and storage procedures.

Deena Plaire-Haas

This newsletter was prepared by Deena Plaire-Haas and Amy Purvis. Deena's practice includes representation of financial institutions and businesses in bankruptcy court, drafting contracts and leases, formation of new businesses, general business litigation, and closing complex commercial transactions. She understands the importance of responsiveness, efficiency, anticipation of clients' needs and creative solutions. Contact Deena at (229) 883-2441 or e-mail her at deena.plaire-haas@gwsh-law.com.

Amy Purvis earned her Juris Doctorate from the University of Georgia School of Law. Amy is President of the Young Lawyers Division of Albany and a member of Emerge Albany, Albany Area Chamber of Commerce, and is a provisional in the Junior League of Albany. Amy represents financial institutions and her practice includes formation of new businesses, general business litigation, and commercial transactions. Contact Amy at (229) 883-2441 or e-mail her at amy.purvis@gwsh-law.com.

Amy Purvis

32-030-2013-06