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HOW TO FORECLOSE ON PERSONAL PROPERTY IN TEXAS

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HOW TO FORECLOSE ON PERSONAL PROPERTY IN TEXAS

I. Introduction

Article 9 of the Uniform Commercial Code (the "UCC") – Secured Transactions governs the foreclosure of personal property in Texas. The default provisions in Chapter 6 of the UCC provide the statutory framework and process that secured creditors need to follow for effective foreclosures of security interests in personal property.

II. General Principals

A. The UCC requires default before exercise or remedies.

The remedies under Chapter 6 of the UCC arise upon default. "Default" is not defined in the UCC. Instead, courts will look to the parties' agreement and its interpretation under non-Article 9 law to determine whether a default has occurred or been waived. Tex. Bus. & Comm. Code Ann. § 9.601 at Comment 3.

Pursuant to § 9.601, after default, a secured party may reduce a claim to judgment, foreclose, or otherwise enforce a claim, security interest, or agricultural lien, by any available judicial procedure, or it may proceed as to documents or the goods that they cover. Tex. Bus. & Rem. Code Ann. § 9.601(a). In addition, a secured party in possession of collateral or control of collateral under § 7.106 (control of electronic document of title), § 9.104 (deposit account), § 9.105 (electronic chattel paper), § 9.106 (investment property), or § 9.107 (letter of credit), has the rights and duties provided in § 9.207. Tex. Bus. & Rem. Code Ann. § 9.601(a).

Default is also required under § 9.609, which governs a secured party's right to take possession and to assemble the collateral.

B. The secured party must give notice of default.

Texas law requires the secured party to give notice of default to the debtor. Presentment to the maker of a note is required before the note holder can exercise an optional right to accelerate the time for any payment due on the note. *Shumway v. Horizon Credit Corp*., 801 S.W.2d 890, 892 (Tex. 1991) (citing *Ogden v. Gibraltar Sav. Ass'n,* 640 S.W.2d 232, 233 (Tex. 1982); *Allen Sales & Servicenter v. Ryan,* 525 S.W.2d 863, 865 (Tex.1975); *Faulk v. Futch,* 147 Tex. 253, 214 S.W.2d 614, 616–17 (1948). The note holder must also notify the maker both of his intent to accelerate and of the acceleration. *Id.* (citing *Ogden,* 640 S.W.2d at 233; *Allen Sales,* 525 S.W.2d at 865; *Faulk,* 214 S.W.2d at 616–17). Notice may be waived in advance, but "waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective if and only if it is clear and unequivocal." *Id.* at 893.

C. Upon default, the secured party has multiple remedies.

The rights under § 9.601(a) and (b) are cumulative and may be exercised simultaneously. Tex. Bus. & Rem. Code Ann. § 9.601(c).

Under § 9.604, if a security agreement covers both real property or fixtures and personal property, the secured party may proceed:

> (1) under this subchapter as to the personal property without prejudicing any rights with respect to the real property; or
>
> (2) as to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this subchapter do not apply.
>
> (b) Subject to Subsection (c), if a security agreement covers goods that are or become fixtures, a secured party may proceed:
>
> (1) under this subchapter; or
>
> (2) in accordance with the rights with respect to real property, in which case the other provisions of this subchapter do not apply.
>
> (c) Subject to the other provisions of this subchapter, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.
>
> (d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

Tex. Bus. & Comm. Code Ann. § 9.604. In cases involving collateralization by real estate and personal property, a lender can choose to apply personal property foreclosure rules to personal property collateral and real property foreclosure rules to real property collateral. *Marhara Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W. 3d 208, 221 n. 7 (Tex. Ct. App.- Houston [14th Dist.] 2015). Thus, a secured creditor can proceed as to the personal property either under the UCC or under an applicable deed of trust.

D. Duties owed.

A secured party does not owe a duty to a person that is a debtor or obligor, unless the secured party knows that the person is a debtor or obligor, the identity of the person, and how to communicate with the person.[1] Tex. Bus. & Comm. Code Ann. § 9.605. Nor does a secured party

[1] Under § 9.102, a debtor means "(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor; (B) a seller of accounts, chattel paper, payment intangibles, or

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