

July 11, 2018

NOTICE TO CLIENTS AND FRIENDS

Supreme Court of Puerto Rico Decision:

Limit of the Power of the Court of Appeals to Review the Denial by the Superior Court of a Request for Provisional Remedies Under Rule 56 of the Rules of Civil Procedure.

I. Impact for Creditors:

On June 29, 2018, the Supreme Court of Puerto Rico (“SCOPR”) issued a ruling that may adversely impact ongoing cases, as well as the security interests of commercial creditors in the midst of collection proceedings within the Commonwealth of Puerto Rico. In essence, SCOPR (i) reversed a ruling from the Puerto Rico Court of Appeals which had overturned a ruling from the lower court denying a motion for attachment of rents filed by Citibank, N.A., as agent for other lenders, under the rationale that the creditors were over-secured; (ii) completely overlooked or intentionally ignored contractual provisions of the loan documents regarding the assignment of rents based on what SCOPR understood were active disputes regarding the validity of the loan documents; and (iii) seemed to imply that the validity of the loan documents must be ruled upon, prior to allowing the self-help provisions of the same to be enforced by the creditor.

As has been the unintended (or perhaps intended) consequence of similar rulings in the past, Creditors should prepare themselves for an immediate increase in (i) debtors citing the case summarized below to contest the validity of the loan documents as a means to delay or extend foreclosure litigation; (ii) debtors contesting the validity of self-help remedies; and (iii) debtors arguing that the creditors are over-secured to avoid pre-judgment attachments and garnishments. A slight increase in evidentiary hearings and discovery processes regarding the foregoing matters may also soon follow.

II. Summary of Case:

In Citibank, N. A., et al v. Atilano Cordero Badillo, et al, 2018 T.S.P.R. 119, the Supreme Court of Puerto Rico expanded on its view that, in the context of preventive remedies under Rule 56.1 and 56.3 of the Rules of Civil Procedure, 32 L.P.R.A. Ap. V. R. 56.1 and 56.3, (“Rule 56”), the Court of Appeals may revise a determination of the Superior Court *only* when (i) the ruling is not governed by the reasonable and adequate standard; or (ii) when the Superior Court does not consider the interests of both parties as may be required by justice and the circumstances of the case.

On February 4, 2014, Citibank, N.A., as lender and as administrative agent for Oriental Bank, Scotiabank de Puerto Rico and Banco Popular de Puerto Rico (collectively, the “Lenders”) filed a complaint for collection of monies and foreclosure of mortgages in the amount of \$11,640,152.75 against Atilano Cordero Badillo, Inc. and ATUE Real Estate, S.E. (collectively, the “Defendants”). Defendants answered the complaint and raised, as an affirmative defense, that the loan documents were null and invalid. On February 26, 2014 Plaintiff filed a motion

for preventive remedies under Rule 56 requesting among others the attachment and garnishment of the rents assigned by the Defendants to the Lenders under the Mortgage Deeds executed as part of the loan documents. Defendants filed an opposition to the motion for preventive remedies claiming that the remedies requested by Plaintiff would constitute the collapse of Defendant's business and a failure of justice since it would deprive Defendants of their property. Defendants also claimed that Plaintiff was over-secured since the alleged market value of the properties subject to the foreclosure was \$12,654,000.00. That is, higher than the amounts claimed in the complaint. The Superior Court held a hearing on the preventive remedies request and on that same date issued a Resolution denying Lenders' request for preventive remedies under Rule 56.

The Lenders filed a *certiorari* petition before the Court of Appeals requesting review of the *Resolution* issued by the Superior Court and Defendant filed its brief in opposition. The Court of Appeals reversed the Resolution issued by the Superior Court and issued a judgment granting the preventive remedies requested by the Lenders, ordering the Lenders to place a bond in the amount of \$11,640,152.75 and ordering Defendants to deposit the rents in Court.

Both parties filed *certiorari* petitions before the Supreme Court of Puerto Rico requesting revision of the Judgment issued by the Court of Appeals. The Supreme Court reversed said Judgment and held that: (a) the Superior Court has ample discretion to decide if its grants or denies a request for preventive remedies under Rule 56; (b) the remedy to secure the effectiveness of a judgment under Rule 56 must be adequate and reasonable; (c) the Court must consider the interests of all parties as required by justice and the circumstances of the case; (d) the Court of Appeals substituted the Superior Court's appreciation and unduly intervened with its discretion; (e) while there is a risk that Defendants do not use the rents payments for the conservation of the properties and the mortgaged properties may deteriorate, the Lenders are secured since, from the case file documents, the market value of the properties subject to the foreclosure was higher than the amounts claimed in the complaint; (f) the deposit of the rents in Court as ordered by the Court of Appeals would result in a condition too burdensome to Defendants and would deprive them of the cash flow needed to meet the needs of their business; (g) that, even if the loan documents have a clause in which Defendants assigned the rents to Plaintiff before the execution of the mortgage, in this case there is a controversy as to the validity of the loan documents since it is an affirmative defense raised by Defendants in their answer to the complaint.

This document has been prepared for information purposes only and is not intended as, and should not be relied upon, as legal advice. If you have any questions or comments or wish to obtain more information please contact us.

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