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Arbitrator Cuts Some Slack to Developers in Down Economy

By Mindy Farabee
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LOS ANGELES — In a case that could have significant repercussions for developers facing foreclosures during the recent credit crunch, an arbitrator has barred the sale of an 82-unit, mixed-use, waterfront condominium development, citing the “impossibility of selling the units” under current economic conditions.

In what may be a first-of-its-kind ruling, JAMS arbitrator Robert Thomas on April 24, enjoined the foreclosure sale of the Long Beach development named Blu, which had been scheduled to take effect April 27.

Gateway & 4th, a management company, developer, and equity investor, along with its parent company Intracorp, had filed for an arbitration

hearing, when their lender, Pacific CityHome, moved to foreclose on the property.

Although Gateway had not defaulted on loan payments, CityHome signaled it intended to institute foreclosure proceedings after the management company failed to sell a single unit at the minimum sales price mandated by their agreement.

In a four-page opinion, Thomas found that injunction relief was appropriate due to the global credit freeze.

“Civil Code Section 1596 requires that the object of a contract must be possible to be performed,” Thomas wrote. “The object of the contract is set forth in the agreement between [Gateway] and [CityHome]. There is a set quota. It is clear that the set quota cannot be achieved during these financial conditions.”

In supporting his ruling, Thomas reiterated a quote Gateway included in its court documents from former

lion in equity capital toward the project’s completion. Thomas concluded that a foreclosure sale would cause

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Federal Reserve Chairman Alan Greenspan: “We are in the midst of a once-in-a-century credit tsunami,” Greenspan testified before Congress in October, referring to the magnitude of the economic crisis.

Gateway had also claimed to have contributed approximately \$3.6 mil-

“irreparable harm” to Gateway’s financial interest.

“CityHome was just doing what the contract said,” explained Skip Miller of Miller Barondess, who is representing Gateway along with Daniel Miller. “We invoked the equitable doctrines of impossibility and frustration,

which are well established in California law, and said [that contract] is impossible to fulfill with the current economic crisis.

“This is a very important decision for developers,” Skip Miller continued. “Usually if the market changes, that’s life, that’s too bad. Before, [developers] had no defense against a technical default. Not anymore. Because of the severity of this downturn, they do have recourse.”

Miller said Pacific CityHome rebuffed suggestions by his clients that Blu be converted to apartment rentals until the economic climate improved, which Miller says is what his clients now intend to do.

CityHome is represented Goodwin Procter lawyers Anthony Feeherry and Brian Mukherjee in the Boston office and Brooks Brown in Los

Angeles.

Anthony Feeherry declined to comment on behalf of CityHome, citing the confidentiality inherent to arbitration.

Gateway filed for arbitration in January, and this injunction does not resolve the underlying dispute. But, as Thomas granted his injunction on the merits, Miller said that he believes a forthcoming settlement could be likely.

“We put our best foot forward, and the other side put their best foot forward. I don’t know what other issues there are to arbitrate,” Miller said.

If a settlement is not reached, Miller estimates that after discovery and depositions a final ruling could come down later this year.

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