

In Dispute Between Developer and Lender, Arbitrator Finds in Favor of Former

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Long Beach, Calif.—In today's trying economic conditions, developers nationwide are finding it more and more difficult to sell their recently completed condominiums to interested parties. With the credit markets frozen, even those who use these units as investment opportunities are often unable to purchase them. While some developers have turned to a rental exit strategy, others have found that their contracts with their lenders make this rather complicated, if not impossible.

In a recent ruling that found in favor of the developer, Gateway and 4th, an arbitrator banned the sale of Blu, an 82-unit, mixed-use condominium development, citing the "impossibility of selling the units" under current economic conditions.

"The second lien lenders (Pacific CityHome) tried to foreclose and sell the interest," explains Daniel S. Miller of law firm Miller Barondess LLP in Los Angeles, who represented Gateway and 4th. "The loan agreement allowed them to foreclose if units weren't sold. We filed for a preliminary injunction to block the foreclosure."

According to the proceedings, Pacific CityHome LLC agreed to loan \$10.4 million to Gateway and 4th LLC—whose parent company is Intracorp—for the development of Blu, as stated in a loan agreement dated September 28, 2007. The agreement provides for minimum purchase prices ranging from \$431,300 to \$635,700.

Also according to the proceedings, Gateway took every step possible to sell units, but found that, given the state of the market, they were unable to close any sales.

Because Gateway and 4th had not defaulted on their loan payments, Miller argued that "under equitable doctrine, we should be skewed from performance and [the lender] should be blocked from foreclosing. We argued that this credit tsunami created an impossibility, and people can't get credit to buy condos and, especially on these multi-unit buildings, it's even more difficult because unless you have 50 percent under contract, you can't get financing."

JAMS (Judicial Arbitration and Mediation Service) arbitrator Robert Thomas enjoined the foreclosure sale of the development, which had been scheduled to take effect April 27.

"I think this could impact developers facing technical defaults and an inability to sell units, things of that nature. They might have a way of using equitable doctrines to stave off a foreclosure, whereas conventional wisdom is, if there's a default, there's a default, but that's not the case today," Miller tells MHN.

The best course of action seems to be to convert the condominium into a rental community, as selling it as condos is impossible in this market, Miller notes, who believes his client will likely take this strategy