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Make whole prepayment premium enforceable even after loan acceleration

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In *In re 1141 Realty Owner LLC, et al.*, No. 18-12341 (SMB), 2019 WL 1270818 (Bankr. S.D.N.Y. March 18, 2019), Bankruptcy Judge Stuart M. Bernstein of the U.S. Bankruptcy Court of the Southern District of New York recently reaffirmed that upon sufficient contractual language, "make whole" prepayment premiums are enforceable under New York law even after loan acceleration. The court emphasized that the language of the contract provided for such a result and that this was an enforceable liquidated damages clause under New York law.

Prior to filing for Chapter 11, 1141 Realty Owner LLC, (the Debtor) received a notice of default and acceleration from Wilmington Trust NA (Wilmington). Wilmington demanded immediate repayment in full of the entire outstanding debt including all accrued interest and other payments due under the loan agreement.[1] The contractual make whole prepayment premium provision stated that any payment following an event of default was deemed a "voluntary prepayment" requiring payment of the premium. After the Debtor filed for Chapter 11, Wilmington filed a proof of claim, that included payment allocated to the make whole premium. The Debtor objected to the claim, asserting that the prepayment premium was unenforceable because the lender had accelerated the loan.

Although the general rule is that prepayment premiums are not applicable after acceleration because such payment after the accelerated maturity would be a repayment and not a prepayment, the court recognized two exceptions to that rule. First, where a clear and unambiguous clause provides for the payment of the prepayment premium even after default and acceleration, and second, where the borrower intentionally defaults to evade payment of the premium. There was no evidence that the borrower intentionally defaulted in this case.

The court concluded that the contract expressed the parties' intent that the make whole premium should apply in the context of any payment made after an event of default. Indeed, the relevant provision did not need to reference acceleration to permit application of the prepayment premium after acceleration because the language used by the contract addressed any payment following an event of default, rendering reference to acceleration irrelevant.

The lesson of this decision is that with sufficiently clear contractual language, make whole prepayment premiums may be enforced after acceleration under New York law, and no particular

[1] Because this case addressed a pre-bankruptcy loan acceleration, the case does not address issues affecting enforceability of make whole prepayment premiums that may arise where the acceleration event is the bankruptcy filing itself.

magic language is required. References to applicability of make whole premiums post-acceleration can suffice, but so can alternative language.

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