

FORBEARANCE AGREEMENT DID NOT WAIVE RIGHT TO FORECLOSE

On November 21, in *Sweely Holdings LLC v. SunTrust Bank et al.*, the Supreme Court of Virginia issued an opinion that is beneficial to the mortgage industry in Virginia because it upheld a bank's right to foreclose, even if it could have pursued other options under a forbearance agreement. In doing so, the Court affirmed settled principles of contract interpretation, where provisions are understood in light of their plain language and place within the contract as a whole.

The case involved multiple parcels of real property as well as personal property, default on an \$18.3 million loan, and the borrower's allegation of breach of contract on a forbearance agreement, among other claims. The bank demurred, the trial court sustained, and the Supreme Court of Virginia affirmed.

The relevant facts are as follows: The parties entered the forbearance agreement after the borrower's default on a loan and threat of bankruptcy. The agreement called for the borrower to make a set number of payments, and in the event the borrower failed to make the payments on the turnover date, the borrower would convey deeds to the parcels of real property as credit to the overall debt. When the borrower failed to make one of the payments and the bank chose to foreclose on the parcel extinguishing a junior lien, litigation arose.

At issue was whether the contract required the bank to accept these deeds in lieu of foreclosure or whether the bank had the discretion to proceed with the contract provisions on friendly foreclosure to protect its interest.

The Court unanimously affirmed that the bank had discretion to proceed with foreclosure and did not breach the forbearance agreement by electing that route. In reaching this conclusion, the Court noted that the forbearance agreement did not waive the bank's right to foreclose but instead simply provided for a non-contested "friendly foreclosure" procedure. Further, when interpreted as a whole, the contract provisions that required conveyance of the deeds plainly allowed the bank to pursue foreclosure, extinguishing previously undisclosed junior liens.

The Court's opinion is beneficial to the mortgage industry in Virginia where breach of contract claims sometimes arise out of forbearance agreements.