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‘Shanghai Commercial Bank:’ Practical Implications for Transactions in New York

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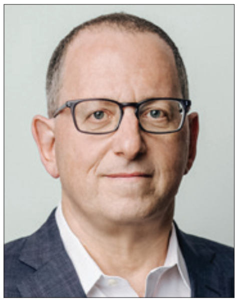
Commercial real estate lenders working out troubled loans have often used the so-called “deed in a box” tool—essentially a pre-wired deed in lieu of foreclosure—in negotiating forbearance and other workout agreements.

The ruling by the New York County Supreme Court (Commercial Division) in *Shanghai Commercial Bank Ltd. v. New Tent, LLC*, No. 850240/2024, 2026 WL 1816002 (N.Y. Sup. Ct. June 13, 2026), however, underscores the questionable validity of these workout mechanisms and highlights a category of title risk that buyers’ counsel, lenders’ counsel, and title underwriters must account for whenever a deed in lieu or “deed in a box” scenario appears in a property’s chain of title.

When a borrower defaults on a mortgage, the lender’s ultimate remedy is foreclosure of the mortgage followed by a sale of the property at auction in full or partial satisfaction of the loan. A deed in lieu of foreclosure is a streamlined alternative where the borrower voluntarily conveys the property to the lender by deed, and, in exchange, the lender typically agrees to release



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the borrower from the outstanding debt and any guarantees.

A “deed in a box” (also known as a “deed in escrow”) is a variation on the deed-in-lieu structure. At a high level, the arrangement typically operates as follows:

- A borrower who has defaulted on a mortgage negotiates a forbearance agreement with the lender.
- In return for (and as a condition to) the lender’s agreement to delay foreclosure, the borrower agrees to deposit a deed into escrow, or a metaphorical “box”.
- If the borrower subsequently fails to satisfy the forbearance conditions, the lender may release the deed and record it in the land records.

The deed in lieu or deed in escrow avoids the costs and uncertainty associated with the foreclosure process, and offers a more efficient, court-free path for a borrower to convey its real property to its lender in the event an attempted loan workout fails.

While these types of arrangements can offer practical advantages, New York courts have subjected them to judicial scrutiny.

For instance, in *Basile v. Erhal Holding Corp.*, 148 A.D.2d 484 (2d Dept. 1989), the Second Department held that a deed in lieu of foreclosure executed simultaneously with a mortgage and held in escrow pending default was an equitable mortgage.

The court reasoned that since the surrounding circumstances suggested the deed was intended as security for the mortgagor's debt, rather than as an absolute conveyance or sale, the deed should be characterized as a mortgage.

The First Department reached a similar conclusion in *Patmos Fifth Real Estate Inc. v. Mazl Bldg., LLC*, 124 A.D.3d 422 (1st Dept. 2015), holding that a deed placed in escrow as part of a loan extension agreement was to be characterized a mortgage.

Because the agreement reflected that the deed was given in exchange for the extension, the court concluded that it was intended as security for the debt rather than a conveyance.

Courts have not, however, uniformly reached this result. For instance, in *Simmons v. Reich*, 171 A.D.3d 1237 (2d Dept. 2019), the Second Department denied a mortgagor's motion for summary judgment seeking to invalidate a deed in escrow, holding that the mortgagor "did not demonstrate, prima facie, that the deed was intended as security" because his submissions "did not include an affidavit or any evidence specifically attesting to the nature and purpose of the transaction."

Although not decided in connection with a deed in lieu or deed in escrow, *Bielawski v. Bazar*, 47 A.D.2d 435 (3d Dept. 1975) also illustrates the importance of the parties' intentions.

In that case, the court held that deeds accompanied by a repurchase option were not equitable mortgages where the option agreement did not evidence an intention that the deeds were really security, explaining that whether a deed absolute on its face was, in fact, only a mortgage depends upon the intent of the parties.

In its initial 2025 decision in *Shanghai Commercial Bank*, the New York County Supreme Court reached a similar result. The lender had made a $34 million loan to the borrower, secured by real property in Manhattan's Garment District.

After the borrower defaulted, the parties executed a forbearance agreement under which the lender agreed to refrain from exercising remedies under the applicable loan documents. In consideration, the borrower executed and delivered a deed in lieu of foreclosure (styled as a "Bill of Sale in Lieu of Foreclosure"), conveying all of its right, title, and interest in the property to the lender.

The forbearance agreement expressly stated that the conveyance "will be an absolute transfer, assignment and conveyance" and "is not now and shall not be intended as a mortgage, trust conveyance, deed of trust or security instrument of any kind." When the borrower subsequently failed to satisfy the forbearance conditions, the lender moved for summary judgment to enforce and record the deed.

The court held, in part, that, in light of the explicit terms of the forbearance agreement, the lender had demonstrated that the borrower's failure to repay the loan in full upon expiration of the forbearance period entitled the lender to record the deed immediately.

The following year, however, the same court changed course. On a motion to reargue based on Section 320 of the N.Y. Real Property Law, the court vacated its prior decision. The court held that, despite the explicit language in the deed and forbearance agreement to the contrary, the deed in escrow was intended as additional security for the underlying mortgage.

Relying on Section 320, which provides, in relevant part, that "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage", the court found in favor of the borrower.

Because the court found that the evidence was sufficient to demonstrate that the conveyance was intended as a security interest rather than an absolute transfer, the court ruled that the lender "must proceed in the same manner as any other mortgagee—by foreclosure and sale—to extinguish the mortgagor's interest."

Further, the court emphasized the equitable right of redemption, citing the U.S. Supreme Court's holding that the right to redeem property upon payment of a loan cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage—"a doctrine from which a court of equity never deviates" (*Shanghai Commercial Bank, citing Peugh v. Davis,* 96 US 332, 337 (1877)).

Although presently on appeal, *Shanghai Commercial Bank* constitutes a precedent that a deed in lieu of foreclosure delivered pursuant to a forbearance agreement—where the lender agrees only to delay the exercise of its remedies rather than to release or extinguish the underlying debt—is to be characterized as a mortgage under Section 320 of the N.Y. Real Property Law, regardless of how the parties have characterized the conveyance in their transaction documents.

Nonetheless, the wavering of the court is an illustration of the nuance involved in these types of arrangements, and the facts of each case are of particular importance.

What *Shanghai Commercial Bank* makes clear is that a recorded deed in lieu cannot be taken at face value, which presents complexities not only for borrowers' and lenders' counsel negotiating the applicable workout itself, but also for buyers' counsel, lenders' counsel, and title underwriters evaluating a property's chain of title.

One of the key questions in any such review must be: Was the deed delivered in connection with a forbearance agreement under which the underlying debt survived the delivery of the deed into escrow? If the answer is yes, the deed may be recharacterized as a mortgage rather than a conveyance, thus potentially clouding title to the applicable property.

Counsel for buyers of real property in New York cannot stop at confirming that a deed in lieu was properly executed, acknowledged, and recorded. The diligence checklist must go further than that. When a deed in lieu appears in the chain of title, counsel should request and review not only the deed itself, but also the underlying forbearance or workout agreement, the original loan documents (and any amendments or modifications thereto), evidence of debt satisfaction or release (such as a payoff letter or UCC terminations), and any additional relevant evidence available.

The key question is whether, at the time the deed was delivered, the grantor's debt to the grantee was fully extinguished. If any debt obligation survived, the deed may be vulnerable to recharacterization as a mortgage under Section 320 of the N.Y. Real Property Law.

The ruling in *Shanghai Commercial Bank* makes clear that even explicit contractual disclaimers, such as stating the deed is "not intended as a mortgage," will not override the economic substance of the transaction.

A buyer's counsel may consider sharing the following due diligence requests with seller's counsel to confirm the status of the deed in lieu:

- Describe the agreement under which the applicable deed was delivered (e.g., a forbearance, loan modification, etc.), and provide all documentation with respect thereto.
- Did any of the underlying indebtedness survive delivery of the deed?
- Is there evidence of a simultaneous release and satisfaction of the note, mortgage, guarantees, and other security instruments? If so, please provide.
- Were there any documents as part of the agreement that contemplate a potential redemption of the applicable real property by the borrower?

Similarly, title underwriters will likely need to examine the forbearance documents underlying the applicable deed to confirm that the related debt was truly fully extinguished. A deed in lieu that appears in the chain of title (particularly in connection with a forbearance where the debt survived) could constitute a title chain defect.

Given the practical difficulty a remote buyer would have in conducting proper diligence on a prior deed-in-lieu transaction, title insurance underwriters have an outsized role under these circumstances. Where the parties are unavailable or uncooperative, or where the underlying loan closing document sets are incomplete or inaccessible, a title insurance underwriter will likely rely on the work of the underwriter that insured the current seller in confirming the validity of the questioned conveyance

Under certain circumstances, if the proper diligence was not done at the time of the deed in lieu, it is foreseeable that title insurance underwriters may have difficulty insuring.

The ruling in *Shanghai Commercial Bank* underscores weaknesses in a tool upon which commercial lenders and borrowers in New York have frequently relied, because it can offer a quick exit from a failed workout without the time and expense of an ordinary foreclosure process.

After this decision, lenders, borrowers and their counsel must think even more carefully about how they structure forbearance arrangements, and transactional lawyers and title underwriters involved in acquisitions or new financings must closely analyze any deed in lieu that appears in a property's chain of title to determine whether it might be vulnerable to recharacterization as a mortgage.

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