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PROHIBITION CLAUSE TO IMPOSE THE MORTGAGE RIGHT ON THE SAME WARRANTY OBJECT

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ABSTRACT

Purpose of the study: This study aims to examine the validity of the prohibition clause and the legal consequences that arise if the debtor violates that clause.

Methodology: This study uses conceptual and statute approaches. Legal materials were analyzed using law number 4 of 1996 regarding Mortgage Right.

Main Findings: Efforts that can be made by creditors are first, ending their ability to provide Credit Facilities by sending a notification letter regarding this matter to the Debtor. Second, demanding payment in full without a bailiff's warning letter. Third, carry out the execution of the guarantee in accordance with the Agreement.

Applications of this study: Based on Article 5 Section (1) regarding Mortgage Right of an Object Law, a Mortgage Right can be imposed with more than once to guarantee the repayment of a debt, but there is a mismatch in its practice with this article. In banking practice, banks often make rules included in a clause and the credit agreement which prohibit the debtor from imposing the mortgage right on the same warranty object with the other creditors.

Novelty/ Originality this study: In conclusion, due to the law of debtors in default, it is necessary to pay attention to the applicable provision of the agreed credit agreement model.

INTRODUCTION

Mortgage right is one of guarantee right institutions which contains the elements of guarantee and agrarian law. This is because the two warranty objects are land (Paputungan, 2016:13). A mortgage agreement is an agreement which is accessoir, while the main agreement is a credit one or

accounts payable. The mortgage right itself is regulated in Article Number 4 of 1996 regarding Mortgage Right of Land and Objects Related to Land (Hidayat, 2018:4).

There are formal conditions that must be fulfilled in the transfer of the land right, namely general and special terms according to the type of agreement (Novierasanti, 2008). The land right which can be imposed with Mortgage Right based on Article 4 Section (1) of Mortgage Law including Ownership, Business Use and Building Use Rights; as well as Section (2) which states that the Use Right over State Land can also be an object of Mortgage Right – as referred to in the Basic Agrarian Law – as the land rights which must be registered and can be transferred according to their characteristic (Paputungan, 2016:13). This is related with the priority creditor position given to the creditors who hold Mortgage Rights against the other ones; hence, the Mortgage Right is a special guarantee for the interest of creditors which makes them domiciled as the Preferred Creditors (Hardianto et al., 2019).

The emergence of the Mortgage Law to provide complete provisions regarding the Mortgage Right as a guarantee rights institution that the provisions in the Law have provided protection to the creditors and also the problems that exist in the world of banking practice (Wijayati, 2019). The credit agreement in the practice between the bank as a creditor and the customer as a debtor has a discrepancy with the provisions stipulated in the Mortgage Right Act.

Based on the above explanations, the first rank mortgage holder should be that the bank as a creditor which only holds or keeps the Mortgage Certificate. Meanwhile, the original certificate of land right is returned to the mortgage provider, which is the owner or debtor. Hence, the debtor can re-guarantee the certificate of his/her land rights to the bank or the other creditors to be imposed with the second rank mortgage and so on to the other creditors. Moreover, the Mortgage Law does not contain a provision which states the debtor must impose the next rank of Mortgage Right in the same creditor. The enforceability of these clauses has been controversial, mainly because of the difficulty in explaining the legal consequences (Nieto et al., 2019).

Based on the background on the above, thus the aim of this research is to analyze the inclusion of a prohibition clause for the debtors to re-guarantee Mortgage Right to other creditors in accordance with the applicable laws and regulations. The other aim is to analyze the legal consequences if the debtor re-guarantees the land right that has been encumbered with the Mortgage Right to the other creditors.

RESEARCH METHOD

The type of research used is normative juridical. The used approach in this

study is conceptual and statute approaches (Riyandhita et al., 2018). The deductive method is a method that analyzes statutory regulations as a general thing which then makes a specific issue can be drawn, discussed, compiled, and described in order to achieve a conclusion (Mahmud, 2015).

The entire obtained legal sources will be analyzed in detail through literature review in order to answer the issue. Afterwards, it continues with the selection of legal source systematically and logically, so that it matches with the object of the study. Act Number 4 of 1996 regarding Mortgage Right of Land and Objects Related to Land which is then referred to the Mortgage Law. Those selected legal sources are processed and classified into several chapters. Finally, those all will be analyzed in order to resultin a conclusion regarding prohibition clause for the debtor to impose Mortgage Right with the other creditors on the same warranty object.

RESULT AND DISCUSSION

The Correlation of Priority Principle to the Prohibition Clause to Reimpose the Same Warranty Object at the Other Creditors

Based on Article 1313 BW, it states that "An agreement is an act in which one or more people bind themselves to one or more other people (Wicaksono, 2017). The aspects of the agreement are as follows (1) existence of a legal act; (2) compatibility of the statement of will from several people; (3) intended intention to cause legal consequences (Hassanah, 2016).

According to Subekti (1981), "an agreement is an occasion in which a person promises to the other or the two persons are promised to each other to conduct a certain thing" (FIDUSIA et al., 2013). The parties arising from the agreement are Creditor as the party entitled to achievement, and the debtor as the party who obliged to fulfill the achievement. Based on Article 1234 BW, this achievement can be in the form of giving, doing, or not doing something.

Based on Article 1320 BW which regulates the validity of an agreement, it states that the validity of an agreement needs four conditions as follows (1) agree that they are binding themselves; (2) the ability to make an engagement; (3) a certain thing; (4) a cause that is allowed (Jamilah, 2012). The first and second conditions can be categorized as subjective conditions. A failure to fulfill these subjective conditions will result in the legal consequence that the agreement being cancelled *(vernietigbaar).* The third and the fourth are categorized as the objective conditions. If these conditions are not fulfilled, then it will cause the legal consequence that the agreement is null and void *(nietig, null and void).*

Based on Article 1320 BW regarding the validity condition of agreement with the above correlation, it states that by disregarding the provisions of

Article 5 of the Mortgage Right Law does not violate the legal requirements of an agreement. Afterwards, it is related to the element of agreement which can occur explicitly, secretly, or with the existence of a certain act. It then linked to the Credit Agreement Number x in which there is an agreement with signature by the parties. The signature in a contract is an agreement prove. This also shows that all parties have agreed and are subject to the agreement made to waive Article 5 of Mortgage Law (Suparto, 2017). Hence, the clause which forbids the debtor to reimpose Mortgage Right on the same warranty object at the other creditors based on the above explanations is a valid clause according to the law.

The Legal Consequences for Debtors who Violate the Prohibition Clause to Reimpose the Same Warranty Object at the Other Creditors

A new debtor can be said as default if he/she has been given a summon by creditor which arise because the debtor does not meet his/her target. This summon is a legal instrument for the debtors to fulfill their target. The matters regarding summon are regulated in Article 1238 BW and Article 1243 BW. This summon itself has the meaning of a warning from the creditor to the debtor in order to be able to fulfill the achievement with the agreement content agreed by the parties (Katrinasari et al., 2017).

There are three ways of summonning to occur. The first one is the debtor made a wrong achievement. The second one, the debtor does not fulfill the target on the promised day. These unfulfilled achievements can be divided into two types: the delay in conducting achievements and not giving any achievements at all. The reason for not conducting at all is because the achievement is not possible or because the debtor openly refuses to make any. Finally, the third one is the performance made by the debtor is no longer useful for the creditor after the agreed time has passed (Salim, 2014).

Based on those explained things, it can be assumed that the form of delivered summons by creditor to debtor is a in the form of a warrant or a similar deed, and the creditor or official authorized to issue that said order is the authorized. It is an unfair practice in business-to-business relationships (Schebesta et al., 2018). The authorized official can be a bailiff, the State Accounts Receivable Agency, etc. Warning letter must be issued at least three times, taking into account the distance between the creditor's residence place and the debtor’s residence.

Based on that Article, it can be known that every person is free in making an agreement with anyone regarding the content and form of agreement. However, this freedom is not absolute. In making an agreement, one should refer to Article 1337 BW which states that in making agreement should not violate the law, decency, or public order as regulated in that article (Gumanti, 2012). Thereby, the agreement agreed by all of those parties can be declared as legally valid and binding as a law.

For example, the case of credit agreement number x between Mr Riza Corpino whose position and authorized on behalf of PT. Bank MNC Internasional Tbk, hereinafter referred to as Bank or Creditor. Mr Riza conducted an agreement with Mrs Nita Noviyana. She is a Debtor of the credit facility in the form of Property Ownership Credit (KPP) to the debtor with a credit facility ceiling of Rp. 1,000,000,000.00 to finance the purchase of a new house at Pondok Jati Housing Blok CC Number 16. There is a guarantee provided by the debtor to the Bank for the borrowing of this amount of money, which is bound by the Mortgage Rank I (First). This Mortgage is given to guarantee the debt repayment with a Mortgage value of Rp. 1,250,000,000.00 with the object of the Right to Use Building Right Mortgage Number 1372 / Jati Village which will be upgraded to the Ownership Right.

This attempt can be conducted by the creditor or the first mortgage holder through termination of the ability to provide the Credit Facility by sending a notification letter regarding this matter to the Debtor. The second one, demand the payment in full or debt or the other obligations in full immediately and at once without the need for a bailiff's warning letter or the other letter. Finally, conducting an execution towards the warranty according to the Warranty Agreement.

CONCLUSION

The prohibition clause to re-guarantee a warranty object of the Mortgage Right with the other creditors does not contradict with the principle priority. Considering that there is a redaction in that article which is related with the binding strength of an article including in a complementary law (aanvullend recht); therefore, with the agreement of that credit agreement, the parties have agreed to set aside the existing terms and comply with the existed provisions in there.

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