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A Potpourri Of Concepts

Delaying Tactics; The Deficiency Judgment And The Workout Agreement, Bankruptcy

BY BRUCE J. BERGMAN, © 1999

As we are wont to say in these discussions from time to time, not every new case or concept merits a full article. Sometimes a shorter review of a number of enlightening events is the most valuable elucidation and such is the approach on this occasion.

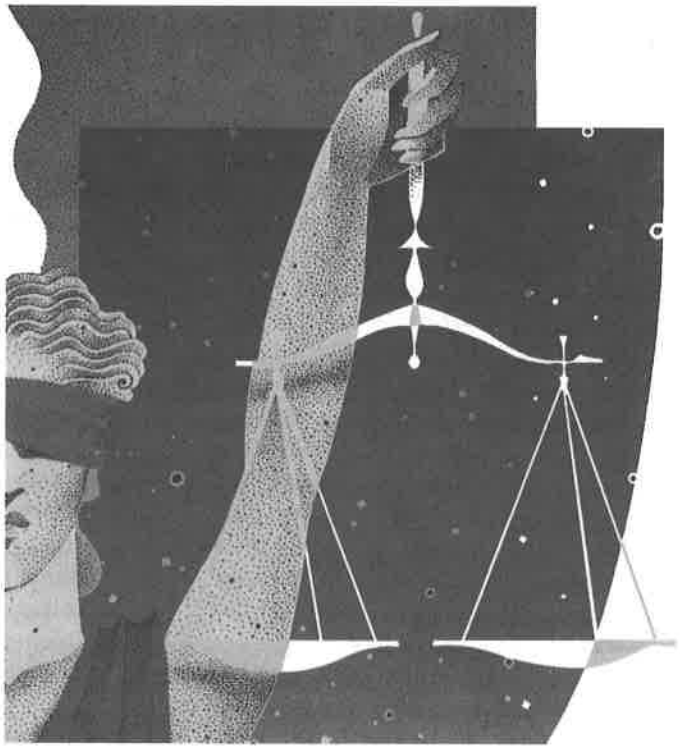
Slapping the bad guys

"The system is made to be abused" could be the mantra for attorneys who prosecute foreclosures and are all too familiar with the plethora of delaying tactics and dissembling which crafty borrowers seem to create from the ether.

Legitimate or even marginally colorable defenses can, of course, be accepted with equanimity and a borrower's attorney should certainly represent the client with all due vigor and expertise.

Irksome, though, are the discursive thrusts designed solely to impede conclusion of the case, e.g., perhaps:

- the baseless motion to dismiss a foreclosure arguing lack of jurisdiction (assuming the borrower manufactured the claim);
- the transparent answer alleging illusory defenses;
- the motion to reargue the resultant defeat;
- the multiple bankruptcy filings with plans never fulfilled, first by one borrower followed by the whipsaw of the next borrower's filing; or
- the eve of sale order to show cause - all a delineation which hardly exhausts the creativity of the dedicated.



Assuming for discussion purposes that the noted roadblocks were indeed meritless (we respect the real defenses and acknowledge their existence), foreclosing plaintiffs' dismay is exacerbated by courts which are constrained to consume time evaluating such defendants' entreaties and, in an effort to give everyone their day in court, are sometimes overly solicitous of the specious. War stories in this regard are legion but uneasily explained to perplexed mortgagees not as conversant as counsel with the vicissitudes of trench warfare litigation.

Seeing through the bogus

So, when the courts do see through the bogus, and react forcefully, it is especially gratifying, worthy of huzzahs and deserving of mention here. [SRF Builders Capital Corp. v. Ventura, 229 A.D.2d 431, 644 N.Y.S.2d 813 (2d Dept. 1996).] Here are the facts and the result, with the latter recommended as a guiding standard.

Foreclosure is commenced against husband (H) and wife (W), with a notice of pendency wisely filed. Judgment of foreclosure and sale issues. During that period (and thereafter), H and W alternatively file no less than three bankruptcy petitions. The stay is lifted each time and after the third occasion, the order vacating the stay prohibited further filings by H or W for 180 days.

"Undaunted," as the court phased it, and notwithstanding the lis pendens and the judgment of foreclosure and sale, H and W conveyed the mortgaged premises to a corporation of which H was president and apparent sole shareholder (H's counsel assisted in preparation of the deed). The grantee corporation (surprise) then filed a bankruptcy petition and after a foreclosure sale was conducted, moved in Supreme Court to vacate the sale. When that

motion was denied, an appeal ensued and that really caught the attention of the court.

The denial to vacate was affirmed and both H and his counsel were sanctioned $2,500 each. The New York appeals court (the Appellate Division, Second Department) recognized H's tactics for precisely what they were.

Whether this sage exercise of judicial authority will diminish the zeal of purveyors of sham is doubtful, but it certainly is welcome and refreshing.

Deficiency and workouts

Deficiency judgments continue to be a field of landmines in New York. Highly technical and layered with nuance, a foreclosing lender desirous of pursuing a deficiency must be both careful and timely. A new case helps - a little - with more on that after we set the stage so the relevance of the decision can be better appreciated.

A deficiency is available in New York and it is measured by the difference between the sums due the plaintiff (as quantified in the judgment of foreclosure and sale) less the greater of the amount bid at the sale or the value of the property (as of the date of sale.) Whether a lender or servicer chooses to seek a deficiency is purely a business decision based upon many factors, two of which are how much the deficiency is and whether the parties liable have assets to execute upon if the judgment is awarded.

Then there is the problem of all the rules:

- The post-sale deficiency motion must be served within 90 days of delivery of the referee's deed (not always a moment so easy to pinpoint).
- The motion must be personally served upon the party liable, or his attorney - also not always so easy.

Plaintiff will need an appraiser capable of testifying if the parties liable protest and a valuation trial is scheduled. (There are more hidden issues, but this recitation will suffice.)

Bruce J. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 1998), is a partner with Certilman Balin Adler & Hyman in East Meadow, N.Y., outside counsel to many major lenders and servicers and an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

Comfort from a new case

Now for the comfort (a bit) offered by a new case, National Loan Investors v. Goertzel,_A.D.2d_, 676 N.Y.S.2d 605 (2d Dept. 1998).

If mortgagors agree in a stipulation to waive opposition to the deficiency, then it must be enforced. What was unclear in the decision is whether the mortgagors would have been liable for the deficiency before the stipulation was entered into, or whether that liability was imposed by the stipulation. Pursuant to that stipulation, the mortgagors agreed to waive any defenses to the foreclosure and further that they "shall be jointly and severally liable for any deficiency and shall consent to the entry of judgment against them for the full amount of said deficiency."

So when a deficiency was granted and the mortgagors appealed, the appeals court would hear none of it. Somewhat unclear though the decision is, two lessons emerge.

- First, if for some reason a mortgage does not impose deficiency liability (or does not impose it upon all the people the lender would want or prefer), a stipulation entered into as part of a foreclosure settlement whereby liability is affixed will be enforced.
- Second, if any foreclosure is settled by a stipulation, clarifying the borrowers' lack of opposition to any deficiency motion is something to seriously consider.

Deficiency and bankruptcy

No, this is not the usual issue when these two subjects intersect. The typical, but easily answered problem, arises when a borrower (or any other party liable for a deficiency) files a bankruptcy in response to a deficiency judgment motion.

As a secured interest, a mortgage, of course, is not discharged in a bankruptcy. But personal liability for the debt is subject to discharge, so that a bankruptcy could lead to preclusion of the ability to pursue a deficiency – all of which is standard fare for experienced lenders and servicers.

Something different – and a bit alarming for the unwary – emerges from a new case in New York, Steuben Trust Co. v. Buono,_A.D.2d_, 677 N.Y.S.2d 852 (4th Dept. 1998).

There, a foreclosing plaintiff misapprehended the relationship between lifting of a stay and continuing all aspects of a foreclosure. After a foreclosure was initiated, the borrower filed a petition in bankruptcy. The automatic stay was lifted in May 1995, allowing plaintiff to proceed with the foreclosure. Ultimately, a foreclosure sale was held and a deed was delivered on Oct. 17, 1995.

Plaintiff, otherwise obliged to serve the motion for a deficiency within 90 days of delivery of the deed, waited until the bankruptcy petition was dismissed, on the theory that lifting of the stay applied only to the foreclosure – not the motion for a deficiency judgment. Not so, said the court. A motion for a deficiency judgment is part of the foreclosure action, not separate from it.

Thus, there was no impediment to the mortgage holder timely pursuing the deficiency judgment. The mortgagee's tardiness, based upon the mistaken belief that it was unauthorized to proceed, proved fatal to seeking that deficiency. It is a lesson well learned: if the stay is lifted, it applies also to the deficiency. SM