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A World Where Being Right Just Isn't Good Enough

Legislation designed to be of aid to borrowers has served to delay and defeat untold numbers of foreclosures.

by Bruce J. Bergman

We can't be polyannas and say that servicers don't sometimes shoot themselves in the foot. They do, but that is not the message of this excursion.

Rather, posited here is that overwhelmingly, foreclosing servicers are in the right. The investor does own the mortgage, the borrower is in default, the notices were sent; there is no defense to the action.

And yet, time and time again, foreclosures are delayed, defeated or set back for perceived servicer defalcations. Borrower-friendly statutes contribute to this, which in turn can lead to errant court decisions. Sometimes, on appeal (although not always pursued), the servicer is vindicated. But this comes at the cost of considerable legal expense and loss of time, with the concomitant accrual of interest - which, in too many instances, will ensure a loss.

That servicers too often suffer this fate is rarely, if ever, articulated. It is not seen as politically correct.

What is really going on here? Using New York as an example, the dilemma can be exposed.

Statutes and rules

The infamous robo-signing scandal led New York's chief judge to conclude that irregularities in the foreclosure process were so rampant that every action must now be accompanied by an attorney's affirmation attesting to the foreclosing plaintiff's ownership of the mortgage and the legitimacy of the claim. Needing to speak to appropriate parties and obtain a supporting affidavit to ensure accuracy in the mandated affirmation has led to enormous delay in the progress of foreclosures, concomitantly increasing the debt.

In more than a few instances, want of - or lateness in obtaining - the attorney affirmation has led to outright dismissal of foreclosures. While in a number of instances these have been reversed, servicers suffered all the time and expense attendant to the appeals process.

Strikingly, the mandated opening language of the attorney affirmation, in bold type, is: "N.B.: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and 'robosignature' of documents."

Traversing a foreclosure with this indictment of one party - the lender - suggests an uneven approach to the posture of a foreclosing party.

Then there is a rule that bars servicers in any home loan case from including a borrower's waiver of defenses in any case settlement. Servicers dismayingly recognize that borrowers will often contest a foreclosure by answering the action (or later obtaining an order to show cause) asserting a few or a host of claimed defenses - sometimes as many as 20 or 25.

While overwhelmingly these are baseless, the complications of rules and practice (and prudence) impel the servicer to meticulously meet those defenses. Whether or not this necessitates a lengthy legal brief, it certainly elicits a fair amount of time and expense to meet the challenge.

Mindful that borrowers are poised at any time to thrust these defenses upon the foreclosing party, it had always been an essential element of any settlement that borrowers withdraw any existing defenses and waive the right to use them anew or any other claimed defenses in the future.

After all, if servicers are amenable to a forbearance agreement, if it fails, servicers should not then be subjected to protracted litigation in exchange for their largesse.

Legal fees to borrowers

Servicers may be aware that the American rule on legal fees is that each

party bears its own such expense - except if statute or the contract provide otherwise. While local laws typically have not entered the arena of legal fees in the mortgage foreclosure case, the contract (the mortgage) usually provides legal fee recompense to the foreclosing party. When borrowers tried to claim legal fees, the thrusts were rejected.

A new statute (in New York) provides, however, that where there is a legal fee provision for a lender in a mortgage, a like provision must be implied for the benefit of the borrower, at least in home loan cases. Another part of the mandate affords legal fees to the borrower if there is a successful defense of any action commenced by the lender against the borrower arising out of the contract.

The potential problem here is that borrowers sometimes defeat foreclosures on the issue of process service or upon the assertion that notice was not given. These are technical, non-substantive defenses; they do not mean that the borrower was not in default or was not liable upon the mortgage obligation.

Whether borrowers will be able to recover legal fees under such circumstances is still an open question, but the danger lurks, and sentiment in favor of such rules seems apparent.

Although professional lenders and servicers will always contact delinquent borrowers, both in writing and by phone, and while the omnipresent Fannie Mae-Freddie Mac uniform instrument has for decades required a 30-day notice to cure as a prerequisite to instituting a foreclosure, laws requiring further, additional and extensive notice have been passed. Typical is the 90-day pre-foreclosure notice in New York, which must be sent by the lender, which is required to attach a list of various agencies that can be of aid to a borrower in distress.

Aside from adding 90 days to the duration of the default process, the courts have been very strict in ruling that the notice is an absolute precondition to acceleration and foreclosure. Even where borrowers have had actual notice of their default and have not raised failure to send the 90-day notice as a defense, the courts have been very strict in overturning cases for want of that notice.

There are then sundry other notices that must now be a part of or appended to the summons in the New York case. Here, too, the courts have been strict by intercepting foreclosures where absolute compliance with the additional notices could not be demonstrated - again, even where borrowers could not assert any resultant prejudice.

The maintenance obligation

Local municipalities, sometimes dismayed at the condition of properties in foreclosure, pushed for and obtained a provision in New York law requiring lenders to maintain abandoned mortgaged premises from the moment a judgment of foreclosure and sale is obtained.

Of course, a mortgage is a lien on property - not an ownership interest - and the statute imposes considerable burdens. A lender would never know how much money it might have to spend or for what period of time to maintain the property in a foreclosure action. It is just an open-ended obligation.

Moreover, in making such repairs as may be needed, a lender exposes itself to tort liability. Anyone injured at the premises could then sue the lender for damages, and there would be no insulation for that lender.

There is yet another problem with such a formulation. Sometimes a lender will determine that completing a foreclosure just isn't worth it. They might just want to refrain from continuing prosecution of any foreclosure action. If, however, the case has reached the stage of judgment issuance, the lender remains liable for maintenance of the property into perpetuity, unless the action is completed - which is just the opposite of what the lender wants. And recently, when a foreclosing party tried to bail out under such circumstances, the court ruled that it simply was not allowed.

In addition to the inability in the home loan situation for lenders to settle a case and bar future imposition of borrower defenses, a settlement conference is mandated. This must be conducted early on in the case, immediately after process service and before any other stage of the foreclosure action can be reached. While this certainly seems like a helpful idea, the procedure typically elicits multitudes of conferences and many months of delay, often resulting in no settlement.

Then there is the problem that lenders are required to bargain "in good faith." Precisely what good faith is has proven elusive and, although some clarification has recently been forthcoming from the courts, it does not change the actuality that hearing officers often wish to impose settlements upon lenders which are unpalatable.

Because the applicable statute requires penalties for failure to bargain in good faith but does not delineate what those penalties are, lenders and servicers are in a very difficult position when the case is in a foreclosure mode, in addition to all the time that is lost.

Still further, even when the case may go beyond the mandated settlement conference, should further settlement efforts ensue, lenders must be meticulously clear in advising borrowers that the foreclosure is proceeding notwithstanding settlement discussions or overtures. Failure to affirmatively make that point has led to reversals of foreclosures when borrowers claim they refrained from interposing defenses because they believed the action was being settled.

Standing

The foreclosing plaintiff has standing when it is the holder or assignee of both the note and mortgage at the time the action is commenced. While it would seem there ought not to be any issue about this, it has become a pervasive hot-button subject, and borrowers will almost invariably submit a defense of lack of standing on the part of the foreclosing plaintiff. And there is much room for findings that a foreclosing party does not have standing, even though one would think they really do.

While an assignment of mortgage need not be recorded to be valid, if the assignment is signed by a party whose authority cannot be demonstrated or if an assignment is simply lost, the foreclosing party must then prove that the mortgage documents were actually delivered.

Proving the delivery can sometimes be elusive. And an assignment dated and delivered after the beginning of the action, even if it states by its own terms

to be valid retroactively, will not suffice. There is much law on this, and it can vary on a state-by-state basis, but this issue of standing is out there to delay or torpedo many a foreclosure case.

Miscellaneous attitudes

There are far too many examples of aberrant court decisions in foreclosure cases. The servicer is then placed in the difficult position of accepting a serious setback or taking the case up on appeal. Pleasingly, the appeal process will, in many instances, reverse lower court errors, although the foreclosing party suffers both the considerable delay and expense of vindicating its position through the appeals process.

But a few examples make the point. Servicers understand, of course, that a mortgage can be assigned at any time, including during the course of the action itself. In a number of cases, and perhaps surprisingly, lower courts have ruled that the assignment of the mortgage during the course of the action was fatal to its prosecution. These decisions were reversed on appeal, but they continue to occur, and as noted, the servicer has incurred the delay and expense.

When a mortgage is assigned, there is no need to substitute the new party as the plaintiff, unless the court specifically asks for it. Nonetheless, there has been any number of cases where although the assignment itself was not assaulted, the failure to substitute was, which created delays. These cases, too, have been appealed and reversed, but the cost to the servicer remained.

Although sympathy is not a defense to foreclosure, in more than a few cases, judges have blocked continuation of a foreclosure where a borrower may have been ill or presented some other sympathetic posture. These cases have also been reversed on appeal - but again, nothing changes the actuality that the servicer loses time and expense in righting the wrong.

The nation's economic crisis circa 2008 created a widespread impression that borrowers are helpless victims of gargantuan and unfeeling lenders. This, in turn, has led to remedial legislation designed to be of aid to borrowers but which has, in too many cases, created unintended consequences.

Those consequences have served to delay and defeat untold numbers of foreclosures, even when there is no genuine issue about the default or ability of the plaintiff to proceed. SM

Bruce J. Bergman, author of the three-volume treatise "Bergman on New York Mortgage Foreclosures," is a partner with Berkman, Henoch, Peterson, Peddy & Fenchel PC in Garden City, N.Y. He can be reached at (516) 222-6200.