REAL PROPERTY LAW SECTION NEWSLETTER

Vol. 15, No. 3 | NEW YORK STATE BAR ASSOCIATION | July, 1987

ACCELERATING THE MORTGAGE WHEN THE BUILDING IS DEMOLISHED

By Bruce J. Bergman, Esq.*
Garden City, NY

The recent decision in *Laber v. Minassian*, 511 N.Y.S. 2d 516 (1987), is an interesting and perhaps surprising stand in an area where many courts seem to be faint of heart. In essence, the judge authorized foreclosure when the buildings on the mortgaged premises were demolished - even though the value of the property subsequent to demolition was in excess of the mortgage.

Why this should be of particular interest requires some background. Derived from the standard NYBTU form, virtually every mortgage will contain a provision giving the mortgagee the option to accelerate if any building on the premises is altered, removed or demolished without consent of the mortgagee, and such language was present in this case. The necessity for this long standard provision is obvious. The lender needs to know his security is safe and not open to questions raised by conflicting appraisals. Similarly, a mortgage would presumably be less saleable without the protection of this clause.

In preservation of this safeguard we have the landmark decision in *Graf v. Hope Building Corp.*, 234 N.Y. 1 (1930), ruling that the mortgage agreement is sacred, to be enforced even if the default is inadvertant and notwithstanding a harsh result. Moreover, there are a number of cases holding acceleration valid for breach of **any** condition of the mortgage. The application of *Graf*, however, is most persuasive in the face of a failure to remit a payment due on the mortgage with perhaps less convincing effect beyond that. Adding to *Graf* and its considerable progeny, the rulings in many cases that a mortgage is a contract, to be enforced as written, might lead to the conclusion that a breach of the mortgage allowing acceleration would have just that effect.

But then we have the hornbook maxim that foreclosure is an equitable action, supported by a plethora of decisions for a host of concepts in the foreclosure arena. There are also exceptions to *Graf*, those being waiver, estoppel, fraud, bad faith and oppressive or unconscionable conduct. While accelerating the mortgage balance for failure to pay, even immediately upon expiration of the grace period, is **not** oppressive or unconscionable. When other varieties of breach are encountered, courts will often invoke one of the exceptions in an attempt to achieve a result perceived as equitable - just the position the mortgagor wanted to take here.

The facts of the case were simple. Plaintiff had sold the property situated in Port Washington, Long Island in 1977, taking back a purchase money mortgage of $55,000. Used as a gas station, the property was sold a number of times, subject, of course, to the mortgage. Although, as the court observed, plaintiff heard rumors about possible demolition of the building, his consent was neither requested nor given and in fact he wrote to the ower's attorney objecting to any demolition. Nevertheless, in early 1985, the building was demolished and the gas tanks removed - all in admitted violation of the mortgage.

(Continued on Page 2)

INSIDE

(Continued from Page 1)

Plaintiff instituted foreclosure. Mortgagor resisted, citing the issue of value and supposed case law precedent. Concerning value, plaintiff originally sold the property for $60,000. The current owner bought it for $165,000 and produced an appraisal evidencing a current value of $220,000 for the land without the demolished structure and $233,000 if the improvements had remained intact. Still further, the appraisal suggested the highest and best use of the property as retail or office space, from which the owner concluded that the property would be more valuable after demolition since such would have to be accomplished to meet that highest and best use standard. Finally, with the property worth far more than the mortgage, defendant urged only the existence of a "technical" violation.

Unarmed with case law precisely in point, defendant relied upon *Loughery v. Catalano*, 117 Misc. 303, 191 N.Y.S. 436, *aff'd*, 207 A. D. 895, 201 N.Y. S. 919. There, foreclosure was rejected even though defendants had altered the premises with mortgagee's consent. But in *Loughery*, the work was minor and more in the nature of repair, was necessary to preserve the building, did not change its character and in actuality enhanced its value. These factors were not present in the case at bar and so it was clearly distinguishable.

Reliance was also placed upon *Rockaway Park Series Corp. v. Hollis Automotive Corp.*, 206 Misc. 955, 135 N.Y.S.2d 588 (1954). [A similar case was also cited, *Caspert v. Anderson Apartments, Inc.*, 196 Misc. 55, 94 N.Y.S.2d 521 (1949)]. In *Rockaway Park Series Corp.*, foreclosure was based upon existence of municipal violations, another of the more obscure mortgage breaches. The court ruled against foreclosure because the action was begun some years after the violations were placed and subsequent to the performance of corrective work and removal of the violations. Estoppel and laches was the basis to void foreclosure there - readily distinguishable from the case at issue.

Finding no support in mortgagor's case citations, the court reaffirmed the following principles and applied them to the case:

- While foreclosure is an equitable action, equity will not provide relief from consequences merely because they are harsh.
- The mortgagor is bound by the terms of his contract, including the acceleration clause.
- Sympathy cannot undermine the stability of contractual obligations.

The concepts cited by the court are those typically urged by the foreclosing mortgagee. Some courts, however, ascribe minimal weight to them when seeking the "fair" result. Perhaps, then, the actual basis of the decision was the court's observation that real property values had risen substantially in the past decade, so much so that present values are often a multiple of the amount due on any mortgage on the property.

To adopt defendant's argument would create a dangerous precedent whereby any landowner could destroy the building on mortgaged property without consent, merely because the value of the raw land was greater than the sum due on the mortgage. The court did not wish to set that precedent in the face of a clear breach of the mortgage.

Mortgagees can derive considerable comfort from the conspicuously resolute support for the sanctity of the mortgage contract under assault from a unique factual pattern.

***Mr. Bergman is a partner in the firm of Roach & Bergman in Garden City, New York, an Adjunct Associate Professor of Real Estate with the Real Estate Institute of New York University and Contributing Editor of the text, *Mortgages and Mortgages Foreclosure in New York*.**