

Attorneys' Fees In Mortgage Foreclosure; Who Pays and Who Doesn't



Introduction - The Practicalities**

Most litigation does not benefit from an award of attorneys' fees to the plaintiff; but most often, the reverse is true in the mortgage foreclosure case. It is therefore apparent that the legal fee component of any mortgage foreclosure action is of considerable importance to the mortgagee, its counsel and, not incidentally, the mortgagor. To the extent all or some portion of the legal expense is compensable to the lender, the burden of foreclosing is reduced. At the same time, as lender's ultimate cash outlay is diminished -or eliminated entirely -the smoother and more commodious is the relationship between lender and its attorney.

Assuming that all or some portion of lender's legal fees are borne by the borrower, there is consequent chastening effect upon the latter's desire to obfuscate and delay.

That is, it is urged, as it should be, in most cases, where a mortgagor does not have a genuine defense. In the minority of cases where a mortgagor's defense is legitimate - and a foreclosure is thereupon dismissed -it is a reasonable conclusion that he will not be obligated to pay the lender's legal fees. Since foreclosure

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is an equitable action¹ there is always the possibility that some fault could be ascribed to the borrower, in which event a court could possibly decree some sharing of the legal expense.

But the compelling point remains the same. A lender who must protect its position derives benefit from a carefully constructed legal fee clause because it will recover that expense up to the limits of reasonableness.² Pursuant to the well conceived mortgage contract, the borrower suffers the obligation to underwrite lender's legal fee expense. Although always free to assert his rights, there is a cost to borrower attendant to that averment, which is an agreement he made in advance.

The legal fee is quantified by the court and inserted in the judgment of foreclosure and sale. The court is not empowered to make such an award unless the mortgage itself contains a provision so authorizing.³

If, prior to judgment, a borrower wishes to reinstate the mortgage, (assuming lender chooses to accept arrears)⁴ or desires to satisfy the mortgage in full, the lender may insist upon payment of reasonable legal fees. The borrower who declines to pay those fees will, in the case of reinstatement, have it rejected. Borrower's declination to remit legal fees upon an attempt to satisfy the mortgage will also be in vain because lender knows it can go forward in the action (since borrower's tender was insufficient) and later secure a judgement of foreclosure and sale encompassing legal fees.

Even without a legal fee clause in the mortgage, a lender retains some strength in this area. When a borrower offers a reinstatement, lender can request reasonable legal fees as a condition of reinstatement. A borrower relying upon the absence of a legal fee provision in the mortgage is correct, but only insofar as any judgment of foreclosure and sale

which eventually issues in the action will not award such fees to the plaintiff. Lender can still demand legal costs upon reinstatement and, if borrower refuses to pay them, lender is fully authorized to decline acceptance of arrears.

Since both the necessity and enforceability of the legal fee clause are clear, a lender's initial consideration is assuring that such a clause appears in the mortgage. Bear in mind that even the most meticulously crafted clause in the note alone will not suffice.⁵

Authority For Legal Fees In Foreclosure

The prevailing American rule is that each party must bear its own counsel fees.⁶ This can be varied, however, either by statute or contractual agreement of the parties.

Although no statute in New York imposes a requirement that a mortgagor subjected to a foreclosure action is bound to pay the mortgagee's legal expense in prosecuting the action, such obligation is frequently contained in the mortgage instrument. Consequently, in both a general and specific sense, legal fees are awardable to a foreclosing mortgagee where the

Swartz, 61 Misc.2d 504, 306 N.Y.S.2d 64 (1969); *Baldwin-Bellmore Fed. Sav. & Loan Ass'n. v. Stellato*, 55 Misc.2d 1043, 287 N.Y.S.2d 516 (1968); *T.J. Bettles Co. v. South Falls Corp.*, 28 A.D.2d 198, 284 N.Y.S.2d 262 (3rd Dept. 1967); *Shapiro v. Housewares Super Mart, Inc.*, 43 Misc.2d 107, 250 N.Y.S.2d 343 (1964); *Blomgren v. Tinton*, 33 Misc.2d 1057, 225 N.Y.S.2d 347 mod. other grds. 18 A.D.2d 979, 238 N.Y.S.2d 435 (1st Dept. 1963); *Bay v. Bay*, 11 A.D.2d 615, 200 N.Y.S.2d 784 (4th Dept. 1960); *Josephson v. Caral Real Estate Co.*, 200 N.Y.S.2d 1016 (1960); *100 Eighth Avenue Corp. v. Morgenstern*, 3 Misc.2d 410, 150 N.Y.S.2d 471 (1956) mod. other grds. 4 A.D.2d 754, 164 N.Y.S.2d 812 (2nd Dept. 1957); *Rockaway Park Series Corp. v. Hollis Automotive Corp.*, 206 Misc. 955, 135 N.Y.S.2d 588 (1954); *Caspart v. Anderson Apartments*, 196 Misc. 555, 94 N.Y.S.2d 521 (1949); *Battim Assoc. v. L & L Estates*, 186 Misc. 142, 58 N.Y.S.2d 96 (1945); *Domus Realty Corp. v. 3440 Realty Co.*, 179 Misc. 750, 40 N.Y.S.2d 69 (1943); *Home Owners Loan Corporation v. Wood*, 164 Misc. 215, 298 N.Y.S. 427 (1937); *Troubrodge v. Malex Realty Corp.*, 198 App. Div. 656, 191 N.Y.S. 97 (1st Dept. 1921); *Nove Holding Corp. v. Schecter*, 218 App. Div. 656, 191 N.Y.S. 97 (1st Dept. 1926); *Loughery v. Catalano*, 117 Misc. 393, 191 N.Y.S. 436 (1921); *Bieber v. Goldberg*, 133 App. Div. 207, 117 N.Y.S. 211 (2nd Dept. 1909); *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N.Y.S. 435 (1st Dept. 1908); *Verplanck v. Godfrey*, 42 App. Div. 16, 58 N.Y.S. 784, (1st Dept. 1899); *French v. Row*, 77 Hun 380, 28 N.Y.S. 849 (1891); *Noyes v. Anderson*, 124 N.Y. 175, 26 N.E. 316 (1891).

² A properly worded legal fee clause in the mortgage is the source of authority for lender to recover legal fees, discussed in detail, *infra*.

³ discussed, *infra*

⁴ *Loque v. Young*, 94 A.D.2d 827, 463 N.Y.S.2d 120 (3rd Dept. 1983); *Nat'l Bank of North America v. Cohen*, 89 A.D.2d 725, 453 N.Y.S.2d 849 (3rd Dept. 1982); *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 176 (1932); *Dime Sav. Bank of New York v. Dooley*, 84 A.D.2d 804, 444 N.Y.S.2d 148 (2nd Dept. 1981); *Belsid Holding Corp. v. Dahm*, 12 A.D.2d 499, 207 N.Y.S.2d 91 (2nd Dept. 1960); *Hudson City Sav. Inst. v. Burton*, 88 A.D.2d 728, 451 N.Y.S.2d 855 (3rd Dept. 1982); *Bowers v. Zaimes*, 59 A.D.2d 803, 398 N.Y.S.2d 766 (3rd Dept. 1977); *Fiedler v. Schefer*, 54 A.D.2d 751, 387 N.Y.S.2d 711 (2nd Dept. 1976); *Dime Sav. Bank of New York v. Barnes*, 67 Misc.2d 837, 325 N.Y.S.2d 365 (1971); *Nelson v. Vinel*, 26 A.D.2d 792, 273 N.Y.S.2d 652 (3rd Dept. 1966); *Balzarano v. Bertino*, 37 Misc.2d 597, 236 N.Y.S.2d 249 (1962); *Bolmer Bros. v. Bolmer Constr. Co.*, 114 N.Y.S.2d 530 (1952).

⁵ Discussed, *infra*.

⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)

¹ *Laber v. Minassian*, 134 Misc.2d 543, 511 N.Y.S.2d 516 (1987); *DiMatteo v. North Tonawanda Auto Wash, Inc.*, 101 A.D.2d 692, 476 N.Y.S.2d 40 (4th Dept. 1984); *Miller v. Kotzen*, Sup. Ct., Bronx Co., NYLJ (9-28-83) p.11, col. 2 (Cotton, J.); *Karas v. Wasserman*, 611 A.D.2d 812, 458 N.Y.S.2d 280 (3rd Dept. 1982); *Karhan v. 1374 First Ave. Realty Corp.*, Sup. Ct., N.Y. (County, Index No. 10571/82, Sherman, J. (slip opinion); *Newburgh Savings Bank v. Grossman*, 118 Misc.2d 1036, 462 N.Y.S.2d 92 (1982); *Lincoln First Bank v. Thayer*, 102 Misc.2d 451, 423 N.Y.S.2d 795 (1979); *Nichols v. Evans*, 92 Misc.2d 938, 401 N.Y.S.2d 426 (1978); *Notey v. Darien Constr. Corp.*, 41 N.Y.2d 1005, 396 N.Y.S.2d 169, 364 N.E.2d 883 (1977); *Aetna Life Insurance Company v. Avalon Orchards, Inc.*, 505 N.Y.S.2d 216, 118 A.D.2d 297 (3rd Dept. 1986); *Federal Nat'l. Mortgage Ass'n v. Ricks*, 83 Misc.2d 814, 372 N.Y.S.2d 485 (1975); *Griffo v.*

documents so provide.⁷

The quintessence of the cases is that where the mortgage provides for legal costs to the foreclosing party, it is to be enforced. The right of a mortgagee to recovery of reasonable attorneys fees is recognized if so specified in the mortgage⁸ and New York is said to permit enforcement of contracts supporting payment of reasonable attorneys fees.⁹ Clauses for payment of counsel fees when the mortgagee is required to engage attorneys are not uncommon¹⁰ and may be considered as an enforceable provision for liquidated damages.¹¹

It therefore follows that in the absence of an express agreement for payment of attorneys' fees, the court may not award it in a foreclosure.¹² Thus, merely providing reimbursement of "costs and expenses incurred" in an action on the note will not underwrite an award of legal fees.¹³ Nor would the mortgagor's verbal promises as to what he would pay be sufficient.¹⁴ Not incidentally, it has been ruled that a mortgagor in a foreclosure is likewise not entitled to collect counsel fees without either specific statutory authority or an applicable contractual provision because such costs are deemed to be merely nonrecoverable incidents of litigation.¹⁵

No Award for Clause in Note

While an appropriately worded clause in a mortgage will compel an award of attorneys' fees upon foreclosure, such a clause found only in the note or bond will not be sufficient. This is so even when the terms of the note are incorporated by reference in the mortgage.¹⁶ The theory is that to do otherwise would give attorneys' fees a priority status above other judgment creditors without notice.¹⁷ Consequently, even where a note was clear that there was to be fifteen percent attorney's fee upon collection, it was awarded only in an action on the note. No legal fees were awarded upon foreclosure of the mortgage

securing the note.¹⁸

A similar pronouncement is found in *Lipton v. Specter*¹⁹ where the note alone provided for an award of counsel fees "in case any installment under this Note is not paid when due." It was held that such a provision in the note was not the equivalent of an obligation to pay counsel in an action to foreclose the mortgage.²⁰

Stated somewhat differently is the judicial theory that mortgage foreclosure is not brought to recover the underlying debt. Therefore, even though recovery of counsel fees is allowed by the note, the mortgage instrument controls the foreclosure and when the mortgage does not constrain payment of attorneys' fees, no award can be given therefor.²¹

The "Standard" Clause

Perhaps the most commonly used mortgage form in New York State is the "statutory" or "title company" form of mortgage, widely distributed by the New York Board

Corp., 40 Misc.2d 1003, 244 N.Y.S.2d 491 (1963), aff'd 21 A.D.2d 878, 251 N.Y.S.2d 892 (2nd Dept. 1964); *Fairfield Lease Corp. v. Marsi Dress Corp.*, 60 Misc.2d 363, 303 N.Y.S.2d 179 (1969); *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (4th Dept. 1977); *Marine Midland Bank v. Roberts*, 102 Misc.2d 903, 424 N.Y.S.2d 671 (1980); *General Lumber Corp. v. Landa*, 13 A.D.2d 804, 216 N.Y.S.2d (2d Dept. 1961); *Roe v. Smyth*, 278 N.Y. 364, 16 N.E.2d 366 (1938); *Waxman v. Williamson*, 256 N.Y. 117, 175 N.E. 534 (1931); 379 Madison Avenue v. *Stuyvesant Co.*, 242 App. Div. 567, 275 N.Y.S. 953 (1st Dept. 1934); aff'd 268 N.Y. 576, 198 N.E. 412 (1935); *Security Mortgage Co. v. Powers, Trustee in Bankruptcy*, 278 U.S. 149, 49 S.Ct. 84, 73 L.Ed. 236 (1928)

Although there is one case to the contrary [*Lincoln First Bank v. Thayer*, 102 Misc.2d 451, 423 N.Y.S.2d 795 (1979)], it is clearly against to the weight of all authority before or since and must be viewed as an aberration.

⁸ *City of Utica v. Gold Medal Packing Corp.*, supra., at Note 6.

⁹ *Matter of Nicfur-Cruz Realty Corp.*, supra. at Note 7.

¹⁰ *In Re American Motors Products Corp.*, supra. at Note 7.

¹¹ *Bank of Smithtown v. Pelletier*, 178 (81) NYLJ (10-26-78) p.14, col. 6B (Deluca, J.); see also, *inter alia*, *Federal Land Bank of Springfield, Mass. v. Ambrosano*, supra. at Note 7; *General Lumber Corp. v. Landa*, supra. at Note 7; *Inter-City Investor Corp. v. Kessler*, supra. at Note 7.

¹² *Cohoes Sav. Bank v. Blair*, 119 Misc.2d 153, 462 N.Y.S.2d (1983); *Radford Realty Corp. v. Chung*, 167 (19) NYLJ (1-27-72) p.14, col. 2T (Greenfield, J.)

¹³ *Bowery Bank of New York v. Hart*, 77 App. Div. 121, 79 N.Y.S. 46 (1st Dept. 1902)

¹⁴ *Bowery Bank of New York v. Hart*, *Id.*

¹⁵ *Norstar Bank of Long Island v. Stradford*, 125 A.D.2d 298, 508 N.Y.S.2d 583 (2nd Dept. 1986)

¹⁶ *Federal Land Bank of Springfield v. Handschuh*, 125 Misc.2d 686, 480 N.Y.S.2d 294 (1894)

¹⁷ *Federal Land Bank of Springfield v. Handschuh*, *Id.*

¹⁸ *Smith v. Rothman*, 16 Misc.2d 689, 157 N.Y.S.2d 676 (1956) aff'd 6 A.D.2d 782, 175 N.Y.S.2d 556 (1st Dept. 1958), aff'd 6 N.Y.2d 993, 188 N.Y.S.2d 187, 159 N.E.2d 679 (1959)

¹⁹ 96 A.D.2d 549, 465 N.Y.S.2d 59 (2nd Dept. 1983), app. lv. den., 61 N.Y.2d 608, 475 N.Y.S.2d 1026, 464 N.E.2d 1004 (1984)

²⁰ *Lipton v. Specter*, *Id.*, citing *Jamaica Sav. Bank v. Cohan*, 38 A.D.2d 841, 330 N.Y.S.2d 119 (2nd Dept. 1972)

²¹ *Country Capital Corp. v. Corydon M. Johnson Co.*, 154 (99) NYLJ (11-23-65) p. 18, col 4M (Suozzi, J.); see also, *Bowery Bank of New York v. Hart*, supra. at Note 13; *Vardy Holding Co. v. Metric Resales, Inc.*, 131 A.D.2d 564, 516 N.Y.S.2d 490 (2nd Dept. 1987)

⁷ *Kenneth Pregno Agency, Ltd. v. Letterese*, 122 A.D.2d 1032, 492 N.Y.S.2d 824 (2nd Dept. 1985); *Matter of Nicfur-Cruz Realty Corp.*, 50 BRW 162 (S.D.N.Y. 1985); *In Re Berry Estates, Inc.*, 47 BRW 1004 (S.D.N.Y. 1985); *Community Sav. Bank v. Shaad*, 105 A.D.2d 1063, 482 N.Y.S.2d 162 (4th Dept. 1984); *In Re Guccione*, 41 BRW 289 (S.D.N.Y. 1984); *United States v. Bedford Assoc.*, 548 F. Supp. 748 (S.D.N.Y. 1982); *Federal Land Bank of Springfield, Mass. v. Ambrosano*, 89 A.D.2d 730, 453 N.Y.S.2d 857 (3rd Dept. 1982); *Avco Fin. Serv. Trust v. Bentley*, 116 Misc.2d 34, 455 N.Y.S.2d 62 (1982); *Bank of Smithtown v. Pelletier*, 178 (81) NYLJ (10-26-78) p. 14 col. 6B (Deluca, J.); *Inter-City Investor Corp. v. Kessler*, 56 A.D.2d 645, 391 N.Y.S.2d 894 (2nd Dept. 1977); *Scheible v. Leinen*, 67 Misc.2d 457, 324 N.Y.S.2d 197 (1971); *City of Utica v. Gold Medal Packing Corp.*, 54 Misc.2d 721, 283 N.Y.S.2d 603 (1967); *In Re American Motors Products Corporation*, 98 F.2d 774 (2d Cir. 1938) [Some of the many cases standing for a like proposition, but where the suit is upon a note or some other situation not involving foreclosure of a mortgage, include *Franklin Nat'l Bank v. Wall Street Comm.*

of Title Underwriters.²² Precisely when language in a mortgage will underwrite a award of counsel fees is sometimes a source of consternation to parties employing this form. While paragraph 12 in that version mentions attorneys' fees, it provides for recompense only in actions other than to foreclose the mortgage. Attorneys' fees, therefore, cannot be awarded in a mortgage foreclosure based upon that standard clause.²³

Rather, that standard legal fee clause provides for payment of attorneys' fees in any action or proceeding to defend or uphold the lien of the mortgage. This has been held to mean that the legal expenses must be rendered in an adversary proceeding other than foreclosure of the mortgage.²⁴ Significantly, the cited maxim cannot be resurrected to provide counsel fees in a foreclosure when a mortgagor challenges the mortgage by interposing defences to the foreclosure.²⁵

Clarity in the legal fee clause is an essential element. One permutation of the standard clause obligated mortgagor to pay plaintiff "all sums that may be advanced or liability for which may be incurred by the mortgagee, including reasonable attorneys' fees, either to remedy default by mortgagor or to defend or preserve the rights and liens created by said bond or note, mortgage and any extension agreement." Upon foreclosure, lender was denied legal fees. The court found that an action to foreclose was not one "to remedy default by mortgagor", but rather, a phrase designed to compensate mortgagee for payment of sums mortgagor should have paid under the mortgage.²⁶ Nor could the foreclosure be deemed an action in which mortgagee sought to "defend or preserve the rights and liens" created by the instruments. To the contrary, the court determined that the language contemplated mortgagee's acts to sustain secured relationships of mortgagor and mortgagee but could not and did not encompass foreclosure undertaken to

terminate that relationship.²⁷

Another example, albeit more obscure, where the standard clause did not give compensation for fees was where plaintiff mortgagor brought an action to remove mortgagee as escrow agent, with a claim for damages based on alleged wrongful withholding of monies. The mortgagee was granted summary judgment, but its application for legal fees was denied. The legal fee provision was to be effective were it necessary for mortgages "to defend or uphold the lien of the mortgage or the bond, not or obligation which it is given to secure." However, the subject action was ruled not to be an attack on the mortgage lien.²⁸

Quantifying the Legal Fee

Regardless of what any legal fee provision may assert, the courts retain supervisory power to determine the quantum²⁹ of any award.³⁰ When a court inquires into the amount of a legal fee request, case law urges the test to be reasonableness on a quantum meruit basis, a formulation which applies to foreclosures and other cases alike.³¹

In turn, reasonableness is governed by a myriad number of factors, considerations certainly not confined to the foreclosure arena. One formulation, of many, holds that reasonable legal fees are "...such as are necessary to accomplish the end sought considering the skill and experience of counsel, the magnitude, complexity and novelty of the litigation, the respective positions of the parties in the litigation and the extent of the responsibility legitimately undertaken by counsel."³²

Succinctly stated as the cited view is, there are, in varying combinations, a host of factors weighed by the courts in arriving at the conclusion of reasonable in any particular case. Among these considerations are the following:

²² Attorneys who represent lenders as a matter of course, or who otherwise regularly prepare mortgages, would most often have their own form of mortgage. Even if they use the NYBTU form, the issue of legal fees will be dealt with in an appropriately drafted rider. For a detailed discussion of this form, its advantages and disadvantages and the legal fee aspect, see "When the Seller Gives a Purchase Money Mortgage-A Lawyer's Primer on Advising the Client," 59 *New York State Bar Journal* 7 (Nov. 1987)

²³ *Vardy Holding Co. v. Metric Resales, Inc.*, *supra.* at Note 21

²⁴ *City of Utica v. Gold Medal Packing Corp.*, *supra.* at note 7; *Engelsberg v. Cinderella Homes, Inc.*, 20 Misc.2d 1027, 192 N.Y.S.2d 317 (1959); see also, *Lipton v. Specter*, *supra.* at Note 19

²⁵ *Neidich v. Petilli*, 181 (40) NYLJ (2-28-79), p.17, col. 3T (Wood, J.)

²⁶ *Jamaica Sav. Bank v. Cohan*, *supra.* at Note 20

²⁷ *Jamaica Sav. Bank v. Cohan*, *supra.* at Note 20

²⁸ *Carr v. First Fed. Sav. & Loan Ass'n of Rochester*, 517 N.Y.S.2d 256 (2nd Dept. 1987)

²⁹ Emphasis is given to the concept of quantum, it being suggested that the cases are clear in authorizing an assessment of legal fees where the mortgage so provides. While the court should determine how much is due, a voiding of any award whatsoever would seem unjustified.

³⁰ *Gair v. Peck*, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (1959); *Matter of Nicfury-Cruz Realty Corp.*, *supra.* at Note 7; *Rahmey v. Blum*, 95 A.D.2d 294, 466 N.Y.S.2d 350 (2nd Dept. 1983); *Industrial Equip. Credit Corp. v. Green*, 92 A.D.2d 838, 460 N.Y.S.2d 337 (1st Dept. 1983), *aff'd* 62 N.Y.2d 903, 478 N.Y.S.2d 861, 467 N.E.2d 525 (1984); *United States v. Bedford Assoc.*, *supra.* at Note 7; *Simmons v. Gov't Employees Ins. Co.*, 59 A.D.2d 468, 400 N.Y.S.2d 99 (2nd Dept. 1977); *First Nat'l Bank of East Islip v. Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875, 368 N.E.2d 1240 (1977); *New York Bus Assistance Corp. v. Shustin & Ginsberg, Inc.*, 157 (106) NYLJ (6-2-67) p.22, Col.2M (Dillon J.); *McAvoy v. Harron*, 26 A.D.2d 452, 275 N.Y.S.2d 348 (4th Dept. 1966); *aff'd* 21 N.Y.S.2d 821, 288 N.Y.S.2d 906, 235 N.E.2d 910 (1968)]

³¹ *Industrial Equip. Credit Corp. v. Green*, *supra.* at Note 30; *Beacon Fed. Sav. & Loan Ass'n. v. Marks*, 97 A.D.2d 451, 467 N.Y.S.2d 662 (2nd Dept. 1983); *Avco Fin. Serv. Trust v. Bentley*, 116 Misc.2d 34, 455 N.Y.S.2d 62 (1982); *Federal Land Bank of Springfield, Mass. v. Ambrosano*, *supra.* at Note 7; *Marine Midland Bank v. Roberts*, *supra.* at Note 7; *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (4th Dept. 1977); *First Nat'l Bank of East Islip v. Brower*, *supra.* at Note 30; *Inter-City Investor Corp. v. Kessler*, *supra.* at Note 7; *City of Utica v. Gold Medal Packing Corp.*, *supra.* at Note 7

³² *United States v. Bedford Associates*, *supra.* at Note 30

- Time spent (also denominated as labor entailed, time devoted by counsel, actual time spent, hours worked as well as other semantic permutations)³³

- Difficulties involved (also denominated as complexity of case, difficulty of questions of law, character of work or opposition encountered)³⁴

- Nature of services (also denominated as extent of services)³⁵

- Amount involved (also denominated as amount in controversy)³⁶

- Professional standing of counsel (also denominated as learning of lawyer, standing and reputation, experience of counsel, training or background of counsel)³⁷

- Result obtained³⁸

- Importance of work performed³⁹

- Lawyers integrity (also denominated as assumption of responsibility, learning, integrity and assiduity displayed and skill exercised in handling the case, among others)⁴⁰

- Questions involved (also denominated as gravity and importance of questions investigated, nature of issues encountered, complexity of litigation, among others)⁴¹

- Necessity for time (also denominated as billing judgment or time devoted where delay attributable to defendant)⁴²

- Customary fee⁴³

Conspicuously absent from the recitation of factors considered in assessing a reasonable legal fee is the amount the foreclosing party has agreed to pay his counsel. Although such may ultimately be found reasonable, it is not in and of itself controlling, even though lenders' attorneys would likely attribute parsimony rather than profligacy to their clients. While perhaps too forceful an analysis, the point was made in *Equitable Lumber Corp. v. IPA Land Development Corp.*⁴⁴ that "Plaintiff may not manipulate the actual amount of damages by entering into any exorbitant fee arrangement with its attorney and, thus, it may be necessary to look beyond the actual fee arrangement between plaintiff and counsel to determine whether that arrangement was reasonable and proportionate to the normal fee chargeable by attorneys in the context of this case." Thus, in accord with the weight of authority, the test must be reasonableness alone, with all the components of that concept. Although the noted case was not a mortgage

foreclosure, it was cited with approval in a later foreclosure action⁴⁵ and should, therefore, be considered as applicable.

Legal Fee as a Percentage

A legal fee clause expressing recompense as a percentage of the mortgage debt is enforceable so long as it bears a reasonable relationship

³³ *In Re Merz' Estate*, 164 Misc. 855, 1 N.Y.S.2d 116 (1937), aff'd 254 App. Div. 811, 5 N.Y.S.2d 507 (4th Dept. 1938); *Hayman v. Morris*, 37 N.Y.S.2d 884 (1942); *In Re Bond & Mortgage Co.*, 68 N.Y.S.2d 10 (1946); *Golden v. Aldell Realty Corp.*, 70 N.Y.S.2d 341 (1947); *Mandell v. Curtis*, 205 Misc. 836, 131 N.Y.S.2d 132 (1954); *Booth, Lipton & Lipton v. Cassel*, 51 Misc.2d 853, 274 N.Y.S.2d 90 (1966) aff'd 278 N.Y.S.2d 178 (1st Dept. 1967); *Jordon v. Freeman*, 40 A.D.2d 656, 336 N.Y.S.2d 671 (1st Dept. 1971); *Isaiahs v. Fischhoff*, 39 A.D.2d 850, 332 N.Y.S.2d 976 (1st Dept. 1972), aff'd 33 N.Y.2d 941, 353 N.Y.S.2d 728, 309 N.E.2d 129 (1972); *Marine Midland Bank, N.A. v. Petersel*, slip opinion, Index No. 10287/86 (Nassau County 6-30-87, Widlitz, J.); *Marine Midland Bank v. Roberts*, supra. at Note 7; *In Re Burk's Will*, 6 A.D.2d 429, 179 N.Y.S.2d 25 (1st Dept. 1958); *Matter of Ury*, 108 A.D.2d 816, 485 N.Y.S.2d 329 (2nd Dept. 1986); *Rahmey v. Blum*, supra. at Note 30; *Simmons v. Gov't Empl. Ins. Co.*, supra. at Note 30; *Randall v. Packard*, 142 N.Y. 47, 36 N.E. 823 (1984)

³⁴ *In Re Merz' Estate*, 164 Misc. 855, 1 N.Y.S.2d 116 (1937), supra. at Note 33; *Federal Land Bank of Springfield, Mass. v. Ambrosano*, supra. at Note 7; *Hayman v. Morris*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Mandell v. Curtis*, supra. at Note 33; *Booth, Lipton & Lipton v. Cassel*, supra. at Note 33; *Marine Midland Bank v. Petersel*, supra. at Note 33; *Zauderer v. Barcellona*, 130 Misc.2d 234, 495 N.Y.S.2d 881 (1985); *Matter of Ury*, supra. at Note 33; *Randall v. Packard*, supra. at Note 33

³⁵ *In Re Merz' Estate*, supra. at Note 33; *Booth, Lipton & Lipton v. Cassel*, supra. at Note 33; *Jordon v. Freeman*, supra. at Note 33; *Marine Midland Bank v. Roberts*, supra. at Note 7; *In Re Burk's Will*, supra. at Note 33; *Rahmey v. Blum*, supra. at Note 30; *Simmons v. Gov't Employees Ins. Co.*, supra. at Note 30; *McAvoy v. Harron*, supra. at Note 30; *Randall v. Packard*, supra. at Note 33

³⁶ *In Re Merz' Estate*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Mandell v. Curtis*, supra. at Note 33; *Booth, Lipton & Lipton v. Cassel*, supra. at Note 33; *Simmons v. Gov't Employees Ins. Co.*, supra. at Note 30; *Randall v. Packard*, supra. at Note 33

³⁷ *In Re Nicfur-Cruz Realty Corp.*, supra. at

Note 7; *In Re Merz' Estate*, supra. at Note 33; *Hayman v. Morris*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Mandell v. Curtis*, supra. at Note 33; *Jordon v. Freeman*, supra. at Note 33; *Marine Midland Bank v. Petersel*, supra. at Note 33; *Marine Midland Bank v. Roberts*, supra. at Note 7; *In Re Burk's Will*, supra. at Note 33; *Zauderer v. Barcellona*, supra. at Note 34; *Matter of Ury*, supra. at Note 33; *Rahmey v. Blum*, supra. at Note 30; *Simmons v. Gov't Employee Ins. Co.*, supra. at Note 30; *Randall v. Packard*, supra. at Note 33; *United States v. Bedford Assoc.*, supra. at Note 30

³⁸ *In Re Merz' Estate*, supra. at Note 33; *Hayman v. Morris*, supra. at Note 33; *In Re Bond & Mortgage Co.*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Mandell v. Curtis*, supra. at Note 33; *Booth, Lipton & Lipton v. Cassel*, supra. at Note 33; *Jordon v. Freeman*, supra. at Note 33; *Marine Midland Bank v. Petersel*, supra. at Note 33; *Marine Midland Bank v. Roberts*, supra. at Note 7; *Martin Foundation, Inc. v. Phillips-Jones Corp.*, 204 Misc. 120, 123 N.Y.S.2d 222 (1953), mod. 283 App. Div. 729, 127 N.Y.S.2d 649 (2nd Dept. 1954), aff'd 306 N.Y. 972, 120 N.E. 230 (1954); *In Re Burk's Will*, supra. at Note 33; *Zauderer v. Barcellona*, supra. at Note 34; *Simmons v. Gov't Employees Ins. Co.*, supra. at Note 30; *Randall v. Packard*, supra. at Note 33

³⁹ *Hayman v. Morris*, 37 N.Y.S.2d 884 (1942); *In Re Bond & Mortgage Guarantee Co.*, supra. at Note 33; *Randall v. Packard*, supra. at Note 33; *United States v. Bedford Assoc.*, supra. at Note 30; *In Re Nicfur-Cruz Realty Corp.*, supra. at Note 7

⁴⁰ *In Re Nicfur-Cruz Realty Corp.*, supra. at Note 7; *United States v. Bedford Assoc.*, supra. at Note 30; *Hayman v. Morris*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Zauderer v. Barcellona*, supra. at Note 34; *Mandell v. Curtis*, supra. at Note 33; *Matter of Ury*, supra. at Note 33

⁴¹ *Hayman v. Morris*, supra. at Note 33; *Golden v. Aldell Realty Corp.*, supra. at Note 33; *Jordon v. Freeman*, supra. at Note 33; *Marine Midland Bank v. Petersel*, supra. at Note 33; *Marine Midland Bank v. Roberts*, supra. at Note 7; *In Re Burk's Will*, supra. at Note 33; *Simmons v. Gov't Employees Ins. Co.*, supra. at Note 30; *United States v. Bedford Assoc.*, supra. at Note 30; *In Re Nicfur-Cruz Realty Corp.*, supra. at Note 7

⁴² *Jordon v. Freeman*, supra. at Note 33; *Gandy Machinery, Inc. v. Poque*, 106 A.D.2d 684, 483 N.Y.S.2d 744 (3rd Dept. 1984); *Marine Midland Bank v. Petersel*, supra. at Note 33; *In Re Burk's Will*, supra. at Note 33; *Rahmey v. Blum*, supra. at Note 30; *Simmons v. Gov't Employees Ins. Co.*, supra. at Note 30

⁴³ *Gandy Machinery, Inc. v. Poque*, supra. at Note 42; *Matter of Ury*, supra. at Note 33; *Rahmey v. Blum*, supra. at Note 30

⁴⁴ 38 N.Y.2d 516, 381 N.Y.S.2d 459, 344 N.E.2d 391 (1976)

⁴⁵ *Federal Land Bank of Springfield, Mass. v. Ambrosano*, supra. at Note 7

to the necessarily incurred legal services.⁴⁶

Precisely what percentage will meet the ultimate test of reasonableness will vary on a case by case basis, as will the necessity to have a hearing to reach that determination.⁴⁷ Five percent has been held reasonable and was granted summarily.⁴⁸ Another case required a hearing on that same percentage.⁴⁹

Fifteen percent has been held reasonable on its face,⁵⁰ although some cases have required a hearing as a prerequisite to consider facts and circumstances.⁵¹ Upon a hearing, one case found fifteen percent unreasonable under the circumstances and reduced the award to the quantum meruit as adduced at the hearing.⁵²

A legal fee of twenty percent can be reasonable⁵³ and can be summarily granted when the percentage attaches to the entire debt⁵⁴ or to a portion thereof.⁵⁵ Resolution of the issue of whether twenty percent is reasonable in the particular case can sometimes require a hearing.⁵⁶ Even thirty percent may be reasonable, but the one reported case in point required a hearing to evaluate the question.⁵⁷

Mechanics and Procedures⁵⁸

It is generally accepted that entitlement to legal fees will only arise if plaintiff has engaged outside counsel and that engagement of salaried employees or house counsel precludes seeking legal fee reimbursement. In that regard, there is some authority for the rule that while a lender is empowered to employ house counsel to collect a debt, obtaining attorneys' fees thereon is prohibited because the fees must be an actual expenditure.⁵⁹ However, the cited case involved interpretation of a particular statute, Banking Law Section 108, which contained the word "actual" when referring to attorneys' fees. Absent that limiting adjective in a legal fee clause in the mortgage, the principle may be of problematical application in a mortgage foreclosure case,

although it is generally accepted as the rule.

Although perhaps obvious, a prerequisite to a legal fee award is that it be pleaded in the complaint or the court will be powerless to grant the request.⁶⁰ Should plaintiff neglect to seek legal fees in the judgment, or should the court fail to make the award, it would seem apparent that plaintiff's counsel should be able to move to reargue the judgment motion or submit a judgment to be modified by order to correct or insert the legal fee, as the case may be. Indeed, it is not infrequently done just that way. Perhaps curiously, though, there is a case standing for the proposition that the correct procedure is for plaintiff to move to vacate the judgment with a new one to issue, rather than seeking to amend.⁶¹ However, where certain legal fees could not have been quantified at the time of a judgment was sought, when later they could be determined, application to amend the judgment was correct and timely.⁶²

Upon application to the Court for legal fees, counsel will be required to present considerable detail supporting the necessity for the time, its reasonableness, the work performed and the regular and usual billing rates for those services.⁶³

Once legal fees have been awarded, if a case proceeds to the

Most often such is the case, although any judge may require a hearing if circumstances require. An exception to the general rule that a hearing ordinarily be dispensed with is in New York County where an inquest is mandated when legal fees are requested. Indeed, where a computation of attorneys' fees is to ensue in New York County, the appointment of a referee to compute the other sums due on the mortgage is bypassed.

⁴⁸ *Juriaco v. 119 holding Corp.*, Sup.Ct. Queens Cty., Index No., 5260/81, Dunkin J. (slip opinion)

⁴⁹ *Scheible v. Leinen*, *supra.* at Note 7

⁵⁰ *Kenneth Pregno Agency, Ltd. v. Letterese*, *supra.* at Note 7; *Nat'l Bank of Westchester v. Pisani*, *supra.* at Note 46; *Stream v. CBK Agronomics, Inc.*, 79 Misc.2d 607, 361 N.Y.S.2d 110 (1974), mod. other gds., 48 A.D.2d 637, 368 N.Y.S.2d 20 (1st Dept. 1975); *National Comm. Bank & Trust Co. v. Bart Boat Co., Inc.*, 41 A.D.2d 159, 341 N.Y.S.2d 347 (3rd Dept. 1973); *Messina v. Tannenbaum*, 37 A.D.2d 1041, 326 N.Y.S.2d 75 (3rd Dept. 1971)

⁵¹ *Community Nat'l Bank & Trust Co. of New York v. Intercoastal Trading Corp.*, 55 A.D.2d 525, 389 N.Y.S.2d 99 (1st Dept. 1976); *First Nat'l Bank of East Islip v. Brower*, *supra.* at Note 30; *Federal Deposit Ins. Corp. v. Park Lane Realty Assoc.*, 72 A.D.2d 788, 421 N.Y.S.2d 611 (2nd Dept. 1979)

⁵² *Marine Midland Bank v. Roberts*, *supra.* at Note 7

⁵³ *General Lumber Corp. v. Landa*, *supra.* at Note 7; *Franklin Nat'l Bank v. Wall Street Comm. Corp.*, *supra.* at Note 7

⁵⁴ *Franklin Nat'l Bank of Long Island v. Bush Prefabricated Structures, Inc.*, *supra.* at Note 46

⁵⁵ *Nat'l Bank of Westchester v. Pisani*, *supra.* at Note 46

⁵⁶ *Federal Deposit Ins. Corp. v. Kassel*, 72 A.D.2d 787, 421 N.Y.S.2d 609 (2nd Dept. 1979); *Franklin Nat'l Bank of Long Island v. Wall Street Comm. Corp.*, *supra.* at Note 7; *Fairfield Lease Corp. v. Marsi Dress Corp.*, *supra.* at Note 7; *Industrial Equip. Credit Corp. v. Green*, *supra.* at Note 30

⁵⁷ *Equitable Lumber Corp. v. IPA Land Development Corp.*, *supra.* at Note 46

⁵⁸ For a more extensive discussion of mechanics and procedure - and forms in particular - see Bergman *Mortgages and Mortgage Foreclosure in New York*, Chapter 22

⁵⁹ *Matter of Thompson*, 174 (74) NYLJ (9-12-75) p.13, col. 3T (Myers, J.)

⁶⁰ *Sullivan County Nat'l Bank of Liberty, N.Y. v. Hall House Co.*, 8 Misc.2d 733, 170 N.Y.S.2d 748 (1957)

⁶¹ *Chemical Bank v. Buxbaum*, 76 A.D.2d 850, 428 N.Y.S.2d 523 (2nd Dept. 1980)

⁶² *Beacon Fed. Sav. & Loan Ass'n v. Marks*, 97 A.D.2d 451, 467 N.Y.S.2d 662 (2nd Dept. 1983)

⁶³ See Bergman's *New York Mortgages and Mortgage Foreclosure*, Sections 22.12 through 22.20, inclusive

⁴⁶ *Scheible v. Leinen*, *supra.* at Note 7; *First Nat'l Bank of East Islip v. Brower*, *supra.* at Note 30; *Equitable Lumber Corp. v. IPA Land Corp.*, 38 N.Y.2d 516, 381 N.Y.S.2d 459, 344 N.E.2d 391 (1976)

Significantly, an award of legal fees based upon a percentage will not render an obligation usurious. *Nat'l Bank of Westchester v. Pisani*, 58 A.D.2d 597, 395 N.Y.S.2d 487 (2nd Dept. 1977); *Franklin Nat'l Bank of Long Island v. Bush Prefabricated Structures, Inc.*, 30 Misc.2d 473, 219 N.Y.S.2d 280 (1961); *General Lumber Corp. v. Landa*, *supra.* at Note 7; *Gair v. Peck*, *supra.* at Note 30

⁴⁷ If upon application for legal fees counsel submits, and swears to, a detailed delineation of the time incurred and the necessity therefor, a hearing should not be required.

stage of a deficiency judgment motion,⁶⁴ it is too late for a defendant to question the award.⁶⁵ A converse concept is that when a foreclosure arrives at the point of a surplus money proceeding, there is no authority for an award of legal fees.⁶⁶

SUMMARY AND CONCLUSION

To answer the question inherent in the title of this article, the defaulting mortgagor pays the legal fees in foreclosure, at least to the extent that such a sum is added to the judgment of foreclosure. That obligation does not arise, however, unless the mortgage itself contains specific language to that effect. A legal fee clause in the note alone is sufficient. Nor will the "standard" clause in the NYBTU form of mort-

gage provide recompense for this item to the lender.

With a carefully drafted mortgage, a foreclosing plaintiff can expect to be awarded legal fees up to the extent of reasonableness, so long as pleaded in the complaint and only insofar as appropriate support is presented upon application to the court.

Even absent the requisite care in preparing the mortgage, a lender can still be compensated for legal fees should it choose to allow reinstatement of the mortgage - something it is not otherwise bound to do.

Howsoever all this may be viewed philosophically, counsel to foreclosing plaintiffs - and plaintiffs themselves - derive comfort from the status of case law which clearly underwrites legal fees in mortgage foreclosures. While hardly en-

couraging to defaulting mortgagors, they should be mindful of this additional and sometimes substantial obligation which arises upon a mortgage default.

⁶⁴ RPAPL Section 1371

⁶⁵ *Aetna Life Ins. Co. v. Avalon Orchards, Inc.*, *supra*, at Note 1

⁶⁶ *Sadow v. Poskin Realty Corp.*, 63 Misc.2d 499, 312 N.Y.S.2d 901 (1970); *Whitestone Sav. & Loan Ass'n v. Meadows*, 158 (86) NYLJ (11-2-67) p.23, col. 1B; *Goldberg v. Feltmans of Coney Island*, 144 N.Y.S.2d 250 (1955); *Federal Land Bank of Springfield v. Weaver*, 114 N.Y.S.2d 592 (1952), rev. oth. grds., 283 App. Div. 1134, 131 N.Y.S.2d 599 (3rd Dept. 1954); *Realty Assoc. Securities Corp. v. Jaybar Realty Corp.*, 257 App. Div. 1001, 13 N.Y.S.2d 881 (2nd Dept. 1939), *aff'd* 282 N.Y. 603, 25 N.E.2d 387 (1940)



Records	Opening Statement	Plaintiff's Testimony	Defendant's Testimony	Requested Jury Instructions	Instructions Given	Final Arguments
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