The Foreclosure Case:

Attorneys Ask: Will The Settlement Stand Up?

By Bruce J. Bergman

Especially given the trauma in the real estate market which crashed around us in the late 1980s, the durability of a foreclosure settlement is a matter of understandable concern.

From a lender's vantage point—short of complete victory where the goal is to bring a foreclosure to a sale—it would seem nothing is quite as important as assuring that a case which should be settled is settled—and properly.

Conversely but similarly, a critical objective of most borrowers is to settle the case, to somehow make the problem go away.

When it comes to a settlement agreement—and whether called a stipulation or a forbearance or by any other monicker—lenders and their counsel generally have a very solid idea as to what the requirements of the stipulation document are to be.

Counsel for borrowers should be equally aware. Whether or not the particular stipulation encompasses some unusual circumstances, perhaps the ultimate question, at least the one asked by the mortgage holder, is, will these terms really be enforced if the borrower finds some creative way to attack or disavow them? From a reverse angle that is a compelling inquiry of the borrower as well.

That the answer to the question raised would most often be "yes" is underscored both by general principles and interesting recent case law. The well accepted hornbook maxim is that stipulations of settlement which put an end to litigation are favored by the courts and are rarely set aside, absent fraud, collusion, mistake or other grounds which typically void a contract. [1]

Then there is a 1992 case which holds that if a borrower settles, and an aspect of the agreement is a waiver of defenses (which a lender invariably demands), the borrower cannot later try to use some of those very defenses which were waived. [2]

A new case adds to the formula: *Trustco Bank of New York v. Drake*, ___AD2d___, 599 NYS2d 763 (3d Dept. 1993). The facts there make the point very nicely. The borrower defaulted in mortgage obligations for the months of January through May.

Workout discussions ensued, resulting in the signing of a forbearance agreement in May. The agreement, as is typical, acknowledged default and, insofar as is relevant here, promised to pay the sum of $7,754 to the lender on or before May 10. The agreement also provided that a default by the borrower in any obligation of the agreement would allow the lender to immediately commence a foreclosure and exercise any or all of its rights.

We wouldn't be talking about it if it didn't happen this way, so yes, of course, the borrower indeed failed to tender the promised payment on or before May 10. Just as assuredly, the lender responded with a foreclosure action. Meanwhile, the borrower had remitted the check, but on May 29. The lender wisely rejected the remittance as untimely.

Who wins the case? The lender! The borrower argued that its default in timely submission of the check was excusable because it was only a "technical breach" of the forbearance agreement. Moreover, the borrower urged, he should have been allowed a reasonable period of time to perform his obligations. That all sounds like the kind of argument which a sympathetic court just might wish to adopt, but the borrower didn't have his way here.

The court found that the agreed upon payment was not timely tendered. More compellingly, and in response to the claim that some reasonable period of time should have been given to the borrower, the lender had sagely made time of the essence as to payments. Still further, the defendant tried to introduce evidence of claimed discussions or agreements as to the source of the payment due on May 10, but the court excluded that pursuant to the parol evidence rule.

That, of course, is the doctrine which says (in general terms) that where the parties have reduced their agreement to a writing, evidence of any prior or contemporaneous negotiations between them which is offered to modify or contradict the terms of the writing must be excluded.

The agreement before the court clearly set forth the obligation to tender the sum due on or before a specified date. There was thus nothing to interpret and the parol evidence rule precluded any discussions about what might have otherwise been said.

So in the end, this case squarely addresses two of the genuinely vital aspects of virtually any foreclosure settlement or forbearance agreement. If the stipulation provides that payment is due on a certain date, and uses those magical words, "time is of the essence," then it means just that.

If the borrower is going to be late, the lender will be able to avail itself of whatever rights have been set forth in the agreement. And, so long as there is not a fraud or a mutual mistake, any talk about what else the lender may have said or promised will be excluded. The agreement does and will mean what it says.

Editor's Note: Bruce J. Bergman, a partner in Certilman Balin Adler & Hyman in East Meadow, is the author of the two-volume treatise, "Bergman on New York Mortgage Foreclosures" (Matthew Bender & Co., Inc. 1990.)

Footnotes

1 See 2 Bergman on New York Mortgage Foreclosures, Chap. 24, "Settlement of the Foreclosure Action: Law, Mechanics and Strategies" (Matthew Bender & Co., Inc., 1990).

2 *Apple Bank For Savings v Leland Co.*, NYLJ, 7/22/92, pg. 24, col. 1 (Sup. Ct., Bronx County, Silver, J.)