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Borrowers Move To Federal Court To Assail Lenders - And Lose

The ploy will no doubt be repeated interminably, but case law shows it simply doesn't work.

by Bruce J. Bergman

Servicers recognize all too well that the path to pursuing a mortgage foreclosure action has become increasingly slower and more difficult, especially in judicial foreclosure states. Borrowers are often perceived as victims, and so myriad statutes have been passed in various states to afford extra and different notices to defaulting borrowers and to impose mandatory settlement conferences, among a plethora of requirements that make prosecuting a foreclosure ever more treacherous while consuming much more time.

Short of a rare fatal defect in the mortgage, though, the servicer will eventually reach the end of the case. That is to say, if the borrower does not reinstate, or if the mortgage is not satisfied, or if some form of settlement does not emerge, there will be a foreclosure sale. Whether the lender will be made whole may be problematic, but there will be an end.

But that conclusion may not be so immediately final if a borrower, after exhausting his arsenal in the state court, employs the next arrow in his quiver: attacking the lender in federal court.

This is not such an unusual story, and lenders will recognize it - albeit with some dismay. The essence of the situation is that when a borrower is about to lose the case, or after it is lost via conduct of a foreclosure sale, he starts an action in federal court with some version of the argument that he was "cheated" in state court, the state court was wrong, or his rights were violated, and that justice is available to him only in the federal forum.

It is not so. Rather, rescue for the lender is found in a well-established principle known as the Rooker-Feldman doctrine. A tribute to the dedication and tenacity of borrowers - even in the face of a rule that bars them from a second bite of the apple at the federal level - is the number of cases in which borrowers try the ploy. A recent case happily explains the point: Jones v. Phelps Corp.

Here are the facts: A borrower defaults on his mortgage, and a foreclosure is commenced. This leads to a judgment of foreclosure and sale, an auction sale and eviction proceedings in a state court, followed by a warrant of eviction. Just to set the stage for the borrower's attack, which readers will recognize as coming, observe that previously the borrower defaulted in paying taxes, eliciting a tax lien foreclosure and the need for the mortgage holder to pay those taxes. The borrower then sued the lender in federal court, alleging a usurious mortgage, which the lender successfully beat back.

Now, after the inevitable foreclosure and an imminent eviction comes the borrower seeking in federal district court (among other things) a temporary restraining order claiming that the lender misused and abused the state court system by filing a defective and unlawful foreclosure action in state court and obtaining a favorable judgment. There

was also a separate attack on the warrant of eviction.

Will any of this work? As the discussion began, the answer is, "No." The borrower's claims are precluded by the Rooker-Feldman doctrine, which provides that the Supreme Court is the only federal court empowered to exercise appellate jurisdiction over state court judgments. Similarly, the doctrine bars federal courts from considering claims inextricably intertwined with a prior state court determination.

Further, the gist of the doctrine prohibits what, in essence, would be a losing party's claim that the state judgment itself violates the loser's federal rights. Federal courts, in New York for example, have consistently ruled that any attack on a judgment of foreclosure is clearly barred by the Rooker-Feldman doctrine. Expressed in other terms, lower federal courts have no jurisdiction to sit in judgment on a case already decided in state court. In other words, the federal court cannot hear the case and change what happened. Additional actual case scenarios will highlight the concept:

In Kesten v. Eastern Sav. Bank, after a foreclosure sale but before delivery of the deed, the defaulting mortgagor deeded the property to Kesten. In the state trial court, it was ruled that Kesten had no title and no claim. His grantor, the mortgagor, had nothing to sell. When the property was struck down at the foreclosure auction, the mortgagor lost his title - case closed - but Kesten did not accept that. Undaunted, he sued the foreclosing bank in the U.S. District Court, alleging that the bank wrongfully refused to discharge the mortgage on the property he purchased. He also sought damages of $1 million.

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Wrong, said the court. The suit is barred by Rooker-Feldman. Lower federal courts cannot review state court decisions. There is simply no jurisdiction. The borrower's grantee loses.

In Mercado v. Playa Realty Corp., the borrower lost her house in a state court foreclosure. She, too, was undeterred and sued the bank in federal court, alleging that the bank's supposed predatory lending practices caused the loan default so that the loss of the house was an injury suffered because of the predatory lending. Wrong again, ruled the court. This is exactly the type of action that is barred by Rooker-Feldman: The state court loser cannot sue the winner in that case, claiming injury visited upon her by the state court judgment. It doesn't work.

Although borrowers regularly lose when pressing this gambit, they remain undiscouraged. As always, however, lenders and servicers are forced to defend the litigation, incur the costs and lose the time. The ploy will no doubt be repeated interminably, but at least it can be confidently predicted that the borrowers will lose. SM

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