

BERGMAN ON MORTGAGE FORECLOSURES: Borrower Waiver of Counterclaim Enforced

By Bruce J. Bergman

There being no end to the obfuscation and dilatory tactics of defaulting borrowers—from a mortgagee's vantage point, of course—an off-encountered tactic is attacking the plaintiff with a counterclaim. That represents not merely a defense (although it is that) but an *offense* as well, thereby perceived as being an even more potent ploy.

But what if the lender's mortgage contains a provision by which the borrower waives the right to oppose a foreclosure action with counterclaims? Can that be enforceable to protect the lender? The question arises with some frequency and so it may be helpful to respond, "Yes," reconfirms a new case: *KeyBank National Association v. Chapman Steamer Collective, LLC*.¹

Traditionally this has been so. It is hardly uncommon for mortgage documents—the note, the mortgage, or both—to provide waiver by the borrower in any foreclosure action of defenses or counterclaims. While some defenses are not susceptible to waiver in the mortgage at the inception, for example the statute of limitations² or the ability to redeem,³ where the right to otherwise assert defenses, counterclaims or offsets is waived in the mortgage it is honored by the courts.⁴

Here is how the concept plays out in practice, in the real world as presented in the new case.

A mortgage foreclosure action was begun. In addition to a usual answer with sundry denials and perhaps a laundry list of fanciful affirmative defenses, the defendants counterclaimed, asserting (among other things) that the lender, as part of a series of predatory lending practices, induced the defendants into mortgag-

ing the premises founded upon unfulfilled promises of access to further development funding.

The plaintiff appropriately moved for summary judgment and to dismiss the defendants' counterclaim. The defendants opposed, of course, and in addition (a side point to emerge here) cross-moved to compel certain disclosures, which if successful would greatly mire the case in delay.

As to the discovery issue—certainly important but only peripheral to this discussion—the court ruled that the borrowers could not demonstrate how further discovery might reveal or lead to relevant evidence to oppose summary judgment, or that facts to support that opposition might be within the exclusive knowledge or control of the foreclosing plaintiff. While this is standard stuff, it is quite helpful.

But on the point of the counterclaim, the lender's mortgage contained an efficacious waiver by the borrower of the ability to interpose a counterclaim. Both the trial court and the Second Department ruled that the plaintiff was entitled to judgment as a matter of law to dismiss the counterclaim because the defendants validly waived the ability to counterclaim pursuant to the express terms of the mortgage.

So, there are meaningful take-aways from this decision. One point is that a lender's mortgage should advisedly contain a provision waiving defenses and counterclaims. It is recognized that some lenders are con-



strained to use standard forms which might not have such a provision, but if there is any leeway to insert it, it can be quite important. The second aspect is that if there is such a clause, and it is appropriately written, it will be enforced by the courts; that is to say, a counterclaim will be stricken and a foreclosure will be allowed to proceed when there is a waiver by a borrower of using counterclaims.

Endnotes

1. 117 A.D.3d 991, 986 N.Y.S.2d 598 (2d Dept. 2014).
2. See, *inter alia*, *Shapely v. Abbott*, 42 N.Y.443 (1870) and discussion and further case citation at 1 *Bergman on New York Mortgage Foreclosures*, §5.511[6][f], LexisNexis Matthew Bender (rev. 2014).
3. See, *inter alia*, *Hughes v. Harlam*, 166 N.Y.427, 60 N.E.22 (1901) and discussion and further case citation at 1 *Bergman on New York Mortgage Foreclosures*, §4.07, LexisNexis Matthew Bender (rev. 2014).
4. *Baron Associates, LLC v. Garcia Group Enterprises*, 96 A.D.3d 793, 946 N.Y.S.2d 611 (2d Dept. 2012), citing *Quest Commercial, LLC v. Rovner*, 35 A.D.3d 576, 577, 825 N.Y.S.2d 766 (2d Dept. 2006); *Petra Cre CDO 2007-1, Ltd. v. 160 Jamaica Owners, LLC*, 73 A.D.3d 883, 904 N.Y.S.2d 699 (2d Dept. 2010); *Parasram v. DeCambre*, 247 A.D.2d 283, 668 N.Y.S.2d 454 (1st Dept. 1998).

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.