REPRINTED FROM

SERVICING MANAGEMENT

THE MAGAZINE FOR LOAN SERVICING PROFESSIONALS ■ VOL. 10, NO. 7 MARCH 1999

FORECLOSURE

Case Closed! Or Not?

What To Do When The Borrower Attacks The Settlement

BY BRUCE J. BERGMAN, ©1999

Although settling the mortgage foreclosure case is very often a good idea for the foreclosing party, it is usually an even better idea for the borrower.

Particularly, when there is equity, the lender or servicer will derive all (but sometimes only a portion) of the investment. It is more of an all or nothing proposition for the borrowers: either they save the house (or other property) or they lose it in foreclosure.

So it is particularly galling when it is the borrower, just the recipient of the servicer's largesse, who assaults the settlement and vociferously declares that it's the other guy's fault.

Can he get away with it? It will, of course, always depend upon the facts, but probably not. [See *Federal Home Loan Mortgage Corporation v. Nappy, ___A.D.2d___, 678 N.Y.S.2d 642 (2d Dept. 1998).*]

Where's the check?

Here, plaintiff proceeded to judgment of foreclosure and sale but rather than selling the property, entered into a stipulation whereby a sale would be avoided if the borrower made 11 monthly payments of combined arrears and current mortgage installments on the first day of each of those months. Upon default, the plaintiff could go forward without notice to the borrower – all typical stipulation concepts.

As it happens, the borrower defaulted almost immediately and the servicer moved forward and set a sale. Not content with having delayed the case with the stipulation, the borrower then attacked the case via an order to show cause to stay the sale, averring that the servicer either lost or failed to cash some of the checks, thus resulting in a declaration of default that was either in bad faith or was the servicer's fault!

> *Nor did the jumble of checks and receipts offered by the borrower in support of his attempt to stay the sale establish full and timely payment.*

Bruce J. Bergman, author of the three-volume treatise, **Bergman on New York Mortgage Foreclosures**, Matthew Bender & Co., Inc. (rev. 1999), is a partner with Certilman Balin Adler & Hyman in East Meadow, N.Y., outside counsel to many major lenders and servicers, and an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

The danger, of course, with a borrower's posture like this is that a servicer might be placed in the difficult position of proving a negative: "No, we didn't lose the checks, we never got them."

It didn't work

The borrower's ploy didn't work this time. Fortunately, the record showed that essentially all of the borrower's stipulation payments were late and were short of the full suns owed. Nor did the jumble of checks and receipts offered by the borrower in support of his attempt to stay the sale establish full and timely payment.

Consequently, the borrower was found in violation of the settlement stipulation and the servicer was entitled to immediately reschedule the foreclosure sale.

Whether this New York case sets the standard for all jurisdictions is at best an imponderable. The measure of proof will always be critical.

What is especially heartening, though, is that the court was not willing to honor a facile and transparent claim that the servicer lost the checks. There had to be proof of payment by the borrower.

Absent such proof, the stipulation does control. And in the end, this is but one of a number of cases for the comforting proposition that a foreclosure settlement stipulation really does mean what it says.