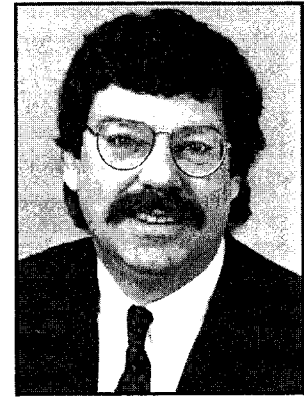

BERGMAN ON MORTGAGE FORECLOSURES . . .

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Co-Op Foreclosure Methodology — What is Your Choice?*

It may be hard to imagine why any lender or servicer would choose a longer method to foreclose on a co-op when a shorter one is available. So perhaps this is merely an academic exercise — which should hardly be imposed upon anyone's busy schedule.

But wait a moment. Lenders and their counsel who have encountered co-op foreclosures in New York can no doubt attest that virtually without exception, the only bidder ever present at the sale is the lender itself. Such could easily suggest that the best approach to co-op foreclosure is to speed to the sale as soon as possible. If the whole exercise is futile (at least in obtaining an outside bidder) what's the point of stretching out the procedure? For the very reason, though, that no one is likely to buy at the sale, maybe affording the defaulting borrower more time for a rescue could be helpful. Exactly how often time will present salvation is highly problematical, but it just might lend some utility to this discussion.

Before returning to the practical premise for a final look, an underlying inquiry is, what does the law say about how co-op foreclosure is to be pursued? The answer is somewhat imprecise because there is no statute which says "co-op foreclo-

sure here." *Mortgage* foreclosure (and remember that the security interest in a co-op is not a mortgage even though it has similarities) clearly has a methodology founded in statute. (That is RPAPL Art. 13, which also has substantial case law interpreting it.) Co-ops are not mentioned in that statute, but it seems both reasonable and appropriate to employ that framework — so long as the time it inherently engenders is not a disadvantage. It is well accepted, however, that co-op lien enforcement is encompassed by the Uniform Commercial Code (UCC Art. 9) applicable to — which is the nature of a co-op. (The UCC doesn't mention co-ops either but because a co-op is *personally* there is no doubt that the UCC applies.)

If we think a secured party has a choice to employ either the mortgage foreclosure approach or the UCC, the next question is, does any authority disagree? Would anyone *deny* a lender the more leisurely path? The answer here is yes, but the authority is perhaps questionable.

One case in New York from 1994¹ considered an application for appointment of a referee to compute in a co-op foreclosure case and denied it, reasoning that only the

UCC was available for co-op foreclosure. (The court then appointed a referee, but with the powers denominated as to hear and determine rather than compute — a distinction without enormous difference.)

In reaching this somewhat odd conclusion, the mentioned case relied upon an earlier decision² which ruled that the procedure to pursue the pledged security in the co-op situation (the shares and the proprietary lease) was enforcement of a security interest pursuant to UCC Article 9 rather than summary recovery of real property pursuant to RPAPL Art. 7.

Although the earlier decision seems correct, it does not by its terms preclude an actual co-op foreclosure in the form of a mortgage foreclosure on real estate.

So all this remains murky at best. It seems safe to say that a lender could comfortably elect between the traditional foreclosure route and the UCC method. Whether anyone would want to eschew the much faster UCC version though is questionable. If the hope is that enough time will allow a stressed borrower to emerge from the dilemma, maybe the slow way isn't a bad idea. But when its just time to cut the losses, look to the UCC.

Endnotes

1. Bank of New York v. Carr, 161 Misc. 2d 332, 613 N.Y.S.2d 572 (Sup. Ct. 1994).
2. Fundex Capital Corp v. Reichard, 172 A.D.2d 420, 568 N.Y.S.2d 794 (1st Dep't 1991).

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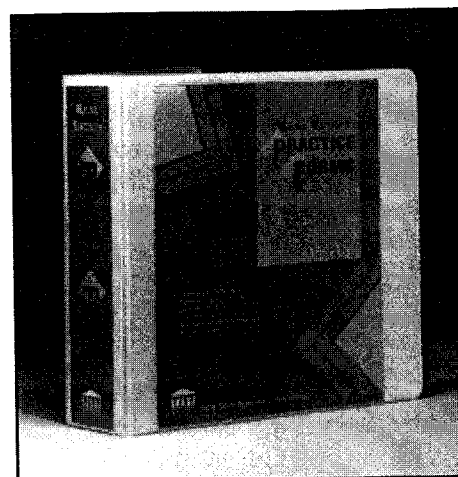
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