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FORECLOSURE

Consequences of Delay And Interest Accrual

The issues of delay and interest accrual can potentially create problems and is an incentive for servicers to refrain from inattention to the foreclosure process.

BY BRUCE J. BERGMAN, © 2000

It is commonly accepted that delay is almost without exception - to use the vernacular - a bad thing. Consequently, mortgage servicers do everything possible (most of the time) to encourage the mortgage foreclosure case to move along.

After all, interest accrues during any period of delay and for every day that interest grows, the equity cushion may diminish. In turn, the specter of a deficiency increases. Of course, the government - sponsored enterprises - or any other investor for that matter - have guidelines that are another impetus to proceed with dispatch.

All that is a given. There is then the seemingly pedantic legal concept that in an equitable action, the award or recovery of interest is discretionary with the court (Note: Grossman v. Pendant Realty Corp., 221 A.D.2d 240, 634 N.Y.S.2d 61 (1st Dept. 1995) and Erhal Holding Corp. v. Rusin, 252 A.D.2d 473, 675 N.Y.S.2d 138 (2d Dept. 1998) are but two of a series of cases in New York standing for this proposition. Also refer to New York's practice statute, CPLR §5001(a)).

Let's rush to explain this further because it is the heart of this warning. In New York, for example - and this will be true in many or most judicial foreclosure states - a mortgage foreclosure action is seen as something different from other actions, such as a suit on a promissory note.

The case involving a promissory note is an "action at law." The mortgage foreclosure case, however, is an "equitable action," thereby triggering the court's equitable powers. That is., the court can be much more involved in exercising discretion to do that which is perceived to be equitable, i.e., fair.

When it comes to weighing the rights of borrowers compared to those of lenders or servicers, mortgage holders are heard sometimes to observe that undue sympathy seems to be lavished upon defaulters.

Be that as it may, the upshot of the noted legal concept which necessitated the elucidation is that in a mortgage foreclosure action, courts in many states have the authority to either reduce or eliminate some interest otherwise due upon a loan in foreclosure. The idea seems somehow unwarranted, but it is a simple fact.

Circumstances

A typical circumstance invoking this power involves the problem of delay. If an action proceeds too slowly, or is halted for some period of time, for any duration of delay attributable to actions of or inactions by the lender/servicer, the court may decide to award no interest at all. Alternatively, it could reduce the applicable rate downward to whatever rate is considered appropriate.

This declination to award interest can occur at different stages. For example, a court might refuse to confirm a referee's computation of default interest, substituting instead the note rate. Or the court could declare that the judgment of foreclosure and sale shall bear no interest whatsoever.

Another permutation (and there are many) is removal from any pursuit of deficiency, interest applicable to all episodes of delay in the action which were the fault of the plaintiff.

If lenders and servicers invariably intend never to delay a foreclosure action, why address this issue? The ready answer, unfortunately, is that lenders and servicers sometimes do delay a case (whether by volition or by accident) or make a mistake in doing something which should not be done.

Although the examples are too broad to present here, sometimes a delinquent file can be lost, misplaced or somehow forgotten.

On occasion, servicers file for bankruptcy and tens of millions of dollars worth of defaulted loans repose in limbo for months or years. There can be confusion in a loan sale portfolio. Or, a borrower could suggest a settlement proposal and the consideration of the offer by a multiplicity of departments consumes month after month.

Then there is the instance of a borrower tendering full arrears to reinstate (when the mortgage says it must be accepted) or remitting enough to satisfy the mortgage, but the servicer for some reason rejects the check. Howsoever far a foreclosure might proceed after such a servicer's blunder would be a period ripe for a court to refuse an interest award.

Lenders and servicers usually need no further incentive to refrain from inattention to the foreclosure process, but just in case a salutary warning would be helpful to a few, the ideas presented here can serve the purpose.

At least there should be an awareness that the consequences of delay can sometimes pose yet another dangerous component.

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