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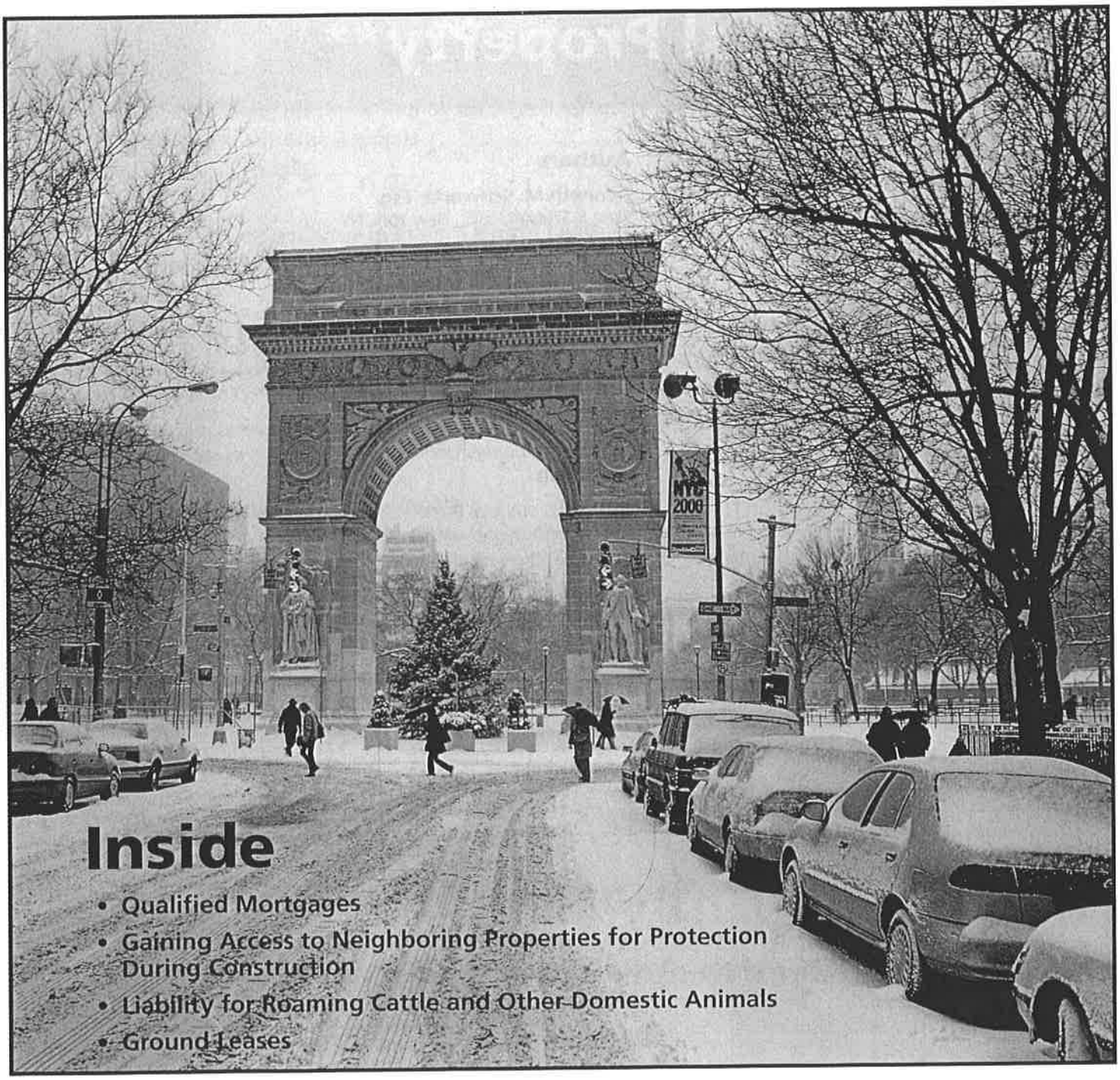

Inside

Bergman on Mortgage Foreclosures: Danger in Settlement Negotiations Redux

By Bruce J. Bergman

If there was ever a time that foreclosing lenders were under pressure to settle cases—at least those involving home loans—today is the time. Courts insist upon it; the government demands that it be done and there is the mortgage lender or servicer's own desire to achieve a performing loan. So there can hardly be anything wrong in pursuing some settlement path—except that in actuality, danger lurks if the lender or servicer does not assiduously make clear its position.

To immediately make the point, a foreclosure can be upset at any stage if the borrower comes forward and convinces a court that he thought settlement negotiations were proceeding and that he therefore was not obliged to defend the case. We called attention to this anomaly at some greater length in our *New York Law Journal* article of December 31, 2008 entitled "Entertainment of Settlement Could Backfire on Lender," at 5, col. 2. [Reference there for the noted lengthier review is invited.] And it has happened again in a recent case: *Wells Fargo Bank, N.A. v. Chateau*, 36 Misc.3d 280, 947 N.Y.S.2d 773 (2012).

We hasten to observe that this is rarely an issue in a commercial foreclosure, a notation which supplies an enlightening thought. As many readers will recognize, in the commercial foreclosure action, the typical magnitude of the case, and as a matter of custom, the foreclosing plaintiff has both the wherewithal and the desire to assure that settlement negotiations do not lead to borrowers' untoward claims that some concession had been made by the lender. This is accomplished by the lenders' insistence that borrowers sign a pre-negotiation letter before discussions can proceed. Among other things, such a letter provides that no change in the mortgage document obligations is arrived at unless there is a new writing signed by the plaintiff and that the foreclosure proceeds during any settlement negotiations, all without waiver of any of the plaintiff's rights. [There is more to it than this, and for those who wish to explore it, attention is invited to 2 *Bergman on New York Mortgage Foreclosures* §24.07, LexisNexis Matthew Bender (rev. 2012)].

This formality, however, is rarely pursued in the residential foreclosure case, which then leaves lenders and servicers open to a possible charge that a borrower believed settlement was in the offing. The case which was the subject of the earlier-mentioned article is worthy of revisiting, but we will move on to the new case since the article can be consulted.

In the recent case, a borrower had defaulted in the foreclosure action and later moved to vacate that default claiming that his lawyer had failed to interpose an answer. For reasons not particularly relevant here, the court was unimpressed with that excuse. In addition, though, the borrower stated that its (inattentive) attorney had assured him that the foreclosure action would not proceed while negotiations took place and that his counsel had made five attempts to obtain a loan modification.

Although all this lacked any documentary support (upon which basis we opine the court could have rejected them) the court also found that the assertion was combined with the borrower's claim that his failure to timely respond to the complaint was also due to his good faith belief in settlement negotiations. The court then ruled that such a good faith belief will supply a reasonable excuse for failure to timely answer.

While it sounds like the borrower's belief was based upon what his own attorney told him, rather than any representations by the servicer, there was nevertheless some indication that the servicer was entertaining the possibility of a settlement, i.e., perhaps by way of mortgage modification.

The failure here—what led to the court allowing the borrower to vacate the achieved stages of the action—was the absence of a lender written declaration that the foreclosure action was proceeding apace, notwithstanding any possible negotiations or any consideration of a mortgage modification. Without that, the door was open for the court to do what it really wanted to do—give the borrower a chance to submit an answer.

The ultimate damage was that an answer would require a motion for summary judgment and all the expense and delay that portends. It likely could have been avoided by a more dedicated approach to the settlement process—and such is the lesson of the cited case.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel 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.