Bergman on Mortgage Foreclosures: Does the Conference Mandate Apply to *All* Residential Property?

By Bruce J. Bergman

The short answer to the question raised by the title of this piece is "no." A recent case confirms this concept, but merits further comment here. [*Independence Bank v. Valentine*, 113 A.D.3d 62, 976 N.Y.S.2d 504 (2d Dept. 2013)].

The focus of the issue is differentiating between a commercial case and what is denominated a home loan foreclosure. That should not be so obscure but tends nonetheless to be a contentious point.

In particular, the facts here involved a not uncommon commercial loan transaction. This is a typical scenario: the borrower is a corporation or an LLC, obtaining a loan for some business purpose. Owning no real estate to pledge (or owning real estate of insufficient value) the lender requires a guaranty (usually from the principal of the borrower entity) with that guaranty then secured by the pledge of the principal's home. (It could be other property, of course, but most often with smaller corporations the officer's only real property asset is the home.)

So when there is a default and a foreclosure is begun, does the usual requirement to conduct a settlement conference (a very time consuming process) apply? The decision here confirmed the rule in the negative, something well understood by mortgage servicers' attorneys, but often ignored or disputed by borrowers' counsel.

The answer comes from the statutory requirement for the conference which in turn refers to the foreclosure statute for the definition of a home loan. The conference imperative originates in CPLR §3408. This requires a settlement conference to be conducted in "any residential foreclosure action involving a home loan as defined by RPAPL 1304 and where the defendant resides at the property." Especially because the foreclosure statute—RPAPL Article 13—refers also to "residential property," being precise about the definition of a home loan is widely important. Per RPAPL 1304(b), this is a home loan, inclusive of an open-end credit plan, but not encompassing a reverse mortgage where:

- The principal amount at inception did not exceed the conforming loan size established by Fannie Mae for a comparable dwelling; and
- The borrower is a natural person; and
- The debt is incurred—by the borrower—and primarily for personal, family or household purposes; and
- The loan is secured by a mortgage whereupon is presently located, or in the future will be located, a structure intended principally to be used as a one-to-four family residence and which is or will be occupied by the borrower as his principal dwelling.

Here, the actual borrower was a corporation which obviously was not a natural person. (The owner of the home was a guarantor, not a borrower.) Moreover, the purpose of the loan was for business (purchase of equipment to set up a store) and therefore this other branch of the definition of home loan was not met either. Perhaps not surprisingly, counsel for the owner fought for the conference, the definition of a home loan notwithstanding. The court, however, confronted the issue directly and lucidly ruled accordingly.

In sum, while the conference obligation applies to many residential foreclosures, it does not apply to *every* residential foreclosure. It therefore never applies to a commercial case, nor does it apply to this type of commercial case even though the property mortgaged is ultimately a home.

All of this is good to know for lenders and servicers involved with commercial loans. But it also underscores the continued tribulation that lenders and servicers suffer in New York. Their merits aside, the host of borrower oriented statutes passed in recent years have, in many instances, created traps for the foreclosing plaintiff which either slow up the process or defeat it. Here, both the trial court judge and the appellate division were correct and the lender was victorious. But as is commonplace in foreclosures, the action was delayed and the lender had to suffer the time and expense of the appeal process to be vindicated on an issue which should not be recondite but rather should be well understood and accepted. This has been and may continue to be an ongoing problem.

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*.