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BERGMAN ON MORTGAGE FORECLOSURES:

Effect of an Appeal on a Foreclosure

By Bruce J. Bergman



This sounds like the obscure stuff, but attorneys know it is a real issue. True, heavily litigated foreclosures are a minority of the cases, but they

do happen, and knowing proper strategy in tough situations is a worthy advantage.

When a mortgage foreclosure action is litigated, it is always possible that an aspect of that litigation could be an appeal. Suppose, for example, a judgment of foreclosure and sale is granted (which, of course, authorizes conducting a foreclosure sale), but the borrower files an appeal. Although there is room for some middle ground, it is most often reasonable to assume that the appeals court will either affirm or reverse. Should the foreclosing plaintiff await the result of the appeal, to avoid whatever consequences may emerge from the uncertainty, or should it dodge delay and speed to the presumed resolution of foreclosure sale? And if a foreclosure sale is conducted, what would be the effect on the ownership of the property if a reversal puts the foreclosure back to an earlier stage, or worse, dismisses the action?

A case of recent vintage provides some answers.¹ The ruling there was that a good faith purchaser is entitled to retain the ownership evidenced by the referee's deed even though the foreclosure was reversed on appeal. Such a result then confines the foreclosing plaintiff to an action solely upon the monetary obligation.² Critically, that the foreclosure sale purchaser may have had actual knowledge of the appeal does not vitiate his position as a bona fide purchaser for value.

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The answer then to the question: if the foreclosing plaintiff is very confident in the result of the appeal, there isn't so much to debate, although these things can never be so certain. To the extent there is some chance of reversal on appeal, if the plaintiff is the purchaser at the sale, danger seems to be eliminated. The only real jeopardy would result upon the confluence of a reversal, a third party bidder at the sale and a

remaining debt that couldn't be recouped from the borrower.

Endnotes

1. *Aubrey Equities, Inc. v. Goldberg*, 247 A.D.2d 253, 668 N.Y.S.2d 598 (1st Dep't 1998).
2. *Id.*, citing *DaSilva v. Musso*, 76 N.Y.2d 436, 560 N.Y.S.2d 109, 559 N.E.2d 1268 (1990).

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