Bergman on Mortgage Foreclosures

Election of Remedies—OK to Foreclose Even Though Suing on Note!

By Bruce J. Bergman

The title of this column merits a usually hokey examination point because a principle which has been a source of much confusion (although we opine that it is established) is pointedly clarified in a recent case—on appeal: *VNB New York Corp. v. Paskesz*, 131 A.D.3d 1235, 18 N.Y.S.3d 68 (2d Dept. 2015).

To be candid, most mortgage lenders and servicers do not enter the byzantine world of election of remedies (known in other states as the one action rule). When there is a mortgage default, they will foreclose the mortgage. In rare instances—and there are good reasons for it—the lender will sue on the note. Examples of apt occasions to pursue on the note include: the mortgage has been extinguished by a senior mortgage or a tax lien foreclosure; or, the borrower or mortgagor personally liable for the debt have deep pockets and the foreclosure presents hurdles. But attempting to do so both at the same time is only rarely an issue.

Such does not mean, however, that the necessity for dual actions never occurs or is unimportant. While typically the arena of commercial cases or more sophisticated or unusual situations, the fact is that proceeding on two tracks can be helpful and meaningful. The problem, though, has been the notion that it is either one or the other; you can't do both. At least such is the prevailing wisdom. But it is not necessarily so, as the cited case illuminates.

This admittedly difficult subject is best approached by noting three aspects of New York statute which affect the subject and then lead to a conclusion. The first is the overall edict (RPAPL §1301) that the holder of a note and mortgage is empowered to proceed at law to recover on the note, *or* proceed in equity to foreclose the mortgage—but must elect only one of these alternative remedies and cannot do both. That is the general proposition which suggests to most that the choice must indeed be one or the other.

Next is the section [RPAPL §1301(1)] addressing that action at law, the suit on the note, which provides that when a plaintiff obtains a final judgment in an action for any part of the mortgage debt, there is then a prohibition against commencing or maintaining a foreclosure action, *unless* an execution on that judgment has been returned fully or partially unsatisfied.

Then consult the reverse provision [RPAPL §1301(3)] which on the other hand bars a party from commencing an action at law—for example, a suit on the note—to recover any part of the mortgage debt while a mortgage foreclosure action is pending but has not itself reached final judgment—at least without leave of the court to do so.

Here, in the new case, the mortgage holder had begun an action for replevin (among other things) and later commenced a foreclosure action. Because the action at law was initiated first, that means the section dealing with a money judgment controls (not the section about starting a foreclosure first) and underscores that because no final judgment had been entered in the replevin action, there was no preclusion of an action to foreclose the mortgage.

This clearly confirms what the statute says. If you sue on the note but don't arrive at a judgment, you are free to also begin a foreclosure action. Once you get a money judgment you cannot begin a foreclosure action until that judgment is returned by the sheriff fully or partially unsatisfied. The reverse, which did not occur in this case, is that when a foreclosure is begun, its existence is a bar against suing on the note, unless there are special circumstances that would lead a court to grant specific permission to sue on the note.

Complicated? A bit, but this case helps a great deal. It is worth consulting in one of those instances where the mortgage holder has a need to think about something other than a pure foreclosure action.

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