Has It Really Come This Far—Sympathy As a Defense to Foreclosure?

A bizarre foreclosure case calls into question the ability of servicers to navigate the legal system with confidence.

Not intending to be overly pedantic, the beauty of the rule of law is the fairness, the even-handed approach, the role of precedent—all of which mortgage holders could traditionally rely upon. There were always aberrations, of course, but there was enough order in the system to avoid chaos.

This may now be changing. Granted, reciting anecdotal incidents is somewhat subjective and is not a substitute for an empirical survey. Nonetheless, being in the trenches of foreclosure litigation does afford a genuine look at reality.

In this regard, here is a frightening scenario for any mortgage servicer or mortgage holder.

A foreclosure is begun on a defaulted mortgage. The borrowers are duly served but default in the action. The servicer moves for appointment of a referee—the next step in a New York foreclosure (and common in many other judicial foreclosure states). This is all standard stuff so far.

One can sense what is coming with the observation both that the borrowers did not oppose the motion to appoint the referee and that the plaintiff's presentation was complete and met all standards. Nonetheless, "No," said the trial court, "motion denied."

It is hard enough nowadays to avoid some statutory, clerk-made law or judicial land mine that halts a foreclosure. But when the case is punctiliously prosecuted, success should be the reasonably expected result.

In some way unstated by the case, the borrowers had apparently conveyed to the court information about their claimed plight: apparently some physical condition requiring significant medical expense. It was that information that led the court, strictly on its own, not only to deny the reference (and thereby stall the foreclosure) but to direct that the borrowers thereafter make reduced monthly mortgage payments, to submit to plaintiff proof of their "excessive medical bills" and to increase the payments once the condition improved, then to make additional payments to cover the difference between the amounts due and the reduced payments made. (It is not clear how long payments would be reduced, what the numbers would become, how long all this might prevail, and when—if ever—this scheme might somehow vitiate the default.)

It should immediately be underscored that there was no indication that the servicer had an opportunity to argue against this imposition or to explain that a casual presenting of assertion of medical expense is not a defense to a mortgage foreclosure action—even if all was established as supportable and true. And as noted, the court directive was so ambiguous that it would ensure the servicer's being mired in uncertainty for an undefinable period—certainly not the way to navigate a legal action.

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In one sense, however, disaster was avoided. Fortunately for lenders and servicers, the decision was reversed on appeal (see *Emigrant Mortgage Co. Inc. v. Fisher,* New York, 2011). On that appeal it was found that while generally a court can in its discretion grant relief warranted by plain facts clearly presented by all parties and proven, the relief cannot dramatically depart from what is sought, and no prejudice to any party can result. Most critically, it was ruled that stability of contract obligations must not be undermined by judicial sympathy. From a purely *legal* standpoint, this is the most critical part.

Lenders and servicers are all too aware of the atmosphere in many states, New York certainly manifestly among them, where borrowers are viewed as oppressed by lenders, needing special aid from the courts. This is reflected both in legislation and in many decisions. While, of course, fairness to borrowers is not something anyone would argue with, when courts proceed to, in effect, void provisions of the mortgage contract and impose terms at variance with that contract, lenders and servicers can understandably be dismayed.

But here the principle presented was that such a departure from the requirements of the contract could not be countenanced. The point was strongly made as well that the relief granted at the trial court level exceeded the scope of the court's authority, citing a number of recent cases where appeal-level decisions have gratifyingly found that lower courts have gone too far.

While this ultimate resolution (rationality prevailing on appeal) is most assuredly comforting—and easily confirmed as correct—it does not guarantee that further rulings refusing to honor the mortgage contract will not continue to bedevil lenders and servicers. Moreover, it fails to assuage the practical problem that undoubtedly survives.

At the trial court level, courts continue from time to time to evidence sympathy for borrowers, which then leads to avoidance of precedent. While clearly erroneous declarations by lower courts can find resolution in an appeal court, servicers should not so often be banished to the time and expense of an appeal process, a fate especially antithetical to the foreclosure construct where the investments suffer with each day of delay.

In the end here, the outcome supports the rule of law. It is welcome and helpful. But the practical cost still portends serious issues.

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