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BERGMAN ON MORTGAGE FORECLOSURES . . .

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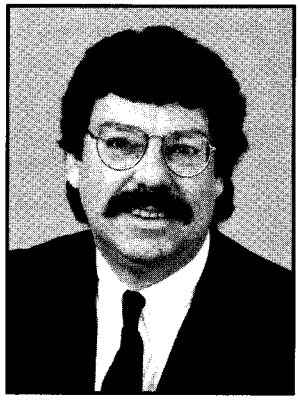

Honor Thy Notice of Appearance (Or, a Shortcut to Avoid)**

Understandably one of the most compelling lender's imperatives is moving the foreclosure case along as quickly as possible. A foreclosure action, afterall, classically proves the old proverb that "time is money," so there is good reason why the mortgage holder wants the matter to proceed apace. And this need is particularly acute in New York where the impositions of judicial foreclosure methodology in a congested and litigious forum create a process far more time consuming than anyone (except, of course, the borrower) would prefer.

All that being so, foreclosing plaintiff and counsel will pursue all avenues to reduce the time consumed, thus ameliorating the problem. Knowing when to eliminate an otherwise necessary or permissible defendant is one sage approach. Skill in presenting a motion for summary judgment is another. Doing things right the first time is also a recommended problem solver, among a host of methods which compose the skilled pursuit of foreclosure nuance.

But this missive is not a lesson in speeding the case along. Rather, it presents a new message from case law urging avoidance of temptation in the zeal to add more zip to the case. It all has to do with the effect of a notice of appearance.[1]

Assuming an answer is not to be interposed, a typical and appropriate defendant's response to a foreclosure complaint is the notice of appearance. Submitting that document entitles a defendant to actual notice of **all** subsequent proceedings in the foreclosure action. In turn, this means that every plateau in the case must proceed upon notice of motion. Then too, a referee's hearing to compute is mandated. This easily grafts months on to the progress of the case. That is, it causes delay. So, from a defendant's point of view, the case proceeds more slowly (certainly an advantage to **some** defendants) while at the same time assuring scrutiny of the plaintiff's actions — accurately computing the mortgage debt conspicuous among them.

Obviously, though, from the mortgage holder's perspective the extra months are usually most **un**welcome. That emotion can lead some attorneys (expressing it diplomatically) to a lower level of care than the rules require. What if, for example, counsel to the foreclosing plaintiff "neglects" to obtain the referee's appointment on notice, even though a party was entitled to notice via a notice of appearance? That clearly and absolutely violates the rules of practice. But not every defendants' lawyer is fully aware of the effect of the notice of appearance. Even if they **do** know, they many not care very much because missing notice of some stages may not be so meaningful. And even if they care, their client might not have the wherewithal to launch an attack to right the wrong. In sum, some lenders' attorneys unfortunately adopt the view that a studied avoidance of notice of appearance dictates can save much time in a multitude of cases because it will only be the rare exception where the opposition is wise enough and well armed enough to effectively protest.

Because experience suggests that playing by the rules alone is insufficient incentive for some practitioners, perhaps the holding of a new case will provide the impetus.[2] There,

a junior mortgagee served a notice of appearance in the foreclosure action. No subsequent papers, however, were served upon the subordinate mortgage holder.

A second request was made, which elicited only service of a notice of sale. A foreclosure sale was conducted and plaintiff was the successful bidder. The response of the neglected junior mortgagee was a motion to have the referee's deed made subject to the second mortgage — all on the ground that plaintiff failed to serve papers or provide required notice of any of the proceedings in the action. The courts agreed.

The apparently wily plaintiff suffered an unexpected reversal of fortune in the form of a switch in priorities. The junior mortgage, which could have been extinguished, wasn't. Whether this resonant ruling will cool the ardor of the slick or the careless is speculative. At least it affirms the rules of the game and warns of a shortcut to avoid.

Endnotes

1. For a complete review of responses to the foreclosure complaint, see 1 *Bergman on New York Mortgage Foreclosures*, Chap. 19.
2. Home Savings Bank v. Chiola, 203 A.D.2d 525, 611 N.Y.S.2d 235 (2nd Dept. 1994).

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