How To Deal With Incorrect 'Answers'

Servicers Can Put A Wayward Case Back On Track

BY BRUCE J. BERGMAN

In judicial foreclosure states, among the innumerable events that are a plague upon mortgage foreclosure case progress is the submission of a baseless answer by some defendant. The moment that occurs, the lender or servicer must move for summary judgment and possibly absorb the interest cost engendered by the considerable delay, to say nothing of the increased legal fees attendant to what is now a litigated case.

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Prevailing wisdom probably suggests that there is no solution for this dilemma other than vigorously litigating the case and banishing that transparent answer. But even in this too frequently irrational world, rationality can *sometimes* present salvation.

Hastening to the point, there are occasions when a defendant can be *persuaded* to withdraw an answer. How and when to attempt the approach merits some background.

Multiple defendants

As you know, a foreclosure case (in a judicial foreclosure state, at least) can have multiple defendants in addition to the borrower or property owner. These include, for example, junior mortgagees, judgment creditors and mechanic's lienors.

Consider the latter as an example. A lien is filed, is revealed of record in the foreclosure search and elicits naming the lienor as a party defendant to unburden the title of that interest.

The lienor is served and probably doesn't even know why. He turns over the pleadings to his attorney, who likely has little or no experience with mortgage foreclosure litigation. Since an attorney's natural - or trained - inclination when sued is to submit an answer, that is precisely what the lawyer does here.

An answer postpones a conclusion and tends to clarify a plaintiff's position so it appears, and it is assumed, that some worthy goal is served. But is it? The answer is most often no, even though counsel to the mechan-

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ic's lienor will not know that *unless told.*

And that is precisely the point of this missive.

A junior lien

Overwhelmingly, the mechanic's lien is in actuality junior and subordinate to the mortgage being foreclosed. That being so, the answer will not defeat the case.

The only definition of success for the holder of a junior interest (other than the owner selling the property with generous equity and paying off everyone) is to claim against such surplus as the foreclosure sale will generate. Surplus is diminished, however, concomitant with the time and effort expended by plaintiff in forging through the foreclosure.

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Lenders and servicers need not be reminded that the passage of each day in the foreclosure case increases the accrual of interest. The larger the mortgage and the greater the rate of interest, particularly where a default rate may apply, the greater will be the debt due the lender. Insofar as the answer then necessitates a motion for summary judgment (or perhaps even a trial), many months are added on to the case. Then, of course, additional legal fees are incurred that can become further increments to the debt.

All these factors portend reduction or elimination of surplus. Yes, lenders and servicers know this, but our not-so-hypothetical attorney for the mechanic's lienor may be completely unaware of the consequences resulting from that seemingly innocuous answer he submitted.

Take the initiative

Defendant's attorney *should* be enlightened, and that is where self-help can convince the lawyer to withdraw the answer. So, servicer's counsel is well advised, on some occasions, to respectfully make these points in a letter to the party who interposed the answer.

The explanation *is* sensible (it is, after all, correct) and on some occasions is favorably received. The urging is for this defendant's attorney to substitute some less time-consuming mode of appearance (precisely what the document is called is a practice issue, which can vary from state to state; one version is a notice of appearance and waiver) in the place of the answer.

The servicer's attorney should consider preparing the document and enclosing it with the letter to ease compliance.

Guiding the borrower

This method becomes somewhat more problematic where the answer originates with the borrower.

He is typically in a more desperate situation, grasping at any chance to postpone the inevitable. The delay engendered by submission of an answer *could* be advantageous for the borrower if there is a glimmer of hope that given enough time, the property can be sold or refinanced, thus saving the day.

There is, though, another aspect of the equation where the borrower is concerned. Not only does delay and litigation diminish surplus, it increases the likelihood and then the amount of a *deficiency*. Where the loan is recourse, the borrower can be personally liable for the shortfall. Because such liability is most often worthy of avoidance, even an otherwise recalcitrant borrower could be amenable to withdrawing an answer.

Obviously, all this involves dynamics, personalities, facts and circumstances. There is no rule. There is, nonetheless, a suggestion that a sage letter under the right conditions can be beneficial.

Even if persuasion as a tool is successful only some of the time, each productive instance is one less headache, one less possible loss. These can add up and become meaningful across a servicer's portfolio. ■

Find It In This Month's Resource Directory On Page 38