

BERGMAN ON MORTGAGE FORECLOSURES

Interesting Look at Redemption—and a Dilemma for Lenders and Borrowers

By Bruce J. Bergman

We all understand that overwhelmingly the mortgage holder wants to be paid—the goal is not to sell the property for its own sake. It is also fairly well recognized that the time to redeem, to pay off the mortgage, exists and continues up until the moment the hammer falls at the foreclosure auction sale. [This latter conclusion can be obscure. For those wanting a detailed analysis of the subject, see 1 *Bergman on New York Mortgage Foreclosures* §2.21, LexisNexis Matthew Bender (rev. 2015).]

While redemption is usually pursued by the borrower/property owner, any other party with an interest in the mortgaged premises has a right to redeem as well. But how does a party know precisely what sum is due? The simple—and practical—answer is that a payoff letter is requested from the mortgage holder. Because the right of redemption is so sacred [see discussion at 1 *Bergman on New York Mortgage Foreclosures* §4.07, LexisNexis Matthew Bender (rev. 2015)] the mortgage holder needs to issue that payoff letter lest it be deemed interference with the right of redemption and be compelled to send the letter with a likely counterproductive stay of the action imposed.

The last point to present before tackling a disturbing new case on this subject is the method to redeem: an unconditional tender of the full amount due.

This was all confirmed by the new case [*LIC Assets, LLC v. Chriker Realty, LLC*, 131 A.D.3d 946, 13 N.Y.S.3d 41 (2d Dept. 2015)] but the facts may



lead to some confusion on the part of both lenders and borrowers.

Here are the somewhat uncommon facts leading to the ruling which in turn give pause.

After the judgment of foreclosure and sale was entered and the foreclosure auction was scheduled, a non-party took an assignment of a junior mortgage on the property in foreclosure—that assignment from a party who had appeared in the action but had not in any way opposed it.

One day before the auction sale, the assignee faxed a letter to the plaintiff advising of the assignment of the mortgage to it and asking to be provided prior to the auction with a payoff amount pursuant to the judgment. The plaintiff did not respond to the request, the sale was conducted and the plaintiff was the sole bidder.

Not surprisingly—and editorially we might note in conformance with general understanding—the assignee moved to set aside the sale to permit it to redeem. The trial court *denied* the assignee's motion and the Second Department affirmed.

The ruling was that the letter from the assignee requesting the payoff amount—even were it to be deemed a stated intention to redeem the mortgage—was not the equivalent of an unconditional tender of the full amount due prior to the sale of the property. Thus, having not met the definition of a tender, redemption in a sense was no longer an issue.

So what's the problem?

From a foreclosing lender's point of view, borrowers and others often request payoff letters, sometimes repeatedly, and then never pay. How many times then must such letters be sent? (It's an open question.) And if

a party requests a payoff but one day prior to the sale, is the lender obliged to go through the exercise of preparing and sending it, and then worrying about a clash of a tender interfering with the sale?

It may be that in this case the assignee purposely waited until the eve of sale to make its request and such a dilatory tactic played a role in the decision. But if a party entitled to redeem otherwise makes a request for a payoff letter (again needing to know what amount to tender) can the foreclosing lender simply ignore that request? The answer has always been "no," but this case suggests that—at least under the unusual events encountered—the answer is "yes."

It is therefore not quite clear when a lender can ignore a payoff letter, nor is it apparent when a party wishing to redeem hits a cutoff point when it is too late to request revelation of the sum needed to redeem.

A party with a right to redeem should not be so careless as to wait until the eleventh hour to request a payoff letter. But this decision only serves to cloud some of the principles relating to redemption. Precisely what it means in the end is perhaps an imponderable.

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