REPRINTED FROM

SERVICING MANAGEMENT

THE MAGAZINE FOR LOAN SERVICING PROFESSIONALS ■ VOL. 10, NO. 8 APRIL 1999

FORECLOSURE

It's Like A High-Wire Act!

What To Do When An Overzealous Referee Delays Your Case

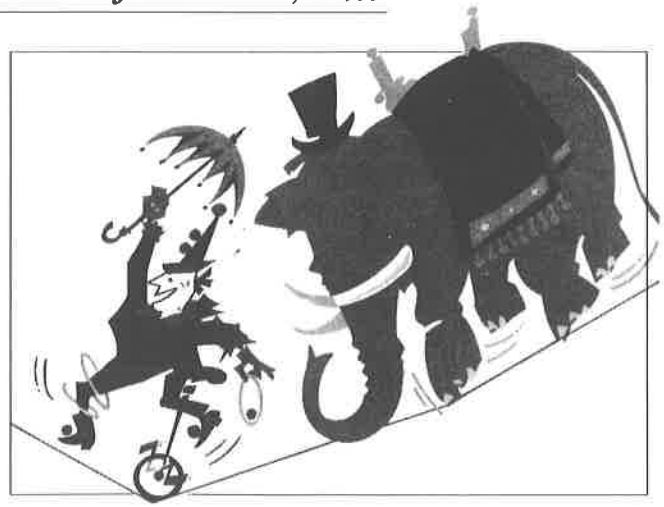
BY BRUCE J. BERGMAN, © 1999

In judicial foreclosure states, generally three outside forces can potentially delay the progress of a mortgage foreclosure case:

- congested court calendars (for example, in New Jersey or downstate New York);
- dilatory borrowers (hardly a shock there); and
- recalcitrant referees.

The main problems with referees, particularly at the computation stage (they can also be appointed to conduct the sale, as in New York), is that they may be neglectful or too busy. Either way, if they refrain from signing the computation or report, the foreclosure is impeded. Vigilance and regular followup by servicer's counsel can help, but on some occasions, a motion is needed to replace a non-responsive referee.

There is another side to the equation, though, that of the hyperactive referee. Some referees with this predilection may require minutiae of proof in support of every calculation in the report. While that can delay the case and be irksome to the servicer needing to speed through the case and avoid interest accrual, it is difficult to criticize a referee for wanting to be precise and correct. The real problem in this regard is the referee who takes it upon himself to do things that are none of his business.



True, referee's fees to compute can be inadequate, and the $50 allotted in New York is certainly archaic. But then, foreclosing plaintiffs and veteran referees should recognize both that the tasks are not extensive and that there is some element of public service involved.

Don't belittle the referee

None of this is, however, to belittle the referee's role. Although plaintiff's counsel prepares the figures,

the referee should verify them with care and assure that plaintiff derives all the sums to which it is entitled, but nothing more.

It all seems quite elemental. In the mortgage foreclosure in New York, for example, a referee is appointed to compute and determine whether the property is to be sold in parcels. Sometimes, though, a referee may decide to explore other issues - such as service of process - and then apply for a greater fee deemed commensurate with the additional effort. Plaintiff's counsel will explain to the referee (politely above the astonishment) that the job is clearly constrained and the fee really is confined to that $50. There is no doubt about this, but where is it written so that even the committedly overzealous will be persuaded?

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Whether law in New York sets the pace in other judicial foreclosure states is problematic to be sure, but if such pointed clarity didn't exist before, it does now. [Al Moynee Holding, Ltd. v. Deutsch, _A.D.2d_, 679 N.Y.S.2d 400 (2d Dept. 1998).]

A classic situation

This is a classic situation and could hardly be more focused in its meaning. Here was a foreclosure which elicited a summary judgment motion inclusive of a demonstration that the mortgage barred oral modification.

> ***The real problem in this regard is the referee who takes it upon himself to do things that are none of his business.***

The order granting summary judgment appointed a referee to compute. When the defeated borrower decided nevertheless to press the issue of a claimed oral modification of the note and mortgage, the referee took testimony on the point! Having launched into this exploratory sojourn, the referee sought additional recompense - 28.5 hours at $250 per hour.

Incredible as it seems, the trial court confirmed the referee's report and awarded the requested fees. The appeals tribunal disagreed. Because a referee's duties are defined by the order of reference, the referee had no authority to take testimony concerning oral modification of the mortgage. Regarding payment for more than twenty-eight hours of time, absent stipulation by the parties or a specific rate set by the court in the order of reference, "...a referee's fee must be limited to the statutory per diem fee of $50."

As an exclamation point to the holding, the trial court was directed to issue a new order of reference for a new computation before a new referee and a recalculation of the referee's fee – no doubt here about the court's view. Although applicable statutes in New York were never ambiguous, some might have argued that unusual instances could require interpretation; pleasingly, not anymore. This doesn't mean that no future referee will run amuck, just that servicer's counsel is now well armed with law to either convince the referee to stop the wasteful effort or show the court why the law says the referee is wrong. SM