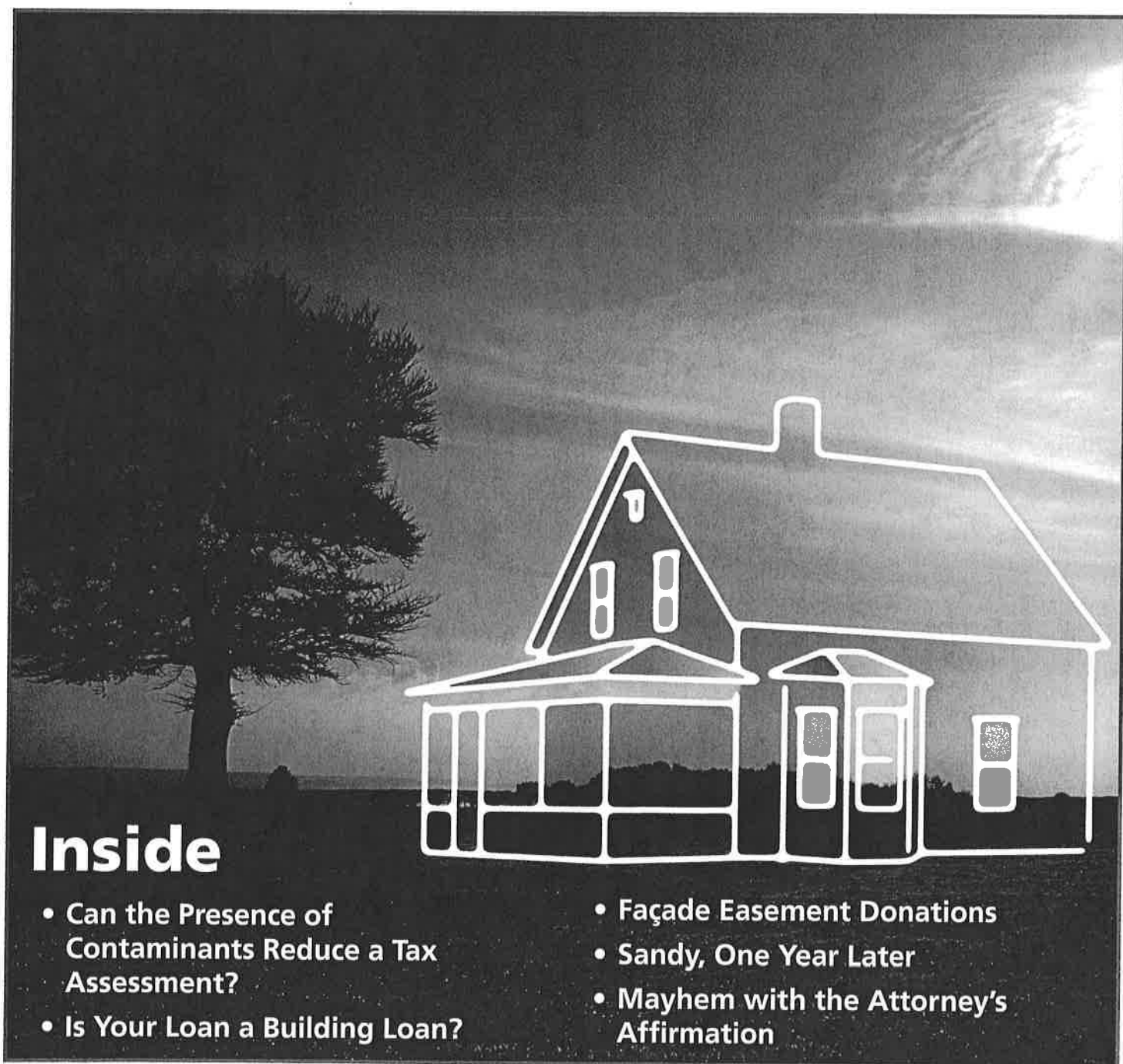


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BERGMAN ON MORTGAGE FORECLOSURES: Mayhem with the Attorney's Affirmation— and a Scary Decision

By Bruce J. Bergman



This is not an issue for commercial mortgage loans, but in the residential arena, lenders and servicers—and conspicuously their lawyers—know about

the attorney affirmation needed in New York home loan foreclosures. A foreclosure action cannot proceed unless an affirmation by plaintiff's counsel is submitted attesting to the accuracy of the plaintiff's documents. (AO 548/10 amended by AO 431/11.) The purpose of the affirmation was to assure courts that all was truly in order and that goal seemed reachable if attorneys had to join in swearing to the bona fides of the plaintiff. But it was not designed to become a trap to avoid the ability to foreclose, which in some instances it has become, as a chilling recent case reveals. [*Aurora Loan Services v. Sobanke*, 101 A.D.3d 1065, 957 N.Y.S.2d 379 (2d Dept. 2012)].

Here is the tale. This began as an ordinary case. The foreclosure was instituted; no defendant answered. (Thus there were no defenses.) There being no answers, the plaintiff submitted an order to appoint a referee—the usual next step in the case. The court responded, however, stating that the order could not be considered, and no referee would be appointed, unless within sixty days the plaintiff submitted the “attorney affirmation.” The court also decided that if the affirmation was not filed

within sixty days, not only would the order of reference be denied, but the complaint would be dismissed as well. (Editorially we could inquire as to where the authority for such a position came from.)

Experience suggests that for many reasons, it can be time consuming to obtain the information necessary and locate the proper parties to prepare the attorney affirmation. It can be surmised that such is what occurred in this case and, facing some delay in being able to prepare the attorney's affirmation, the plaintiff's counsel took the rational step, prior to expiration of the court manufactured deadline, to withdraw its order of reference. This would have then allowed the firm to get the information required for the affirmation.

Instead of responding to the request to withdraw the order of reference, however, and just after the sixty-day deadline had passed, the court, on its own, ordered that the complaint be dismissed—with prejudice—and that the notice of pendency be cancelled. This all meant that the mortgage holder could never foreclose the subject mortgage, even though it was undeniably in default and no one had assaulted the legitimacy of the mortgage or the actuality of the default.

Upon appeal, the offending court order was reversed. The Second Department cited the rule that a court's power to dismiss a complaint on its own must be used sparingly and then only when extraordinary circumstances exist to warrant dismissal of a case. (Citing *U.S. Bank, N.A. v.*

Emmanuel, 83 A.D.3d 1047, 1048, 921 N.Y.S.2d 320).

Mindful of that principle, and finding that there were no extraordinary circumstances supporting dismissal of the complaint with prejudice and cancellation of the notice of pendency, the appellate division found the trial court to be in error. There was, it found, no delinquent conduct on the part of the foreclosing party's counsel, nor was there any evidence of a pattern of willful noncompliance with court ordered deadlines. Instead, the attorneys had simply requested an opportunity to withdraw its proffered order of reference within the sixty-day deadline so that time could be garnered to respond to the request for the attorney's affirmation.

This is yet another example of a foreclosing plaintiff apparently prevailing—in the end—but at the cost of first facing a shocking order and then being constrained to incur the cost and the time of an appeal.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.