

BERGMAN ON MORTGAGE FORECLOSURES: Mortgage Filing Error—And Why Title Insurance Is Vital

By Bruce J. Bergman



Here is a tale to be told primarily because this is the world in which mortgage foreclosure attorneys (and other real estate lawyers) reside. There may be

no lesson in the end (other than explaining why title insurance really is necessary), only enlightenment. [The case making the point is from May 2, 2003; *Coco v. Ranalletta*, 305 A.D.2d 1082, 759 N.Y.S.2d 274 (4th Dep't 2003)].

First to the principle, then some salutary thoughts. If a mortgage mis-spells the borrower's name—and is thereby incorrectly filed in the county clerk's office—subsequent encumbrancers, such as later mortgagees, are *not* charged with constructive knowledge of the earlier mortgage. In other words, the earlier mortgage (dated first and earlier filed) is nonetheless junior and inferior to the mortgage which came later. So what should have been a first mortgage became a second mortgage (a likely disaster depending upon the equity) and a second mortgage became a first mortgage. Of course, from the viewpoint of a possibly second mortgagee, such a situation is a bonanza.

Turning now to how this happens—at the mortgage closing the

mortgage documents are executed and typically delivered to a title company to record. Although it is obvious that care needs to be exercised by all participants in assuring that the mortgagors' names are correctly spelled, errors can be made from time to time, as was so in this case. Where county clerks use names as the indexing method, a misspelling will cause the mortgage to be misfiled in a different place in the index so that if one searches for an existing mortgage at the correct spot it will not be found. Here, the index could have been searched phonetically and that would have revealed this earlier mortgage. But the court said that the availability of searching phonetically does not dispose of the issue. The mortgage had to be correctly filed to give notice to the world and it was not so filed.

Once a defaulted mortgage requires foreclosure, this reversal of priorities will be revealed by the foreclosure search. Then the mortgage holder would turn to the title company which insured the mortgage and ask them to either correct the situation or respond in damages. Whether the lender actually suffers a loss because its first mortgage became a second depends upon the equity in the property, but assuming there was a loss, this is part of what a title insurance policy is for. The title company representative at the closing should have assured that the

mortgagor's name was correctly spelled so that it could be correctly indexed. That miscue created the problem which could lead to liability. While the case did not mention a title company or who might pay for the loss, as a practical matter, that is what would be pursued and what would occur. In New York, of course, it is the owner/mortgagor who has a fee title policy while the lender obtains a mortgage policy.

And if the lender here did not have title insurance? Then, whatever loss might be incurred by virtue of the misfiling is not reimbursed by any insurer and must be borne by the lender—a serious situation indeed.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

© Copyright 2005 Bruce J. Bergman

Catch Us on the Web at
WWW.NYSBA.ORG/REALPROP

