Slow Foreclosures Versus Condominium Liens

Bruce J. Bergman, New York Law Journal

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Abetted by the ongoing economic distress and the glacially slow pace of home loan foreclosures in the Empire State, the continuing substantial volume of such cases has begotten a contentious clash between foreclosing mortgagees and condominiums holding common charge liens. While the underlying issues were explored at some length in these pages in "Effect of Foreclosure Delay on Condominium Liens,"[1] the basic problem is that as foreclosing plaintiffs (it is not always so but let's label them "banks" for brevity of reference) suffer enormous delays, condominiums likewise endure deleterious consequences. Common charges continue to mount during the years consumed by banks' foreclosures, all damaging to the other condominium unit owners. Such contretemps lead to these inquires: What is the condominium to do? And if there are paths the condominium can pursue, how might they threaten the foreclosing banks?

A new case, *Bank of America v. Brooks,*[2] focuses on and clarifies two aspects of the equation: penalty for delay to the foreclosing party and possible jeopardy for common charges.

Penalty for Delay

It is difficult to speculate about whether this concept is so widely known. It is meaningful and has been litigated, but an editorial observation is that it is not so prominent in the legal consciousness.[3] Such evaluation aside, a possible consequence of delay visited upon a foreclosing plaintiff is loss of some or all interest for the period of volitional delay.[4] CPLR §5001(a) addresses this by providing that in an equitable action (foreclosure, for example), interest and both the rate and date from which it is computed shall be in the discretion of the court. And considerable case law confirms this.[5]

Perhaps the most vivid way to appreciate the principle as a practical matter is to consider this—concededly hyperbolic—scenario. Borrower owns a property worth $10 million in a very desirable, stable area. It produces no income and the borrower has no credit, but needs a $500,000 loan. The only money available is at 15 percent, with a 24 percent default rate.

The loan is made, default ensues, the borrower irrationally declines to sell the property to pay the debt, the lender initiates a foreclosure and then has an epiphany. Even with interest accruing at 24 percent, and even if the property does not appreciate in value, interest will in effect never significantly erode the equity cushion. The value—the integrity of the investment—will always be there. Some day, either the loan will be paid in full, with all the interest, or the foreclosure sale will yield full reimbursement or ownership of the property worth far more than the principal and all interest. In short, it is the perfect investment, an otherwise unattainable return with no risk.

Therefore, concludes the lender, there is no reason to vigorously prosecute the foreclosure; better to proceed very slowly, more languidly than the system imposes. So, when the borrower's time to appear or answer expires, instead of submitting an order of reference in a week or two or three, the lender waits a year. When five (or many more) months later the order of reference is entered, instead of submitting the oath and report to the referee within a few weeks, the lender waits 10 months. Similar or greater tardiness ensues in pursuit of the judgment of foreclosure and sale and then the sale itself. The end result is enormous and unjustified accrual of interest imposed by the lender's exceptional and volitional tardiness.

To some extent, indeed to a significant degree, the protraction of foreclosure actions nowadays is a function of myriad statutory requirements, court rules, court congestion and borrower dilatory tactics.[6]Nonetheless, banks can stumble in obtaining needed documents or support, or their counsel can be overwhelmed with case volume, or the foreclosing party itself may be the source of delay, even if not consciously intended.

Where the fault lies with the bank, can the besieged condominium pursue the remedy of attacking interest accrual on the mortgage debt? The Brooks case opines in the affirmative.

Liability For Maintenance

Regularly frustrated by the slow pace of bank mortgage foreclosures, condominiums felt powerless, in part because a first mortgage of record was always paramount to a condominium common charge lien.[7] Then came a case in Westchester Supreme Court in 2012[8] where a victimized condominium moved pursuant to CPLR §2221(d), 5019(c) and RPL §339-z directing the plaintiff to expeditiously proceed with the foreclosure or be liable to the condominium for monthly common charges.

Although delays had finally been cleared, the court feared further delays and granted the motion to a limited extent. It ruled that if the foreclosure sale was conducted more than 60 days after entry of the order, and if the delay was occasioned by the plaintiff, upon appropriate affidavit in support, the court could issue an order directing plaintiff to be personally liable for subsequent "monthly carrying charges."

This ruling buoyed the condominium community, although there was no other or underlying authority for it. When considered in the Brooks case, though, it was rejected, discussed, infra.

'Brooks'

In *Brooks*, there was no doubt but that the bank's foreclosure was greatly delayed—the reason claimed to be the collapse of the bank's prior law firm.[9] (This is a contributing factor for delay in an extraordinary number of foreclosure actions, although it is not necessarily an excuse.)

The aggrieved condominium moved to compel the bank to pay accrued condominium common charges. In denying the motion, the court provided clarity in this oft-encountered situation, addressing common charges and interest questions together.

Regarding the obligation on the bank's part to pay common charges, the ruling was that there was no basis in statute or common law under which a junior lienor (here the condo) can recover from a senior lienor (here the bank) damages for the senior neglecting to promptly enforce its rights. (Reduction of interest is a different issue.) Moreover, requiring the bank to pay the homeowner's accruing common charges to the condo board would improperly subordinate the bank's mortgage to the condominium's lien.

As to possible loss of interest, nothing compels a mortgagee to foreclose at all.[10] And if it does elect to foreclose, no pace of action is mandated, although protracted delay can have monetary consequences such as loss of interest. That is to say, an inordinate delay attributable to the foreclosing party could result in loss of interest otherwise due pursuant to the loan.[11] Accordingly, the court observed, the condominium could argue at some point that the bank's delay in prosecuting the action should result in loss of interest.[12]

Conclusion

Condo Weapon Preserved. That a foreclosing plaintiff could incur loss of interest on the mortgage obligation related to its volitional delay is well established. Although some case law expressed that point when the protest was made by a defendant other than the borrower, no case precisely supported the proposition when the party seeking the relief was a condominium defendant. The Brooks case does.

To be sure, *Brooks* is an unofficially reported case at the trial court level, but the concept should have been apparent; now it is manifest. That a mortgage debt—the interest component—can be reduced or extinguished commensurate with a period of undue volitional delay by the foreclosing party is a potent remedy. It should encourage foreclosing plaintiffs to heightened dedication in foreclosure prosecution. This weapon available to condominiums, is preserved.

Condo Weapon Rejected. From the condominium's perspective, that a dilatory foreclosing bank could be liable for lost common charges was amenably encouraging. Anything that would compel a more rapid pace to mortgage foreclosures is welcome. But the lone decision positing such a remedy, while intriguing—and morally pleasing from the condominium's vantage point—seemed devoid of genuine authority. *Brooks* actually states that, lucidly. It seems doubtful that this postulate needs the attention of an appellate court. This condominium weapon is rejected.

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ENDNOTES:

1. New York Law Journal, Nov. 12, 2013, at 5, col. 2.

2. 2014 WL 2696624 (N.Y. Sup.).

3. The subject is explored in some depth at 1 Bergman on New York Mortgage Foreclosures §2.20[3], LexisNexis Matthew Bender (rev. 2014).

4. What is volitional delay and how much leeway a court will afford the foreclosing party will vary from case to case, as will fact generally. Thus, there is, as always, nuance to the cases, some citations infra.

5. See, inter alia, *Deutsche Bank Trust Co. Americas v. Stathakis*, 90 A.D.3d 983, 935 N.Y.S.2d 651 (2d Dept. 2011); *Dayan v. York*, 51 A.D.3d 964, 859 N.Y.S.2d 673 (2d Dept. 2008); *Danielowich v. PBL Development*, 292 A.D.2d 414, 739 N.Y.S.2d 408 (2d Dept. 2002); *Bank of New York v. Spiro*, 267 A.D.2d 339, 700 N.Y.S.2d 207 (2d Dept. 1999); *Grossman v. Pendant Realty Corp.*, 221 A.D.2d 240, 624 N.Y.S.2d 61 (1st Dept. 1995); *Sloane v. Gape*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dept. 1995); *South Shore Fed. Sav. & Loan Ass'n*, 54 A.D.2d 978, 389 N.Y.S.2d 29 (2d Dept. 1976).

6. Some of this is discussed in the article in the New York Law Journal cited in the text, "Effect of Foreclosure Delay on Condominium Liens."

7. RPL §339-z. See discussion at 4 Bergman on New York Mortgage Foreclosures §36.02 [2]

and [3], LexisNexis Matthew Bender (rev. 2014).

8. *J.P. Morgan Chase Bank, N.A. v. Malik*, Order, June 27, 2012, Index No. 15079/09, Sup. Ct., West. Co., Smith, J.

9. The collapse was of Steven J. Baum, P.C., which likely handled more foreclosure actions than any other firm in New York.

10. *Bank of America, N.A. v. Brooks*, supra. at note 2, citing 1-2 Bergman on New York Mortgage Foreclosures §2.20[4].

11. *Bank of America, N.A. v. Brooks*, supra. at note 2, citing CPLR §5001(a); *Deutsche Bank Trust Co. Ams. v. Stathakis*, 90 A.D.3d 983, 984 (2d Dept. 2011).

12. *Bank of America, N.A. v. Brooks*, supra. at note 2.