SOME SANCTITY IN YOUR MORTGAGE FORECLOSURE SETTLEMENTS

By: Bruce J. Bergman

Short of complete victory in the foreclosure where the goal is to bring the case to a sale, it would seem nothing is quite as important as assuring that a case which should be settled *is* settled — and properly. Accordingly, there should be no reluctance in delving into the subject of settlement and, pleasingly, given a new case, that will be our aim here.[1]

When it comes to a settlement agreement — and whether it's called a stipulation or a forbearance or a standstill agreement, or by any other monicker — lenders and their counsel generally have a very solid idea as to what the requirements of the stipulation document are to be. Whether or not the particular stipulation encompasses some unusual circumstances, perhaps the ultimate question asked by the mortgage holder is, will these terms really stand up if the borrower finds some creative way to attack or disavow them?

That the answer should most often be "yes" is underscored by the new case mentioned earlier.[2] The facts there make the point very nicely. The borrower defaulted in its mortgage obligations for the months of January through May. Workout discussions ensued, resulting in the signing of a forbearance agreement in May. The agreement, as is typical, acknowledged default and, insofar as is relevant here, promised to pay the sum of $7,754.00 to the lender on or before May 10. The agreement also provided that a default by the borrower in any obligation of the agreement would allow the lender to immediately commence a foreclosure and exercise any or all of its rights.

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We wouldn't be talking about it if it didn't happen this way, so yes, of course, the borrower indeed failed to tender the promised payment on or before May 10. Just as assuredly, the lender responded with a foreclosure action. Meanwhile, the borrower had remitted the check, but on May 29. The lender wisely rejected the remittance as untimely.

Who wins the case? The lender does! The borrower argued that its default in timely submission of the check was excusable because it was only a "technical breach" of the forbearance agreement. Moreover, the borrower urged, he should have been allowed a reasonable period of time to perform his obligations. That all sounds like the kind of argument which a sympathetic court just might wish to adopt, but the borrower didn't have his way here.

The court found that the agreed upon payment was not timely tendered. More compellingly, and in response to the claim that some "reasonable" period of time should have been given to the borrower, the lender had sagely made time of the essence as to payments. Still further, the defendant tried to introduce evidence of claimed discussions or agreements as to the source of the payment due on May 10, but the court excluded that pursuant to what is called the parol evidence rule. That is a doctrine which says (in general terms), that where the parties have reduced their agreement to a writing, evidence of any prior or contemporaneous negotiations between them which is offered to modify or contradict the terms of the writing must be excluded.

The agreement before the court clearly set forth the obligation to tender the sum due on or before a specified date. There was thus nothing to interpret and the parol evidence rule precluded any discussions about what might have otherwise been said.

So in the end, this case squarely addresses two of the genuinely vital aspects of virtually any mortgage settlement or forbearance agreement. If the lender says that payment is due on a certain date, *and* uses those magical words, "time is of the essence", then it means just that. If the borrower is going to be late, the lender will be able to avail itself of whatever rights have been provided in the agreement. And, so long as there is not a fraud or a mutual mistake, any talk about what else the lender may have said or promised will be excluded. The agreement does and will mean what it says.

Happily, if you do it right in the first place, many problems can be avoided. So there really should be sanctity in your settlement.

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[1] The new case happens to emanate from New York and although these sometimes fine points of law are not necessarily followed in every state, there is much merit to the concept and it is noteworthy.

[2] *Trustco Bank of New York* v. *Drake*, _____, A.D.2d _____, 599 N.Y.S.2d 763 (3rd Dept. 1993).

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AGENDA

Marketing: What's New for 1994/1995

Home Equity Lines of Credit: Who's Doing Them and How Profitable Are They?

Non-Refinance Home Equity Loans: What is the Current Securitization Situation and Outlook?

RESPA and Legal Update: What the Federal and State Legislators Have in Mind For Us.

Communications With Your Customers: How Might They Play in Court?

Automated Underwriting: How Far and Fast Is This Brave New World Taking Us?

In a Competitive World: Is Your Shop Ready for Higher Interest Rates?