BERGMAN ON MORTGAGE FORECLOSURES . . .

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That Thorny Late Answer In The Foreclosure Case**

One of the particularly frustrating situations in the mortgage foreclosure case in New York is submission of a tardy answer. Most of us would like to think that we will submit our responsive pleadings on time, and, if that is not possible, an appropriate extension will be secured. Regardless of this ideal, the late answer does rear its annoying self from time to time. A new case both disappoints and sheds just a glimmer of light upon the subject. It also serves to open the blueprints of the topic to salutary scrutiny.

The whole issue is really a paradox, because the lender probably should not avail itself of the remedies the law purports to allow. In other words, although practice statutes provide for rejection of a late answer, it is only rarely a sound strategy to send back the overdue document! Explanation will elucidate the recommended tactics and touching the basics should make all that easier.

We know, of course, that the goal of almost every foreclosure case is to glide through to a sale with as little delay as possible — unless the lender can be paid before such a conclusion is reached. When any defendant submits an answer, even one which is patently transparent, it can easily graft months onto the foreclosure process. Obviously, then, a foreclosing lender prefers to avoid the "litigated" aspects and favors never encountering an answer.

There ought to come a time in any litigation (which is what a mortgage foreclosure case is in New York) when a plaintiff knows that it is too late for an answer to be submitted. There **is** such a time, or so the statutres say, which is a simple arithmetic exercise in counting the number of days after a party was served, or perhaps more accurately, after service is complete. This varies with the type of service accomplished, but eventually, there **does** come a time when the requisite days have expired and it is too late for a defendant to present an answer. At least that's the theory.

If the statute is this precise, the reasonable conclusion would be that a late answer can be treated as a nullity. The assumption is accurate, but so laden with exceptions that it begins to lose meaning. First, it is valuable to be aware that in New York, an answer is **also** an appearance. Thus, if retained, and even though stricken upon motion for summary judgment, the answering party remains entitled to notice of all proceedings. However, while a timely answer is an appearance for all purposes, an untimely answer, so long as properly rejected, is not, on the theory that it was a nullity in the first instance. [*Jamaica Savings Bank v. Spiro*, 206 Misc. 897, 135 N.Y.S.2d 728 (1954)].

Suppose an answer is due on Monday, and defendant's lawyer has it hand delivered on Tuesday. Will the court support rejection of the tardy document or find some way to allow it into the case? We know the answer to that one. The judge will find a way to constrain its acceptance.

Well, if but a day late is a readily apparent time frame for contorting the rules, how stale does an answer have to be before the courts adhere to what the statues say? There is no firm guide because the general pronouncement is that a plaintiff can be compelled to accept an answer where there is **both** an excuse for the delay in submission and a meritorious defense to be found in the responsive pleading.

Experience tells lenders' counsel that the inevitable excuse will often be disingenuous and the meritorious defense frequently without foundation. But then there is the strong public policy in favor of resolving cases on the merits instead of upon default. In sum, public policy will control most often so that weakness in excuse and vacancy of defense won't really matter—and that is the way it works in the real world.

The new case mentioned earlier skewed the equation perhaps even further towards the dilatory defendant. [*Albin v. First Nationwide Network Mortgage Company*, ___A.D.2d___, 591 N.Y.S.2d 481 (2d Dept. 1992)] There, the court relied upon the absence of prejudice to the plaintiffs! If that is to be a standard, it is hard to imagine why an answer should not be submitted just about **anytime**. How late does the answer have to be before prejudice results? The only saving grace in the decision — and it is of limited value — is the principle that the failure of defendant's counsel to promptly move to compel accep-

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tance of the answer was a basis to impose a monetary sanction. [Citing, *Martinisi v. Cornwall Hospital*, 177 A.D.2d 549, 576 N.Y.S.2d 150].

In light of all this, what might a lender's strategy be? If an answer is only marginally late, a motion to force acceptance will be extremely difficult to defeat. It is, therefore, easier and more cost effective (one less time consuming motion to endure) to accept an answer which is not especially late. Once the answer goes beyond **reasonable** grounds (a judgment call) there may be expanded room for success, in part because the court may then look more closely at the claimed quality of the defenses.

Whether relatively early or extremely late, if lender's counsel has any inkling that defendant's attorney does not possess the wherewithal to make that motion to compel acceptance, rejection of the answer remains a good approach.

From a lender's point of view, it would be pleasing to assume that rules are to be enforced as written. But knowing when they are bent becomes valuable information too. Rejecting the late answer can more often than not be the wrong choice and cause a lender to incur the very cost it thought would be avoided!

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