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BERGMAN ON MORTGAGE FORECLOSURES . . .

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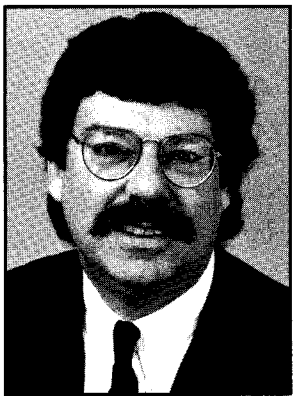

The Prickly Referee's Hearing — If You Stumble*

One of the least fascinating aspects of mortgage foreclosure is the leaden methodology of it — some way to begin an article designed to attract your attention. But since a foreclosure action obviously does not proceed from beginning to end without effective employment of the procedures, there is something to be said about inquiring into the details.

Especially because foreclosures in New York can frequently consume so much time, one of the propelling compulsions is to get through the case as quickly as possible. Even the most fervent supporter of speed, however, recognizes that it still has to be done right. The title which wends its way through the foreclosure process should be as close to unassailable as possible. After all, the very idea of the foreclosure is to derive the maximum price at the sale or, if necessary, take back the property and then sell the clean title for the highest amount.

To accomplish the goal, judicial foreclosure in New York requires the achieving of a succession of plateaus in marching toward a conclusion, which is, of course, the foreclosure sale. One of those stages is the referee's computation. Although in some commercial cases there may be genuine issues about categories for inclusion in the computation, as well as the method of computation itself, it is only the rarest residential case which actually requires a contested hearing to arrive at an accurate sum due. Consequently, the referee's hearing, which may be a vital part of the more complex case, tends to be closer to a formality in the residential matter.

Formality or not, there are instances where the scheduling of a referee's hearing is *mandated* procedure — that is, where any party has either interposed a notice of appearance (not waiving the referee's hearing) or an answer, even though stricken upon a motion for summary judgment.

This obligation has the potential to add *some* time to the course of the foreclosure because it requires lead time to schedule the referee's hearing and serve notices. It means this date must be matched to a referee's availability; and, if the hearing is actually conducted, spurious issues could divert case progress. Not incidentally, costs attendant to the hearing can make the action more expensive — the fee for a court reporter, the possibility of a larger referee's commission, as well as increased legal fees.

With the obvious unwelcome consequences of a referee's hearing — at least from a plaintiff's vantage point — ready ways to avoid the necessity appear. One method is to prepare the referee's oath and report in advance, and mail it to all entitled to notice of a hearing with a letter explaining why attendance is counterproductive. (It just creates a greater debt which works to no one's advantage.) The letter could enclose an actual waiver of the hearing, with the request that it be signed and returned.

Because such waivers are most often just ignored, an alternative is

to declare in the correspondence that should there be no objection to the computation, necessity for the hearing will deemed waived. This tends to render the issue of a hearing, if not moot, of reduced importance to recipients of the correspondence.

Experience suggests that either of the two approaches will most often successfully avoid conducting the hearing, which would otherwise be an absolute requirement of the case.

In their zeal to avoid *anything* which stands in the way of case progress, some foreclosure counsel neither schedule a hearing nor adopt one of the alternatives. Rather, the computation is just sent to the referee without notifying anyone. If the referee is unaware of the hearing requirement, as may often be so, and if no parties notice the defect, this defalcation may in the end be of no consequence. But it is both risky and wrong. Employment of such a technique is not recommended and should be condemned.

What if, though, a lender plaintiff makes an innocent mistake? For example, if a notice of appearance is misplaced in the file so that a party who should have received notification did not. All is not lost — and recent decisions tell us so.[1]

In the first case, there was no dispute that the money was owed. That being so, the court found no reason to go back and require a hearing where there was nothing to contest!

The second case was somewhat similar. There, the holding was that while generally a referee's hearing is appropriate to settle disputed facts, where the amount of the debt and the date from which interest is computed were admitted, a hearing was found to serve no purpose. And a belated claim by defendant that he wanted to subpoena witnesses was rejected because what bearing the testimony might have on the case was unstated.

None of this is to suggest that plaintiffs have free rein to now pass over a referee's hearing. It *does* mean, though, that where an innocent error is made, so long as there really are no genuine disputed issues to be determined by a referee, skipping the computation can be excused.

Endnotes

1. See *LVB Properties v. Greenport Dev. Co.*, 188 A.D.2d 588, 591 N.Y.S.2d 70 (2d Dept. 1992); *Blueberry Investors Company v. Ilana Realty, Inc.*, 184 A.D.2d 906, 585 N.Y.S.2d 564 (3d Dep't 1992).

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