SERVICING MANAGEMENT®
THE MAGAZINE FOR LOAN SERVICING PROFESSIONALS

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The Real Reason Lenders Are Challenged To Foreclose

Defaulting homeowners are increasingly resorting to unusual tactics to delay the foreclosure process.

by Bruce J. Bergman

Foreclosures in judicial states seem to have become even more burdensome and time-consuming in recent years - something lenders and servicers must, to their dismay, confront. We have in these pages (see article entitled "A World Where Being Right Just Isn't Good Enough" in the August 2013 edition of ***Servicing Management***) reviewed some of the daunting impediments, including oppressive and impractical new statutes designed to protect borrowers, and court attitude and missteps, which foster the need for time-consuming and expensive appeals.

But there is perhaps a more elemental component - the will of defaulting borrowers to delay cases by any means possible, including, of course, interposing myriad perceived defenses, sometimes multiple times. While in more than a few foreclosures, borrowers will assert 15, 20 or even 25 purported defenses, attention here will be given to a case where the number of defenses was modest, but the gall and creativity were noteworthy.

Although, pleasingly, the trial court got it right; the borrower's baseless appeal subjected the servicer to the time and expense of that additional exercise. The appeals court, too, ruled quite affirmatively for the foreclosing lender, but the mortgage holder was constrained to slog through the process nonetheless.

So, what did the obstreperous borrower do and say in the mentioned case? We begin with the usual scenario: Money was loaned to a borrower who secured it with a mortgage but later defaulted, necessitating initiation of a mortgage foreclosure action. The borrower unashamedly submitted an answer that was disposed of upon a motion for summary judgment. The borrower thereupon filed a notice of appeal, although ultimately, the appeal court dismissed the appeal for want of prosecution.

When finally the foreclosing lender arrived at and was granted a judgment of foreclosure and sale, it needed to amend that judgment to permit the sale of all the property described in the mortgage.

The borrower, of course, felt a need to oppose this motion, although the borrower construed it as a renewal of the earlier motion for summary judgment on the complaint. No, said the court to the borrower. This was a motion to amend the judgment - it had nothing to do with the earlier summary judgment, and in any event, the borrower had no basis to attack that earlier summary judgment because the appeal had been dismissed.

But the borrower had more pressing contentions up his sleeve. For the first time, he claimed that he had intended

to mortgage only a portion of the property described in the mortgage. This is akin to a not-uncommon borrower thrust saying that he did not understand the mortgage, or someone told him that it meant something else, or he saw only the signature page, or that he was ill that day and couldn't comprehend, or that he was not facile with English, etc., etc. But the court knew the law on this one. One who signs a document, in the absence of fraud or the wrongful act of the lender, is bound by the contents of that document. The person is under an obligation to read a paper before he signs it, and he can't say he did not know its contents. Where a writing is clear that it included all the property, whether a borrower intended to mortgage only a part of that property is irrelevant. (Naturally, none of this stopped the borrower from trying the gambit.)

The borrower still had more to say. In a New York foreclosure, the referee is appointed midway in the action and computes the sum due on the mortgage obligation and decides whether the property can be sold in parcels. The goal is to sell the property in a fashion that will yield the highest sum. Here, the borrower alleged that there was a question of fact as to whether the two parcels described in the mortgage could be sold as one parcel as the referee had found.

The court rejected that contention, too. The evidence showed that the referee concluded that selling only one of the parcels would create an illegal subdivision and, therefore, the property had to be sold as one piece.

The borrower was still not done. In a home loan case, New York law mandates that a settlement conference acts as a predicate to the foreclosure action going forward. But a condition of that conference is that the defendant must be a resident of the property subject to the foreclosure. The protesting defendant didn't live there, so he simply was not entitled to a conference. "Ah," the borrower said, "the conference requirement applies to another defendant in the case." Maybe it did, but the borrower was ruled to have no standing to raise such an argument on behalf of another person.

Finally, then, the borrower's arguments were exhausted, and the court had disposed of all of them. While there is a happy ending here, in the sense that the foreclosing lender will have reached the end of the case when the property is actually sold, the path trodden to that conclusion was greatly inhibited by the dedication to delay an obfuscation of yet another borrower. This is hardly an isolated incident. SM

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