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REAL ESTATE UPDATE

The Skill of the Drafter

Legal Fees Are Available but the Amount Is Up to the Judge

A SUPREME Court judge in a borough of New York City once asked a plaintiff's counsel upon oral argument for the judgment of foreclosure and sale, "Can you get legal fees in a foreclosure?" The answer then, as now, was simply enough "yes" — so long as the mortgage contains an appropriate clause empowering the court to grant the award. The court's candor in making the inquiry was refreshing, but the inherent lack of background on the part of the inquirer should not be surprising. The question was asked in 1977.

Back then, mortgage foreclosure cases were a rarity. Interest rates were less volatile than now and properties tended to hold their equity. Most often, that meant a distressed borrower could more readily sell the property before a foreclosure concluded. All factors combined typically led to reinstatements or payoffs prior to the judgment stage, the point at which legal fees are considered. The end result was that issues surrounding legal fees in mortgage foreclosure cases remained generally obscure until perhaps the mid-1980s. If enlightenment eventually ensued, as is here suggested, this should be a settled arena and legal fee awards should emerge with regularity, free of undue controversy.

If a further discussion of principles attendant to legal fees in the foreclosure action will have a salutary effect, this polemic will have been worthy. Highlighting the role of legal fees, followed by the rules attendant to the award, may help.

MORTGAGE FORECLOSURES

BY BRUCE J. BERGMAN

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Practicality

Though there is nothing wrong with an intellectual exercise in this forum, legal fees most often have genuine practical meaning in foreclosure litigation. Mortgage lenders understand the legal principles associated with counsel fees in the mortgage foreclosure case. They recognize that a legal fee provision in a mortgage supports an award of attorneys' fees in a judgment of foreclosure and sale. This foresight undoubtedly plays some role in the business decisions lenders make. It is understood, in advance, that in the event a mortgage foreclosure action must be pursued, some or all of the legal cost will be recouped. At least that is the way it is supposed to happen.

There are then two scenarios to analyze: reinstatement and payoff. As a matter of law in New York, a lender may freely reject a tender of arrears (that is, an attempt to reinstate the mortgage) made after a proper acceleration, having become entitled to full payment of the mortgage balance. [1]

Thus, a lender's unequivocal rejection of a post-acceleration tender of arrears is authorized. [2] If a lender is free to decline payment

of arrears after acceleration, it is empowered to impose conditions upon the acceptance of that which it could otherwise refuse. So even if a mortgage for some reason did not contain a legal fee clause, in the instance of a borrower's desire to reinstate, a lender could demand reimbursement for legal fees incurred. Failure to remit would result in lender's rejection of arrears.

Although New York law is clear on this point, the mortgage can change the circumstances. For example, the widely used Fannie Mae/Freddie Mac form of mortgage obliges a lender to accept reinstatement at any time up to issuance of the judgment of foreclosure and sale. The privilege is available, however, only if all reasonable legal fees are paid.

Whether it is New York law or the mortgage contract which controls, reinstatement generally does not involve the courts. Legal fees will properly be paid as a condition of reinstatement without judicial intervention.

Payoff or Satisfaction

Payoff or satisfaction presents a different situation. A mortgagor always has the right to redeem the mortgage [3] until the property is struck down at the auction sale. Stated more expansively, at any time prior to the actual auction sale required by the foreclosure judgment, an owner of the equity of redemption — conspicuously including the mortgagor — possesses the right to redeem by remitting the sum total of all principal, interest and costs, together with any other obligations the court finds to be secured by the mortgage. [4]

If there is such an absolute right, then only charges imposed by the mortgage can be assessed. A legal fee provision will support repayment of counsel fees. Absence of the clause from the mortgage instrument removes any obligation to pay for plaintiff's counsel.

Again, though, the courts will typically not become involved with the process. Even attorneys whose fee requests are overly inflated should be open to reasonable compromise. Borrowers may sometimes be chagrined at the level of fees (although if the borrower was the cause of tortuous litigation he should not be shocked) but the need to satisfy the mortgage and avoid further legal expense tends to elicit greater willingness from that side as well.

Only when the lender and borrower are both intractable will the court be called upon to assess the sum due pursuant to the mortgage. Then, resort is to RPAPL §1921(2) which authorizes a special proceeding to obtain judicial discharge of the mortgage if the mortgagee refuses to deliver a satisfaction. Assuming counsel fees are the point of contention, the court will quantify the amount due.

How judges view legal fees more commonly becomes a dispositive part of the equation upon the application for judgment of foreclosure and sale. This harkens back to an earlier thought that, while most often this is not a problem, a few courts are mysteriously disinclined to award legal fees in a foreclosure.

The conundrum is all the more puzzling because the underlying principles are so unalloyed. [5] Of course the courts have discretion as to the amount of the fees, but there should not be dissension about whether fees are to be granted. The legal underpinning makes that apparent.

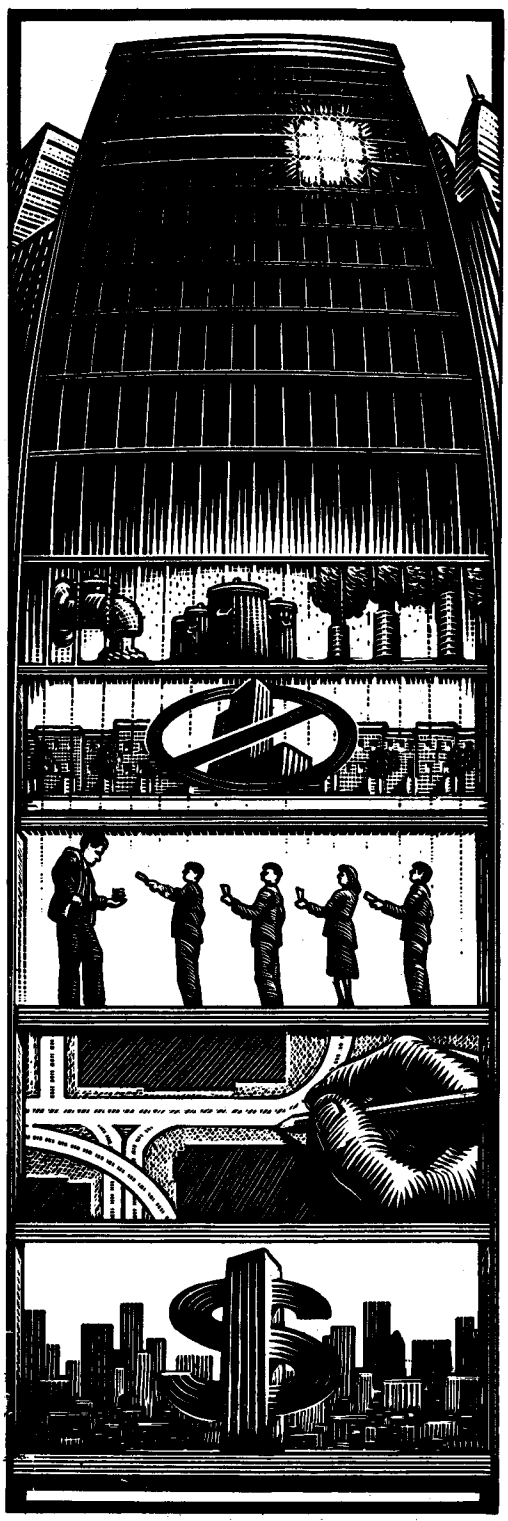

ILLUSTRATION BY JOHN MacDONALD

Rules, in a Nutshell

Although the well recognized American rule is that each party to a lawsuit must bear its own counsel fees, [6] that maxim can be altered either by statute or contractual agreement between the parties. [7]

No statute in New York requires payment of legal fees by one party to the other in a mortgage forelcosure case. But contract — that is, the mortgage itself — can so specify. New York courts have been consistent in ruling that legal fees are awardable to a foreclosing plaintiff in the judgment of foreclosure and sale if the mortgage so provides. [8]

If attorneys fees are to be recovered, the amount is decreed by the court upon application by plaintiff's counsel and made a part of the judgment of foreclosure and sale. [9] How much the plaintiff has paid or has agreed to pay its counsel is not the measure of reimbursement. [10] Rather, reasonableness must control. [11]

Dispositively, although a legal fee clause in a mortgage is effective (the whole point of this missive), if the provision appears solely in the note or bond it will be insufficient. [12] Even though a legal fee clause may properly repose in the mortgage, it must contain enabling verbiage to accomplish the task.

Neither the statuory (RPL §254) nor the title company promulgated forms of mortgage in New York contain an efficacious legal fee provision. [13]

Whether the clause in the ubiquitous Fannie Mae/Freddie Mac mortgage form prior to October 1991 supports legal fees is open to debate. There should be no doubt, though, about the post-October 1991 version, which provides reimbursement for legal expense — something discussed in these pages not so long ago. [14]

The debates about whether there is valid legal fee language in any given mortgage continue. In one case, counsel affirmed in support of the judgment of foreclosure and sale that "The mortgage provides that lender will have the right . . . to collect all costs allowed by law, including . . . reasonable attorneys' fees." [15] The problem for plaintiff was fatal circularity of reasoning. Since "law" does not provide for legal fees (the mortgage would have to say so) "whatever law allows" leads to a blind alley. Legal fees were correctly rejected. [16]

Perhaps a closer call found in favor of the plaintiff's request. [17] There, the language in question recited:

> Mortgagor must pay all expenses of Mortgage; including reasonable attorney's fees, if (a) Mortgagee is made a party in a suit relating to the Property, or (b) Mortgagee sues anyone to protect or enforce Mortgagee's rights under this Note and Mortgage.

Even though mortgage forelcosure was not mentioned, the breadth of the provision was

ruled sufficient to provide attorney fee recompense to the plaintiff. [18]

Conclusion

In the end, the overall direction should be unclouded. Judicial reflection upon the skill of drafters seeking in a mortgage instrument to preserve legal fees to foreclosing parties is likely to continue unabated.

And it should, until every attorney who ever drafts a mortgage becomes thoroughly conversant with the necessary concepts and words to employ.

It happens to be uncommonly elemental, but legal callings are vast enough to assure that novices will frequently dabble in mortgage preparation.

Another area of appropriate judicial scrutiny is how much the legal fee should be. That contemplation is absolutely the realm of judicial discretion. It belabors the obvious to observe that a veteran senior partner pursuing a complex foreclosure is entitled to a greater legal fee award than a first year associate tussling with a garden variety case.

How then to justify a court's silent declination to insert any counsel fee amount in a judgment of foreclosure and sale when there is a competent legal fee clause in the mortgage and a cogent presentation of counsel's efforts to prosecute the case?

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(1) See, inter alia, *Albany Sav. Bank v. Seventy-Nine Columbia Street Inc.*, 197 AD2d 816, 603 NYS 72 (3d Dept. 1993); *Marine Midland Bank v. Malmstrom*, 186 AD2d 722, 588 NYS2d 655 (2d Dept. 1992); *Dime Sav. Bank of New York v. Johneas*, 172 AD2d 1082, 569 NYS2d 260 (4th Dept. 1991); See also 1 *Bergman on New York Mortgage Foreclosures*, §4.06 (Matthew Bender & Co. Inc., Rev. 1996).

(2) *Graf v. Hope Building Corp.*, 254 N.Y. 1, 171 N.E. 884 (1930); *Jamaica Sav. Bank v. Cohan*, 36 AD2d 743, 320 NYS2d 471 (2d Dept. 1971); *Nelson v. Vinel*, 26 AD2d 792, 273 NYS2d 652 (2d Dept. 1966).

(3) See 1 *Bergman on New York Mortgage Foreclosures*, §4.07 (Matthew Bender & Co. Inc., Rev. 1996).

(4) See, inter alia, *Nutt v. Cuming*, 155 N.Y. 309, 49 N.E. 880 (1898); *Basile v. Erhal Holding Corp.*, 148 AD2d 484, 538 NYS2d 831 (2d Dept. 1989); *Finance Investment Co. Ltd. v. Gossweiler*, 145 AD2d 463, 535 NYS2d 632 (2d Dept. 1988).

(5) How the fee is measured is a discussion too lengthy for this article. Attention is invited to 2 *Bergman on New York Mortgage Foreclosures* §26.03 (Matthew Bender & Co. Inc., Rev. 1996) for that review.

(6) *Chapel v. Mitchell*, 84 NY2d 345, 618 NYS2d 626, 642 NE2d 1082 (1994); *Hooper Assocs. v. AGS Computers*, 74 NY2d 487, 549 NYS2d 365, 548 NY2d 487 (1989); *First Nat'l Bank of Highland v. J. & J. Milano Inc.*, 160 AD2d 670, 553 NYS2d 448 (2d Dept. 1990); *Trendi Sportswear v. Air France*, 146 Misc2d 111, 549 NYS2d 561 (Sup.Ct. 1989); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

(7) *Hooper Assocs. v. AGS Computers*, 74 NY2d 487, 549 NYS2d 365, 548 NE2d 487 (1989); *Paroff v. Muss*, 171 AD2d 782, 567 NYS2d 502 (2d Dept. 1991); *Rivkin v. Brackman*, 167 AD2d 239, 561 NYS2d 738 (1st Dept. 1990); *First Nat'l Bank of Highland v. J. & J. Milano Inc.*, 160 AD2d 670, 553 NYS2d 448 (2d Dept. 1990); *Barba v. Lindissimo Boutique Inc.*, 149 Misc2d 117, 564 NYS2d 698 (Sup.Ct. 1991); *Trendi Sportswear v. Air France*, 146 Misc2d 111, 549 NYS2d 561 (Sup.Ct. 1989). See also *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1, 511 NYS2d 216, 503 NE2d 681 (1986); *City of Elmira v. Larry Walker Inc.*, 150 AD2d 129, 546 NYS2d 183 (3d Dept. 1989); *Cross v. Zyburo*, 185 AD2d 967, 587 NYS2d 670 (2d Dept. 1992); *Sibley Mort. Corp. v. Sobotka*, 155 Misc2d 616, 589 NYS2d 279 (1992).

(8) *Matter of Nicfur-Cruz Realty Corp.*, 50 B.R. 162 (Bankr. SDNY 1985); In re *Berry Estates Inc.*, 47 B.R. 1004 (Bankr. SDNY 1985); In re *Guccione*, 41 B.R. 289 (Bankr. SDNY 1984); *United States v. Bedford Assocs.*, 548 F.Supp. 748 (SDNY 1982); In re *Am. Motors Prod. Corp.*, 98 F2d 774 (2d Cir. 1938); *Chelsea/22 Assocs. v. Fleissner*, 540 NYS2d 815 (App. Div. 1st Dept. 1989); *Kenneth Pregno Agency Ltd. v. Letterese*, 112 AD2d 1032, 492 NYS2d 824 (2d Dept. 1985); *Community Sav. Bank v. Shaad*, 105 AD2d 1063, 482 NYS2d 162 (4th Dept. 1984); *Fed. Land Bank of Springfield, Mass. v. Ambrosano*, 89 AD2d 730, 453 NYS2d 857 (3d Dept. 1982); *Inter-City Investor Corp. v. Kessler*, 56 AD2d 645, 391 NYS2d 894 (2d Dept. 1977); *Avco Fin. Servs. Trust v. Bentley*, 116 Misc2d 34, 455 NYS2d 62 (1982); *Bank of Smithtown v. Pelletier, NYLJ*, Oct. 26, 1977, at 14, col. 6 (Sup.Ct. Suffolk Co., De Luca, J.); *Scheible v. Leinen*, 67 Misc2d 457, 324 NYS2d 197 (1971); *City of Utica v. Gold Medal Packing Corp.*, 54 Misc2d 721, 283 NYS2d 603 (1967).

(9) For a discussion of measuring the legal fee, see 2 *Bergman on New York Mortgage Foreclosures*, §26.03, and for the standards for counsel in applying, see 2 *Bergman on New York Mortgage Foreclosures*, §26.06 (Matthew Bender & Co. Inc., rev. 1995)

(10) *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 NY2d 516, 381 NYS2d 459, 344 NE2d 391 (1976); *Federal Land Bank of Springfield, Massachusetts v. Ambrosano*, 89 AD2d 730, 453 NYS2d 857 (3d Dept. 1982).

(11) *First Nat'l Bank of East Islip v. Brower*, 42 NY2d 471, 398 NYS2d 875, 368 NE2d 1240 (1977); *Industrial Equip. Credit Corp. v. Green*, 92 AD2d 838, 460 NYS2d 337 (1st Dept. 1983), aff'd, 62 NY2d 903, 478 NYS2d 861, 467 NE2d 525 (1984); *Beacon Fed. Sav. & Loan Ass'n v. Marks*, 97 AD2d 451, 467 NYS2d 662 (2d Dept. 1983); *Federal Land Bank of Springfield Massachusetts v. Ambrosano*, 89 AD2d 730, 453 NYS2d 857 (3d Dept. 1982); *Mead v. First Trust & Deposit Co.*, 60 AD2d 71, 400 NYS2d 936 (94th Dept. 1977); *Inter-City Investor Corp. v. Kessler*, 56 AD2d 645, 391 NYS2d 894 (2d Dept. 1977); *Avco Financial Services v. Bentley*, 116 Misc2d 34, 455 NYS2d 62 (1982); *Marine Midland Bank v. Roberts*, 102 Misc2d 721, 283 NYS2d 603 (1967).

(12) *Federal Land Bank of Springfield v. Handschuh*, 125 Misc2d 686, 480 NYS2d 294 (1984); *Lipton v. Specter*, 96 AD2d 549, 465 NYS2d 59 (2d Dept. 1983), citing *Jamaica Sav. Bank v. Cohan*, 38 AD2d 841, 330 NYS2d 119 (2d Dept. 1972).

(13) *Vardy Holding Co. v. Metric Resales Inc.*, 131 AD2d 564, 516 NYS2d 490 (2d Dept. 1987); *Li v. Astoria Fed. Sav. & Loan Ass'n*, 81 AD2d 857, 438 NYS2d 865 (2d Dept. 1981); *Daiwa Bank Trust Co. v. Pierri, NYLJ*, Oct. 18, 1989, at 26, col. 6 (Sup.Ct. Queens Co., Hentel, J.)

(14) See "Lenders' Legal Fees, Vintage Government Mortgages: What Was The Drafter Thinking?," *New York Law Journal*, March 22, 1995, at 5, col. 2.

(15) *Citibank v. Robergeau, NYLJ*, Dec. 2, 1993, at 26, col. 6 (Sup.Ct. Queens Co., Lonschein, J.).

(16) Id.

(17) *Leifer v. Unger, NYLJ*, Dec. 23, 1993, at 37, col. 2 (Sup.Ct. Rockland Co., Lefkowitz, J.).

(18) Id.