Bergman on Mortgage Foreclosures: Unusual Events: Borrower Loses Motion to Dismiss; Lender Is Sanctioned

By Bruce J. Bergman

Suggesting to attorneys that the outcome of cases is unpredictable is rather gratuitous; they already know that too well. And it is what they tell their clients with regularity. Nonetheless, a recent case which catches our attention is an odd confluence of two unusual, indeed unexpected, events: a defaulting borrower's motion to dismiss is denied for lateness, but the lender is sanctioned for misstatements to the court. [*U.S. Bank Nat. Ass'n v. Gonzalez*, 99 A.D.3d 694, 952 N.Y.S.2d 59 (2d Dept. 2012)].

First, as to a motion to dismiss, of course a defendant can make such a motion—even before it is required to answer the complaint—but it must do so no later than its time to answer expires [CPLR 3211(a)]. Generally, the courts tend to be very liberal with time limits. Thus, experience suggests that if a party is late with an answer or a motion or a response, the courts are most often overwhelmingly accepting of such tardiness. That is another subject, but the point is that time limit rules are typically only honored in the breach.

Here, though, the defendant borrower was obliged to have made his motion to dismiss thirty days after March 6, 2009 (this is pursuant to CPLR §3211). But he did not submit the motion seeking to dismiss the complaint until October 21, 2009. (He also moved for sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1.)

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Having not requested an extension of time to make the motion to dismiss, and offering no good cause excuse for his delay in making that motion to dismiss—indeed, he didn't even address the untimeliness of the motion—the court should not have accepted such a motion. The trial court did, but on appeal, there was a reversal. The borrower was defeated here, albeit at the cost of an appeal to the plaintiff and the time that involved.

Not only do courts often ignore many time limits, they only very rarely impose sanctions, this to the chagrin of rectitudinous counselors. Foreclosing plaintiffs are frequently dismayed by outrageous and baseless charges assessed by defaulting borrowers in mortgage foreclosure actions. On some occasions, the foreclosing plaintiff is so exercised by the nonsensical responses, it seeks sanctions against the borrower as a punishment for the abusive assertions. (The previously cited court rule supports such a procedure.) Foreclosing plaintiffs' attorneys, however, will confirm that such motions for sanctions are almost invariably futile and are hardly worth making.

In the recent case, the motion for sanctions was by the borrower against the lender—and the borrower won. The court found that the plaintiff had submitted various affirmations and affidavits in which it made a certain representation that proved to be false and then persisted in making that representation after it knew or should have known it was false. Therefore, the trial court was affirmed in granting the imposition of sanctions upon the plaintiff (citing 22 NYCRR 130-1.1[c][3]; *Schwab v. Philips* 78 A.D.3d 1036, 1036-1037, 912 N.Y.S.2d 255).

Yes, as Chuck Berry sagely observed, it goes to show you never can tell.

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