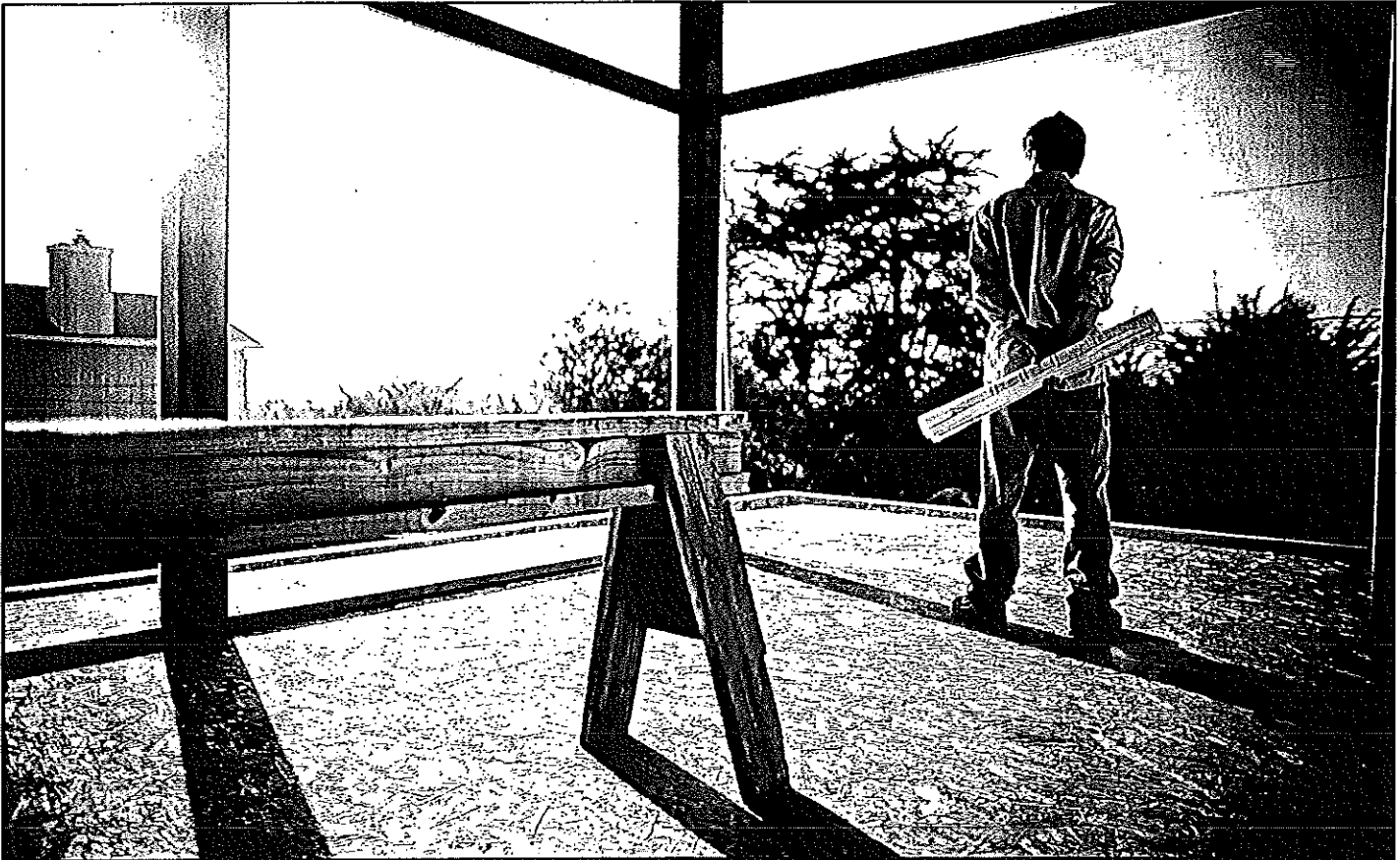


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# BERGMAN ON MORTGAGE FORECLOSURES: Watch Out for the Settlement Stipulation

By Bruce J. Bergman

One of the good things about a settlement stipulation in a mortgage foreclosure case is that it is enforceable. One of the bad things about a settlement stipulation in the foreclosure case is that it is enforceable. These conflicting statements are not designed to be a literary device but a warning that the language of the agreement must be very carefully considered. While that is perhaps obvious, it was not so apparent to a lender who was tripped up by ineffective language in such an agreement. [*Donnelly v. Large*, 77 A.D.3d 1160, 909 N.Y.S.2d 205 (3d Dept. 2010)]. There, the lender was barred from collecting interest and legal fees!



A bedrock aphorism applying to a settlement stipulation or agreement is that it supersedes the parties' prior agreement and becomes the measure of the obligation—an enforceable contract. This is welcome because it means that a foreclosing lender or servicer can generally assume that its settlement agreements can be relied upon; they mean what they say. [For an extensive review of the enforceability of settlement stipulations in mortgage foreclosure actions see 2 *Bergman on New York Mortgage Foreclosures* §24.09[2], LexisNexis Matthew Bender (rev. 2011).]<sup>1</sup>

In what is perhaps the most common form of settlement—the forbearance agreement—the document

supplements the underlying mortgage contract. The mortgage holder agrees to forbear in prosecuting the foreclosure for some period of time in exchange for certain defined payments with other obligations often required to be fulfilled as well. If there is compliance, the mortgage is reinstated. If there is a default, the foreclosure proceeds and the mortgage documents continue to control. (Of course, there are permutations of such agreements but those should not change the message of this review.)

The new case which presents the warning was a suit on mortgage notes. It was settled by a stipulation. The glitch here was that the plaintiff took as security an affidavit for judgment by confession, no doubt intending to file that so if the borrower defaulted, the judgment would encompass all sums due. As it turned out, the plaintiff forgot the affidavit, and by the time he awakened, the three year statute of limitations on the unfiled confession of judgment had expired.<sup>2</sup> That left the lender with only the stipulation to control the obligation and that is just the point.

That stipulation neither separately provided for payment of interest nor incorporated the provisions of the defaulted note into the stipulation.<sup>3</sup> That left the lender solely with statutory interest.<sup>4</sup>

Nor did the stipulation provide legal fees to the lender. The notes did, but again, those were not part of the stipulation. (The confession of judgment might have made provision for this but that was, as mentioned, barred.)

While this may not be an everyday case, the lesson in the settlement arena is still meaningful. If a stipulation becomes the only controlling document—and sometimes it does—then it must be complete: include all the protections, all the obligations. They will not be implied by a court.

## Endnotes

1. In the subject case, in support of the proposition that a stipulation is a binding contract to be construed per the rules of contract interpretation, the Third Department cited *Rainbow v. Swisher*, 72 N.Y.2d 106, 109, 531 N.Y.S.2d 775, 527 N.E.2d 258 (1988); *H.K.S. Hunt Club v. Town of Claverack*, 222 A.D.2d 769, 770, 634 N.Y.S.2d 816 (1995), *lv. denied*, 89 N.Y.2d 804, 653 N.Y.S.2d 543, 676 N.E.2d 72 (1996).
2. CPLR §33218(b).
3. See discussion in the subject case and citation of *H.K.S. Hunt Club v. Town of Claverack*, 222 A.D.2d 769, 769, 634 N.Y.S.2d 816.
4. See discussion in the subject case and citation of *Retirement Accounts, Inc. v. Pacst Realty, LLC*, 49 A.D.3d 846, 847, 854 N.Y.S.2d 487 (2008).

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