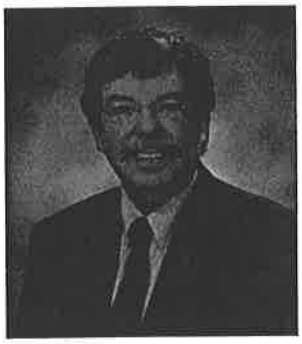
BERGMAN ON MORTGAGE FORECLOSURES

When a Foreclosing Lender Skips a Defendant, and Avoiding a Tale of Woe

By Bruce J. Bergman



As emphasized in a recent case,[1] reforeclosure is a methodology to save a lender when a defendant who should have been served was not. As a sidelight, two lenders incurred considerable difficulty through lack of dedication.

First, to the facts and the tale of woe.

A lender began a mortgage foreclosure in 1991. But it did not proceed to judgment until 2009! The explanation was that they had difficulty in locating the borrowers and in determining whether one of the borrowers had died. This, however, is not likely the real story; if there is an issue like that there are ready solutions, publishing the summons among them. In any event, a foreclosure of 18 years duration is surely going to beget mischief, and of course that happened here.

Somewhere in the middle of the long journey the borrowers conveyed the property to A. A conveyed to B and B obtained a mortgage loan from a hapless lender, who later assigned it to a major mortgage holder.

When finally the foreclosure was completed in 2009 the new mortgage holder had not been cut off by the foreclosure. So the foreclosing lender, who now owned the property, brought a reforeclosure—more on that in a moment.

Unfortunately for the new bank (the holder of the more recent mortgage), it defaulted in the reforeclosure action and when it finally awakened here was its story as to why that happened. It gave the defense of the action to another bank in accordance with a pooling and servicing agreement and sent the summons and complaint to that other bank. The recipient bank then sent the papers to one of its departments located in California and then to another department in Florida where the papers were somehow misplaced and could not be found – certainly no way to run an airline.

This meant that the new mortgage holder needed to vacate its default by showing both an excuse and a meritorious defense. The court did not comment on the reasonableness of the excuse, but jumped to the supposed defense to the reforeclosure action and rejected that, so that the problem with the wayward papers wasn't that much of an issue anyway.

All can be summed up now with a quick mention of the reforeclosure process. If a defendant was not cut off by a foreclosure, the purchaser at the sale (whether the foreclosing party or a third party) can use one of two methodologies in New York to now extinguish the missed party: a strict foreclosure or a reforeclosure.[2] The differences between the two are poorly understood both by most practitioners and the courts, but then it is all very obscure. For the purposes of this review, an assumption can be made that they are quite similar and here's the theory. If the missed party *had* been named in the foreclosure, the only thing it could have done was to pay off the mortgage to save itself. So in the reforeclosure or strict foreclosure, they are given the opportunity to do that, failing in which their interest is then permanently extinguished, as it would have been if they were named in the original foreclosure in the first place.

What was so compelling here, and is probably the ultimate message, is the court's observation that the New York statute provides that the right to reforeclose is *absolute*.[3] So it wouldn't have mattered what defense the new mortgage holder had, it was going to lose.

In addition, and contrary to the new mortgage holder's contention, the reforeclosure is properly maintainable even if the statute of limitations barred an action to foreclose on the original mortgage.[4]

Thus, the reforeclosure process is almost (but not quite) unassailable. It is certainly something to consider when a defendant who should have been in the action is missed.

Endnotes

1. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank National Trust Company*, 92 A.D.3d 768 (2d Dept. 2012)
2. For a further exploration of these methodologies, attention is invited to 4 *Bergman On New York Mortgage Foreclosures*, Chap. 32, LexisNexis Matthew Bender (rev. 2017).
3. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank National Trust Company, supra*, citing *2035 Realty Co. v. Howard Fuel Corp.*, 77 A.D.2d 870, 871, 431 N.Y.S.2d 57 (1980); *6280 Ridge Realty v. Goldman*, 263 A.D.2d 22, 29, 701 N.Y.S.2d 69 (1999).
4. Citing RPAPL § 1503.

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