Bergman on Mortgage Foreclosures: When a Lender Is Sued (or Not) for Injury at the Mortgaged Premises

By Bruce J. Bergman

The title suggests what seems an anomalous notion. But mortgage lenders and servicers and their attorneys will know and can confirm that mortgage holders are sued on occasion by someone claiming either to have been injured at the mortgaged property or having suffered damage to an adjoining parcel resulting from conditions at the mortgaged property. That generally a mortgage lender or servicer need not worry about losing such a claim is tangentially confirmed by a recent case, *Koch v. Drayer Marine Corporation*, 118 A.D.3d 1300, 988 N.Y.S.2d 233 (4th Dept. 2014), although they might yet have to worry. So there is a dual lesson here.

Before highlighting the meaningful enlightenment that case offers, there is another branch of the equation which can readily create confusion which, in turn, should be addressed.

We speed then to the essence of the underlying concept. If a lender is not in control of the mortgaged premises—the buzzwords are "care, custody and control"—then it will not be liable for events at the property which may cause damage or injury. And, without having become a mortgagee-in-possession, the lender typically would not exercise control over the property and so liability would not be an issue. But then comes an artificial, relatively recently minted, forced obligation of care, custody and control upon mortgagees: the maintenance mandate which can be imposed upon the foreclosing party once the judgment of foreclosure and sale "issues." [For extensive review of this subject, see 3 *Bergman on New York Mortgage Foreclosures*, §27.12, LexisNexis Matthew Bender (rev. 2014).]

Effective as of 2010, and pursuant to RPAPL §1307, under certain (ambiguous) circumstances therein delineated, a foreclosing party of residential property (holding only a lien) can be obliged to maintain the mortgaged premises. If such is the case, then the requisite care, custody and control can emerge together with the unwanted liability which accompanies that dominion.

When the statute was passed, that foreclosing lenders could become liable in tort during the course of a foreclosure was easily predictable. A recent case where a lender may be answerable in damages for deaths by fire at the premises confirms this. [See, *Lezama v. Cedano*, 119 A.D.3d 479, 991 N.Y.S.2d 32 (1st Dept. 2014.]

Thus, an immediate distinction must be made between what might be seen as the "usual" situation—a lender sued where there is no foreclosure judgment—with the factors eliciting the maintenance obligation—and the perhaps less common circumstance of the maintenance obligation having been triggered. The analysis here proceeds regarding the former.

It should be emphasized that if a lender has become a mortgagee-in-possession, although that is a right rarely invoked, it then might indeed be liable for injuries at the property. That (and the mentioned maintenance obligation) aside, the law has always been clear (albeit somewhat obscure) that a lender would need to have exercised some degree of care, custody and control over the property to be liable for torts—generally not applicable to a mere mortgage holder. [For a more expansive review of this concept with case citations, attention is invited to 1 *Bergman on New York Mortgage Foreclosures*, §2.24[9], LexisNexis Matthew Bender (rev. 2014.]

While the first new case cited isn't the precise fact pattern, it nonetheless underscores the critical point. There, a man sued the borrower/owner of the property—a marina—claiming he was injured when a plank collapsed while he was fishing from the dock.

The owner, who was in foreclosure, argued that the judgment of foreclosure and sale in the foreclosure action extinguished ownership so it could not therefore be liable. No, said the court, a judgment does not divest title; only the foreclosure sale does. *But*, the borrower/owner showed that shortly after the foreclosure was begun, she and her staff put the boats in storage and thereafter never had any further contact with the premises. In addition, the foreclosing bank denied the owner's access to remove the boats from storage for the summer season, barred the owner from sending rental renewals to customers and hired another marina operator to take over. This thereby established that the borrower/owner no longer possessed, maintained or controlled the marina.

The applicable principle of law was that "an out-of possession title holder lacking control over the property is not liable for injuries occurring thereon."

It is this maxim which protects a lender who is merely the holder of a mortgage and not in possession. The surprise here, though, was that

the injured party did not sue the bank which, it might be argued, *was* in control of the premises through its possible agent, that other marina manager. It can be speculated that such a suit might yet arise.

So, the two lessons:

- A lender or servicer without care, custody and control of mortgaged premises is not liable for injuries occurring there.
- But watch out for consequences if the lender or servicer *does* exercise that care, custody and control—and at the very least, insurance will be needed to protect against such injury claims.

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