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BERGMAN ON MORTGAGE FORECLOSURES . . .

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When a Prior Action Is Pending—A Matter of Strategy*

The pace of mortgage commerce in America is increasing the occurrence of an obscured procedural glitch in the mortgage foreclosure process (at least in New York) which heretofore had been almost unheard of—the existence of a prior foreclosure on the property as a possible bar to foreclosure now. How this happens and the available solutions are the focus here.

The overall strategic concern (at least from a mortgagee's perch) is the conspicuous one. Anything that halts a foreclosure in place is to be avoided. So, when this problem is encountered, the ability to get going is meaningful. In New York, for example, the statute governing foreclosures—Real Property Actions & Proceedings Law (RPAPL), art. 13—mandates that the complaint contain an allegation that no other action has been brought to recover any part of the mortgage debt.[1] This, in turn, relates in part to the prevalent action rule common in so many jurisdictions: You can't sue on the note (the monetary obligation) and foreclose on the mortgage at the same time.

The problem at issue, though, is not so much a prior action on the note, which would be quite uncommon, but the existence of a previous foreclosure. As an example, what sometimes happens—and lately, it seems, more often—is that a foreclosure is begun and then a forbearance agreement settles the case. Because it cannot be predicted whether the borrower will honor the agreement for its entire duration, wise lenders and servicers will not discontinue the foreclosure, but rather will hold it in place as a sword to use if a future default occurs. Especially with a lengthy forbearance, it may not be so difficult to forget that a foreclosure had been begun. And lack of awareness can be exacerbated by changes in servicing personnel, substitutions of new software or tracking systems and, perhaps significantly, assignment of the mortgage—especially in a large pool. Industry professionals recognize all the cited occurrences as familiar.

One can imagine, then, that the loan wends its way to a new servicer which, faced with a default, dutifully conveys the file to its counsel with the directive to foreclose. The foreclosure search then reveals the earlier, forgotten foreclosure action. Because the complaint is required to allege no prior action—which now isn't true—there is an apparent dilemma, and failure to so plead *is* a defect in the complaint.[2]

The safest solution, obviously, is simply to discontinue the earlier action. Sometimes, though, that cannot, or is not, so expeditiously done. The mechanics require either a motion or a stipulation, the latter to be signed by all parties who appeared in the action. Either approach can be time-consuming, depending upon a number of factors which needn't be explored here. (Suffice it to say that delays are frequent in many judicial foreclosure states.) Another impediment can even be the original law firm. Unfortunately, for some attorneys, discontinuing an old case, for no fee, for a non-client when there may be so much other work to do could induce torpor. Regardless of the underlying reason, months of delay encountered in disposing of that ini-

tial foreclosure is certainly both possible and unwelcome.

Faced with this problem, the choice is to wait, or be bolder. Contemplating the latter course, observe that the defect of failing to plead lack of jurisdiction is not jurisdictional, and neglect of any defendant to attack the complaint for failure to employ the required allegation waives any objection.[3] Although this compelling aphorism is not a panacea, it does suggest a possibly speedier alternative. Other parties may never notice the defect which, after all, is not fatal and is correctable. (Persuasive, too; the plaintiff is not trying to foreclose the mortgage twice.) If other parties do recognize the infirmity, by the time the issue surfaces, the first action may by then have been discontinued. Significantly, failure to include the statement in the complaint may merely obligate striking any offending language with leave to replead.[4] Thus, a foreclosure complaint can be drafted absent the otherwise necessary obligation.[5]

It appears, therefore, that the conundrum of the overlooked foreclosure has a practical solution. It is not immune to mishap, but when interest accrues every day, it is a path lenders and servicers may consider.

Endnotes

1. RPAPL 1301(2)
2. Again, such is the rule in New York. *Brandenberg v. Tirino*, 37 A.D.2d 713, 324 N.Y.S.126 (2d Dep't), *leave to appeal dismissed*, 29 N.Y.2d 486, 326 N.Y.S.2d 1025 (1971); *Ginsberg v. Roberts*, 19 A.D.2d 739, 242 N.Y.S.2d 861 (2d Dep't 1963); *Daint-T-Way Laundry v. Ng*, 89 N.Y.S.2d 867 (Sup. Ct. 1949).
3. *Bradenberg v. Tirino*, 37 A.D.2d 713, 324 N.Y.S.2d 126 (2d Dep't), *leave to appeal dismissed*, 29 N.Y.2d 486, 326 N.Y.S.2d 1025 (1971), *citing Szemko v. Weiner*, 176 A.D. 620, 163 N.Y.S. 382.
4. *Ginsberg v. Roberts*, 19 A.D.2d 739, 242 N.Y.S.2d 861 (2d Dep't 1963).
5. Note again that all assumptions are made based upon law in the state of New York.

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