Bergman on Mortgage Foreclosures: When the Borrower Attacks the Action Time After Time

By Bruce J. Bergman

Some borrowers never get discouraged. They default, but then try repeatedly to vacate that default no matter how many times they lose. Or, having interposed an answer which is stricken, they assault various subsequent stages of the foreclosure asserting the very same defenses previously banished by the court.

While not meaning to cast aspersions upon counsel diligently protecting a borrower's rights, the obvious detriment of such tactics to lenders and servicers is twofold: the time consumed by way of case delay in fending off these attacks and the legal expense incurred in the process. While the legal fees should later be recouped, the irony is that when application is made for reimbursement upon the judgment of foreclosure and sale, courts simply do not always reimburse all the legal cost visited upon the foreclosing plaintiff. And if the attorneys' fees are expended *after* the judgment has issued (such as a post-judgment borrower's motion or upon a deficiency judgment motion) it is usually too cumbersome and time consuming to go back and amend the judgment to apply anew for legal fees—especially when the paramount goal is to finally arrive at the end of the action.

When a court rejects a borrower defense once, it is reasonable to assume that it will again do so when later the borrower asserts it yet again, and then again. Need a foreclosing plaintiff worry that a court will buy the ploy next time around? Probably not, but it cannot be said with total assurance that such a scenario is impossible.

But then, a recent case [*Eastern Sav. Bank, FSB v. Brown*, 112 A.D.3d 668, 977 N.Y.S. 2d 55 (2d Dept. 2013)] confirms a dual helpful principle.

In a matter where a defendant borrower repeatedly moved to vacate a default and then each stage of the foreclosure thereafter, an appeals court ruled that it is correct to deny yet another motion a) where it is premised upon grounds asserted in the prior motions previously denied by the court from which no appeal was taken[1] or b) premised on grounds that were apparent at the time the borrower made the prior motions but did not assert the points.[2]

In other words, if a borrower could assert five existing defenses (even if fanciful or without foundation), uses one on a motion to vacate a default, loses, then makes another motion springing one of the defenses held in reserve, it won't work.

This will helpfully serve to defeat some wily borrowers. Unfortunately it does not mean that such borrowers cannot *make* such dilatory motions, just that the chances of defeating those motions are considerably stronger.

Endnotes

1. Citing *Viva Dev. Corp. v. United Humanitarian Relief Fund*, 108 A.D.3d 619, 620 (2013); *Discover Bank v. Qader*, 105 A.D.3d 892 (2013); *JMP Pizza, LLC v. 34th St. Pizza, LLC*, 104 A.D.3d 648, 648 (2013); *47 Thames Realty, LLC v. Robinson*, 85 A.D.3d 851, 852 (2011); *Robert Marini Bldr. v. Rao*, 263 A.D.2d 846, 848 (1999).
2. Citing *Lambert v. Schreiber*, 95 A.D.3d, 1282, 1283 (2012).

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.