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## BERGMAN ON MORTGAGE FORECLOSURES . . .

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### When the Mortgage Assignee Does Not Have to Be Substituted

Slavish adherence to general notions of what is apparently wise and correct is sometimes—maybe most of the time—a safe and recommended course of action. As one old saying goes, surplusage does not vitiate. But, in a mortgage foreclosure case, lack of economy, both in expenditures and time, *can*—and often does—have a deleterious effect upon the result. Indeed, the hackneyed bromide “time is money” finds ready and persuasive application in the mortgage foreclosure arena.

So when a mortgage is assigned (a very common occurrence in modern mortgage commerce), the first thought is to record the assignment, a good idea in any event, and which will be discussed further in a moment. If the mortgage is assigned during the course of a foreclosure action, concomitant reaction is to move to amend the caption to substitute the assignee as plaintiff. Whether *that* is a good (or necessary) approach depends upon when during the action the assignment is given.

Returning to the recording of an assignment, as a matter of New York statute,<sup>1</sup> the recording is not itself notice of the assignment to the mortgagor or the owner of the mortgaged premises (if recorded after the conveyance to the new owner). Accordingly, the usual notice that a mortgage has been assigned still needs to be given—although that would not be necessary during the course of a foreclosure action. But statute<sup>2</sup> does necessitate filing the assignment of mortgage before a referee's deed is executed to the purchaser at the foreclosure sale.

Moreover, there are good, practical reasons why recording the assignment is recommended. In serving as notice to the world of the assignee's position, it offers some protection to that assignee. For example, were there to be a foreclosure of a senior mortgage, the risk of process being *served* upon the assignor with simultaneous neglect to advise the assignee disappears. A like analysis applies upon a tax lien foreclosure or a judgment creditor's sheriff sale, among others.

Thus, while rushing to file an assignment is not mandated, it is suggested.

The second part of the issue is the necessity to amend the caption in a foreclosure action to substitute the assignee as the plaintiff. For the sake of clarity—and to avoid offering an apparent (though groundless<sup>3</sup>) defense to any party bent on delaying the action—amending the caption is a sage strategy. But a separate motion for that purpose is unnecessary and would only contribute to delay of the case. The relief can be requested as an addition to the standard relief at the next stage of the case when either a motion or an *ex parte* order naturally arises, e.g., the order of reference or the judgment stage.

Among the most often asked questions in foreclosure practice is, What happens if the assignment of mortgage is given subsequent to issuance of judgment of foreclosure and sale? And, need a special motion be made to amend the caption because the only event remain-

ing in the case is the sale itself? The answer, as both a practical and legal matter, is "no." On the practical side, advise the referee of the assignment and bring a copy to the sale. An assignee stands in the shoes of the named plaintiff and all the benefits inure to that assignee, such as not being obligated to submit a bid deposit. Referees should, and typically do, readily understand this.

On a more technical basis, CPLR 1018, entitled "Substitution upon transfer of interest," provides that upon such a transfer, the action may be continued by the original parties *unless* the court orders the transferee to be substituted. The issue has recently been litigated in a case where a defendant argued that a foreclosure should be dismissed because the named plaintiff (the assignor) owned no rights in the matter.<sup>4</sup> Based upon CPLR 1018,

and absent a challenge to the substantive validity of the assignment, the First Department affirmed the trial judge in finding the argument without merit.<sup>5</sup>

To the extent that practitioners have always sensed that a post-judgment motion to substitute a plaintiff upon an assignment was not required, an appeals court has now confirmed that the feeling was absolutely correct.

### Endnotes

1. N.Y. Real Prop. Law § 324.
2. N.Y. Real Prop. Acts. & Proc. Law § 1353(2).
3. N.Y. Civil Practice Law & Rules 1018 (CPLR); *Central Fed. Sav. v. 405 W. 45th Street*, \_\_ A.D.2d \_\_, 662 N.Y.S.2d 489 (1st Dept. 1997).
4. *Central Fed. Sav.*, \_\_ A.D.2d \_\_, 662 N.Y.S.2d 489.
5. *Id.*

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