BERGMAN ON MORTGAGE FORECLOSURES

Court Allows Borrowers Standing Defense by the Back Door

By Bruce J. Bergman

Lenders, of course, are aware that standing has likely become the most ubiquitous borrower defense in the foreclosure realm. It can often be problematic. But there is a salutary aspect to all this: the standing defense is waived if not interposed in an answer or a pre-answer motion. There is considerable case law buttressing this proposition and it is meaningful because it saves lenders the burden of suffering a standing defense, for example on the eve of sale.

All that noted, there is a case which affords borrowers another (and more dilatory method) to pursue the otherwise waived standing defense—through amending an answer. [See *U.S. Bank National Association v. Sharif*, 89 A.D.3d 723, 933 N.Y.S.2d 293 (2d Dept. 2011)].

How nefarious this can be is best understood with a mention of the facts—but briefly first the legal principles applicable to amending an answer.

If a defendant desires to amend an answer already interposed (in our milieu, that defendant typically is the borrower) a motion for relief is to be freely granted by the courts, absent prejudice or surprise directly resulting from the delay in seeking that leave. This prevails unless the proposed amendment is palpably insufficient or patently devoid of merit. Mere lateness is not a bar to the amendment; rather it must be lateness coupled with sufficient prejudice to the other side.

So what happened in this case? Here, the borrower made no motion attacking the complaint on the ground of standing and, although he submitted an answer, it contained no standing defense. The foreclosing plaintiff thereupon moved for summary judgment to dispose of the other defenses in the answer.

Upon appeal, the court ruled that waivable defenses (such as standing) can nevertheless be interposed in an answer which is amended by leave of the court—so long as that amendment does not cause the other party prejudice or surprise resulting directly from the delay.

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In this case, it so happens that the plaintiff had a weak response to the standing defense sought to be put in the amended answer (it was an assignee of the mortgage but that assignment did not include the note or bond). Therefore, the court was able to find that the standing defense was *not* palpably insufficient. Nor could the lender prove surprise or damage from the delay in the borrower seeking now to employ the standing defense. Indeed, in most cases, it would be very difficult for a lender-plaintiff to defeat the amendment motion on the grounds of surprise or prejudice.

In sum, under many circumstances, even though the standing defense will have been waived, a motion to amend the answer will be an efficacious way for a borrower to first raise the defense and thereby cause further delay in the case.

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