BERGMAN ON MORTGAGE FORECLOSURES

When Bank Statements Torpedo the Foreclosure

By Bruce J. Bergman

Usually computer-generated monthly statements from mortgagee banks to borrowers are a ubiquitous way for periodic installments to be remitted. But when borrowers are in arrears, especially if they are paying in fits and starts, with possible additional sums accruing (i.e., late charges, default interest, bounced check charges, among others), there is increased possibility for errors. Computers are marvels, of course, but humans program them and humans input information. Mistakes can, and do, occur.

If for some reason a lender statement or invoice recites a lesser sum to be paid than is actually due, might that be a basis for a borrower to avoid paying the correct sum, or even to defeat a foreclosure? Traditionally New York case law was comforting for the lender side on this point—there was no danger if a billing invoice was in error. A recent case, however, rules the other way and presents a sobering lesson. [See *2390 Creston Holdings LLC v. Bivens*, 149 A.D.3d 415, 51 N.Y.S.3d 61 (1st Dep't 2017).]

Addressing the typical circumstances where the lender was not in danger, in one instance, computer-generated billing statements were transmitted to a mortgagor in the first month after two separate foreclosures were begun. There was no evidence, however, that the bills misled the mortgagor into believing that there was a waiver of acceleration or that the respective foreclosures would be discontinued; in fact, no payments were made in response to the statements.[1] So the defense was rejected. In another case, without explanation, billing notices subsequent to default showing only the regular monthly mortgage payment due were held a meritless argument to estop acceleration.[2]

The fact pattern in the recent case tells a different story. A mortgage loan was seriously in default with considerable default interest due. An acceleration letter was sent which particularly pointed out that acceptance of any lesser sums would not be a waiver and that any changes had be in writing, the latter also a provision found in the mortgage. When the borrower submitted all the principal in arrears, but with interest only at the *note* rate, the bank inexplicably generated a statement showing an "adjustment" to the account with a credit for the difference between default interest and the note rate. Thereafter, the bank sent the borrower 20 consecutive invoices consistent with the original loan terms, that is, note rate interest.

The loan was assigned and the assignee, after making a demand, began a foreclosure based upon the continuing arrears in default interest. (After all, default interest as demanded in the acceleration letter had never been paid.) In granting summary judgment to the borrower, the court ruled that the "adjustment" in the bank's statement and the 20 consecutive invoices were inconsistent with demand for full payment of principal and interest—that is, counter to an acceleration. Moreover, even if the waiver asserted by the borrower was to be deemed a loan modification, and therefore required to be in writing, the bank was found to have expressly reversed the default interest rate and the default interest charges.

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In sum, the bank was held to have intentionally waived its right to acceleration with interest at the default rate. While previous cases had in essence said that erroneous monthly statement would not change the actual borrower's obligation, the particular adjustment statement here followed by 20 invoices not seeking default interest were enough for the court to conclude that the lender had indeed waived default interest.

Concededly, these are rather extraordinary circumstances. Nonetheless, they do urge that care in issuing monthly statements is very much in order. At some point, prior case law notwithstanding, the court may indeed find such statements to rise to the level of a waiver.

Endnotes

1. *Bercy Investors v. Sun*, 239 A.D.2d 161, 657 N.Y.S.2d 47 (1st Dep't 1997).
2. *Bank of New York v. Spring Glen Associates*, 222 A.D.2d 992, 635 N.Y.S.2d 781 (3d Dep't 1995).

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