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BERGMAN ON MORTGAGE FORECLOSURES . . .

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A Case to Warm the Soul (and a Tale Worth Telling*)

The American legal system is surely the greatest in the world. But having uttered the expected platitude, apparent though it is, supplies little comfort to a lender or other foreclosing plaintiff who suffers from seemingly interminable court delays. Nor does the underlying truism afford succor when courts sometimes (and might it be whispered, often?) seem bent upon accepting transparent excuses and dilatory tactics from virtual legions of offended borrowers.

In any loan portfolio or complement of foreclosure actions, there will be a certain percentage of cases which appear suited only to those periods when the moon is full — except that foreclosure practitioners tend to see them all too frequently. And it is particularly dismaying when courts give credence to borrowers' claims that are obviously and patently without merit.

What do we encounter to our great displeasure? The borrower always says he wasn't served and naturally knew nothing about the foreclosure. Plaintiff produces a process server with the sworn affidavit of service. Not incidentally, there should also be a fair amount of correspondence to the borrower giving lie to the claim of ignorance of the proceedings. The result? Unpredictable. It's hard to say which way a decision will go and it varies with the facts at hand.

Another borrowers' tactic is to try presenting as many "defenses" as come to mind. Lenders label it a shotgun approach, point out to the court the patent desperation of the posture, but then occasionally find a court seizing upon one of the claims to give some relief to the borrower.

Whatever flailing the borrower may do, it is usually sage strategy for plaintiff to highlight the ultimate truth — that the borrower has simply not paid the mortgage and cannot demonstrate to the contrary, so that all the sound and fury does, to paraphrase the Bard, signify nothing. That's nice, and it ought to be persuasive. Too often though, it just somehow becomes obscured in the motion papers.

Although a reasonable number of times one is blessed with lower courts not fooled by the nonsense, it is rare to find an appellate court address such matters, which leads us to the heartening pronouncement (from a plaintiff's perch) in *Belia Associates v. 27-29 West 181st Street Associates.*[1] There, the defaulting borrower bamboozled nobody.

One defense was that notice of the foreclosure was not received in time to defend.[2] But the borrower had filed a petition in bankruptcy court clearly demonstrating specific knowledge of the existing foreclosure action. The borrower even knew the index number of the foreclosure case two weeks after plaintiff obtained it, so the court didn't buy the ignorance riposte.

Of course, there was also the usual lack of service assertion. These were of the oft-presented conclusory nature; no details, just "I wasn't served." The court found that response too amorphous and plain insufficient to rebut the showing of proper service in lender's process server affidavit.

There is yet more. Even if the court were to believe and accept the various claims, relief was held *not to*

be automatic.[3] And the topper was the most gratifying of all. The court was entitled to consider the actuality that the borrower never said that it had paid the amount due on the mortgage. (That would go to the issue of a meritorious defense, although the court did not couch it in those terms.)

The last finding is precisely the point, one we would prefer to see expressed more often, although we don't really expect that. Why all the jousting when we know the borrower didn't pay? Undoubtedly the answer is because litigation still must proceed by the rules, and quite properly so. Defendants *do* have to be served and *are* entitled to certain notice, even if such is meaningful only in instances where the borrower has a genuine defense.

Still, it is especially refreshing to see a decision like this one, something perhaps to be preserved for one's next memorandum of law on the subject. Ah, if such wisdom were only more prevalent . . .

Endnotes

1. 205 A.D.2d 320, 613 N.Y.S.2d 16 (1st Dept. 1994).
2. Defendant was relying upon CPLR § 317, which provides that a person served other than by personal delivery, who does not appear, may be permitted to defend within one year of obtaining knowledge of entry of the judgment, if the court finds that he did not personally receive the summons in time to defend and has a meritorious defense. Defendant also cited CPLR 5015.
3. Citing Eugene DiLorenzo, Inc. v. Dutton Lbr. Co., 67 N.Y.2d 138, 143, 492 N.E. 2d 116, 501 N.Y.S.2d 8 (1986).

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