

# SERVICING MANAGEMENT

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## FORECLOSURE

### A Cause For Acceleration

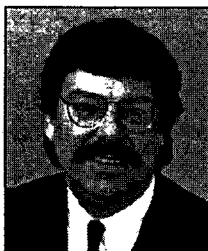
*If A Borrower 'Misstates' Information On An Application, What Happens?*

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**W**hen a borrower fails to make a mortgage payment past whatever grace period may be applicable, lenders and servicers would not feel a need to consult specialized counsel to know if there will be a basis to foreclose, should that become necessary.

And it is no doubt correct to observe that one of the places where lenders and servicers do not so often encounter unusual variety is in the na-



ture of the default which triggers acceleration and then foreclosure.

Overwhelmingly, the default encountered is failure to pay. For

whatever reason, the borrower missed some or many installments or failed to satisfy the mortgage upon its maturity. Although there are nuances surrounding even this most obvious and basic breach, essentially (in New York) the courts are very strict in authorizing foreclosure for neglect to pay. There isn't much room of legitimate excuse when non-payment is the issue.

#### Others ground

Even a brief review of a standard acceleration clause in a mortgage, however, reveals immediately that there are other grounds to accelerate and foreclose. (To be sure, these are seen less often than failure to pay.)

In a residential mortgage, these will typically include:

- due on sale,
- maintenance of insurance,
- keeping current a senior mortgage,
- failure to pay taxes,
- failure to repair,
- alterations without consent,
- demolition without consent,
- building violations, and
- failure to issue estoppel certificate, among others.

The commercial mortgage will contain many more provisions to abide the complexities attendant to larger transactions.

Is it possible that a borrower could be maintaining payments on the mortgage while violating some other term? Although it won't occur

very frequently, the answer is most assuredly "yes."

#### Paying SOME bills

For example, where a lender might not be escrowing for taxes, a borrower could be remitting monthly installments toward the mortgage while ignoring real estate tax bills.

Or, the borrower might be making the payments while neglecting upkeep to the point where the property is precipitously declining in value.

But why the discussion? It might seem apparent that if a borrower breaches an obligation in the mortgage contract, there would be no question but that foreclosure is authorized. In New York, at least, that is not so. This is too broad and detailed a subject to review in depth here. (For a complete discussion, read Chapter 4 of *Bergman on New York Mortgage Foreclosures*, available through Mathew Bender & Co.)

In any event, the key to analysis is the type of default. More briefly than the subject deserves, for failure to pay installments, or maintain insurance, or for breach of the due on sale provision, enforcement will be unswerving. That is likely as well for total demolition without consent and failure to issue an estoppel certificate.

For almost any other variety of default, uncertainty surrounds the result and it may be highly dependent upon the facts. It is these varieties of issues which can truly vary

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from state to state so it is wise to consult local counsel on these decidedly fine points.

### ***Assignment mishap***

Now here is a comforting scenario which engendered this review.

A lender as a matter of course sells many of its loans, either simultaneously with or shortly after closing. The borrower must have a certain level of credit (there are of course other elements) and if the loan is not as represented, the lender must buy it back from the assignee.

In keeping with these procedures, a borrower's mortgage application recites his employment with an insurance company. Some time later, his employment was terminated. At the closing, the lender required a re-signing of the mortgage application to confirm the application. Even though the statement about the employment was no

longer true, the borrower re-signed and the loan closed. The mortgage was then assigned.

Many months later, the assignee discovered the employment misrepresentation and insisted that the original lender buy back the loan. A foreclosure was then about to begin, based upon the misrepresentation, when there was also a payment default. Nevertheless, both grounds were recited as the basis of the foreclosure.

### ***The borrower loses***

While the borrower tried to argue that he did not mislead the lender, the court granted summary judgment to the lender, reciting plaintiff's entitlement to judgment by virtue of "the proof that defendant misrepresented his employment status ... when he re-executed his mortgage application and stated therein that he was employed...." [Loan America Financial Corporation v.

Talboom, Misc.2d, 620 N.Y.S.2d 221 (1994).]

Because the borrower was clearly in default in remitting mortgage payments (although he tried to argue that he was not), it certainly made it easier for the court to support foreclosure for the employment misstatement as well. (Remember, there is virtually no room for legitimate contention when there is an undeniable payment default.)

The ultimate question is whether this case stands firmly for the proposition that such a misleading assertion in a mortgage application is a ground to foreclose in New York.

It appears that it is and at the very least, this enlightened decision for the first time provides potent ammunition to make the argument should it be necessary to protect a lender or servicer. **SM**