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BERGMAN ON MORTGAGE FORECLOSURES . . .

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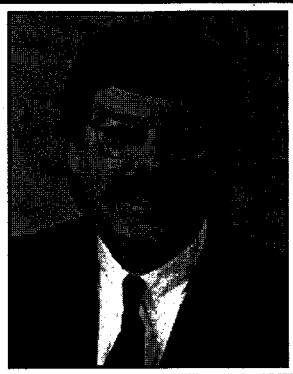

Assault on Foreclosure Judgment Interest*

We had occasion in these pages some years ago to observe that an early 1950s musical refrain once treacled "little things mean a lot,"[1] which obviously can be true. The context was the then-new and welcome confirmation that interest on the judgment of foreclosure and sale *could* exceed 9 percent—and could reflect some default rate of interest—*if* the mortgage provided as such with appropriate clarity.[2] Because, for any number of reasons, the time from issuance of judgment of foreclosure and sale until conduct of the sale can enormously exceed the roughly four weeks' advertising time, the perhaps seemingly inconsequential rate of interest on the judgment can be a matter of consequence. (Even if the sale is optimally conducted, the interest rate is meaningful for institutional lenders who own a large portfolio of defaulted loans.)

That the foreclosure judgment will bear *some* rate of interest (be it the 9 percent judgment rate or something greater as directed by the mortgage documents) is something mortgage lenders and servicers have understandably taken for granted.

Although the assumption that interest automatically accrues on the foreclosure judgment is well-founded, recent case law offers the warning that undue delay following entry of the judgment could be a basis to deny an award of post-judgment interest.[3] To be sure, the CPLR provides that every money judgment bears interest from the date of entry,[4] and that is why all assume that interest on the foreclosure judgment will accrue. According to well-settled law, the underlying basis for post-judgment interest is as a penalty for the delayed payment of a judgment. *But*, where delay after judgment is caused solely by the plaintiff, defendants, it is said, should not suffer the penalty of paying interest.[5]

In equity, the court has this discretion, and wrongful conduct by either party is a factor to consider.[6] So, for example, if a plaintiff wrongfully refuses to allow redemption, interest on the foreclosure judgment can be denied.[7] Such a consequence for an affirmative error hardly seems objectionable. More insidious, though, would be a denial of interest to the plaintiff who, perhaps inadvertently, neglects to schedule a foreclosure sale. So there is a portentous lesson of care here for foreclosing plaintiffs.

Endnotes

1. Bruce Bergman, *Interest on the Foreclosure Judgment B An Unfolding Drama*, 20 Real Prop. L Section Newsl., 4 (Oct. 1992).

2. *Marine Mgmt. v. Seco Mgmt.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991).

3. *Erhal Holding Corp. v. Rusin*, __ A.D.2d __, 675 N.Y.S.2d 138 (2d Dep't 1998).

4. CPLR 5003.

5. *Erhal Holding Corp.*, __ A.D.2d __, 675 N.Y.S.2d 138 (citing *Juracka v. Ferrara*, 120 A.D.2d 822, 824, 501 N.Y.S.2d 936); *Ariola v. Petro Trucking Corp.*, 50 Misc. 2d 216, 217-18, 270 N.Y.S.2d 309.

6. *Sloane v. Gape*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dep't 1995) (citing *South Shore Fed. Sav. & Loan Ass'n v. Shore Club Holding Corp.*, 54 A.D.2d 978, 389 N.Y.S.2d 29); *Bosco v. Alicino*, 37 A.D.2d 552, 322 N.Y.S.2d 414.

7. *Sloane*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dep't 1995).

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