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Representing the Mortgagor:

Can the Mortgage be Saved?*

PART II

The Vital Concepts of Acceleration and Tender

As will later be discussed in detail, there are any number of defenses which may be available in a particular foreclosure case, depending of course, upon the facts. However, by far the most common circumstance which brings the client to an attorney's office well illustrates the issues of acceleration and tender. Lets suppose the following composite fact pattern:

- Mortgagor Jones owes his $750 mortgage payment on January 1.
- On that date, for whatever reason, the payment is not made.
- The mortgage contains the usual grace period of fifteen days, after which the mortgagee has the option to declare the entire principal balance due. This is referred to as the "acceleration clause."[5]
- Jones does not pay on the sixteenth day either and has now obligated himself to pay a two percent late change pursuant to RPL § 254-b. (This presupposes a late charge clause in the mortgage which is standard with institutional lenders.)
- Particularly with institutional lenders, there would soon be phone calls and/or letters to collect the one month arrears.
- In response Jones "promises" to send his check, but fails to do so. (He was called to California

[5] The standard acceleration clause in New York states:

> "That the whole of said principal sum and interest shall become due at the option of the mortgagee: after default in the payment of any instalment of principal or of interest for fifteen days; or after default in the payment of any tax, water rate, sewer rent or assessment for thirty days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgage

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on a family emergency and forgot to take care of it.)[6]

- It is now February and the lender is continuing its requests. Jones finally sends his January and February payments, but submits them on condition that the lender reduce the amount taken every month towards escrow.
- The lender refuses to accede to the condition and returns the check. It is now late March.
- With 2% late charges accruing, Jones owes three months and $750 with late charges of $45 for a total of $2295.
- Jones relents, withdraws his condition and mails a check for $2200 - three months' mortgage arrears.
- The lender rejects the $2200 as insufficient because late charges were not included. The check is returned to Jones.
- By this time the lender has concluded that this mortgage is no longer worthy of the staff time necessary to effect collection, so it excercises its right of acceleration by sending a letter to Jones declaring the entire principal balance and interest immediately due and payable.
- Upon receipt of the acceleration letter, Jones mails his check for the full $2295.
- The lender rejects the check and returns it by mail advising that the file has been turned over to counsel for institution of a foreclosure action.

Jones senses his jeopardy and retains an attorney to extricate him from the dilemma. He recites this story to the lawyer, which later invariably appears in the affidavit in opposition to the lender's motion for summary judgment.

"I was only about a week late and I couldn't send the January payment because I had to go to California. What could I do? Surely a court won't hold me to that - it was a problem beyond my control."

"I've had a continuing problem with my escrow and the bank didn't want to lower the payment. So I *sent* the two months and said they should lower the escrow amount."

"When they sent the check back I gave in on the escrow and paid all the money except for those ridiculous late charges."

"Then they said they wanted the full $40,000 left on the mortgage - which I didn't have - so I sent them all the *back* monies, but they wouldn't take it.

The foregoing is a typical tale of woe which encompasses most of the usual problems encountered in the overwhelming number of residential defaults. Based upon facts such as these, many lawyers, duly noting the hornbook maxim that foreclosure is an equity action, enterpose an answer in the foreclosure. Surely, the lender can't be this cavalier . . . But given these events, the lender is entirely correct in proceeding with the foreclosure and will be successful! Here are the valuable principles which explain why.

Tender

- When the mortgagor "promises" to pay his obligation he has done nothing. A promise or offer is not the equivalent of an actual tender. *(Ponce DeLeon Federal Savings & Loan Association* v. *Nemeroff,* 28 A.D.2d 668, 280 N.Y.2d 632; *New York Utility Co., Inc.* v. *Williamsburg S.L. Co., Inc.,* 187 App. Div. 110, 175 N.Y. Supp. 60; *Rosenbaum* v. *Rose,* 35 Misc. 431, 230 N.Y.S.2d 742; *Nelson* v. *Vinel,* 26 A.D.2d 792, 273 N.Y.S.2d 652; *Lipwal Holding Corporation* v. *Martens,* 270 App. Div. 909, 61 N.Y.S. 2d 507; *Jamaica Savings Bank* v. *Sutton,* 346 N.Y.S.2d 847, 42 A.D. 2d 856.)
- A tender submitted conditionally is not valid. It must be unconditional. *(Balzarano* v. *Bertino,* 37 Misc. 2d 597, 236 N.Y.S.2d 249).
- A tender of less than the full amount validly due is not deemed a tender. *(Nelson* v. *Vinel, Inc., supra.; Mahoney* v. *McCollum,* 146 Misc. 790, 263 N.Y. Supp. 628; *Van Benthuysen* v. *Central N.E. & W.R. Co.,* 17 N.Y.Supp. 709).
- A mortgagor is free to tender all arrears in full subsequent to default but prior to acceleration. *(Albertina Realty Co.* v. *Rosbro Realty Corp.,* 258 N.Y. 472; *Staten Island Savings Bank* v. *Carnival,* 39 A.D.2d 779;

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for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided. An assessment which has been made payable in instalments at the application of the mortgagor or lessee of the premises shall nevertheless, for the purpose of this paragraph, be deemed due and payable in its entirety on the day the first installment becomes due or payable or a lien."

[6] It may be that the mortgagor has lost his job and must decide between food or the mortgage payment. Or, the mortgagors may be involved in an acrimonious divorce wherein the responsibility as between husband and wife to pay the mortgage has either not been determined or is not being honored. Perhaps the mortgagor is just overextended with other financial projects. Sometimes the mortgagor is just a deadbeat. But why payment has not been made is not relevant. What *is* important is whether payment has or has not been made, so dwelling upon problems and emotions are not of concern to this discussion nor are they apposite to most aspects of foreclosure litigation. (*Graf v. Hope Building Corp.* 254 N.Y.1; *First National Stores v. Yellowstone Shopping Center,* 21 N.Y.2d 630, 290 N.Y.S.2d 721)

Sherwood v. *Greene*, 41 A.D.2d 881, 342 N.Y.S. 2d 990; *Cresco Realty* v. *Clark*,128 App. Div. 144, 112 N.Y.Supp. 550; *Seligman* v. *Burg*, 233 App. Div. 221, 251 N.Y.Supp. 689.) However, payment of arrears subsequent to a proper acceleration need not be accepted. *Jaimaica Savings Bank* v. *Cohan*, 36 A.D.2d 743, 320 N.Y.S.2d 471; *Katz* v. *Sardove* Realty Corp., 212 N.Y.S.2d 447; See also cases cited, *infra*, under "acceleration.")

Acceleration

We have observed that there is a right to accelerate upon a default when the mortgage specifically contains such a provision as well as noted the relationship of tender to acceleration. How and under what circumstances acceleration comes about is another critical consideration.

Although the right to accelerate *may* seem harsh, where the covenant is not oppressive or unconscionable and involves no penalty for forfeiture, it is enforceable. That was precisely the ruling in the trend-setting decision, *Graf* v. *Hope Building Corporation, 254 N.Y.1 (1930)*, the facts of which make the point very well.

In that case, the plaintiffs were the holders of two consolidated mortgages. Under the terms of the agreement, the principal sum was due on a certain date. However, there was a clause that provided that the whole could become due after a default of twenty days in the payment of any installment of interest. The principal of the defendant corporation, the mortgagor, who was the only one authorized to sign checks, was departing for Europe some eight years before the entire mortgage would otherwise have been due. Prior to departure, a clerk in the employ of the defendant corporation computed the interest he believed was due, but his computation was erroneous. The principal signed the check and went to Europe. Before the date the interest was due, the error was discovered and the mortgagee was advised of the discrepancy and was told that when the principal returned from Europe, the balance would be paid, but that in the meanwhile, the check for the smaller amount would be forwarded. That check was sent to the mortgagee, was deposited and was paid. When the principal of the corporation returned, another error was made and he was not informed of the default in the payment of interest. When 21 days expired, the foreclosure action was begun and it was then that the defendant tendered the deficiency. The mortgagee, however, insisted upon its contract rights, refused the tender and continued with its foreclosure action. In ruling for the mortgagee and rejecting the tender by the mortgagor, the Court of Appeals states as follows (page 4 ff.):

> "On the undisputed facts as found, we are unable to perceive any defense to the action, and are therefore constrained to reverse the judgment dismissing the complaint. Plaintiffs may be ungenerous, but generosity is a voluntary attibute and cannot be enforced even by a chancellor. Forbearance is a quality which under the circumstances of this case is likewise free from coercion. Here there is no penalty, no forfeiture (*Ferris* v. *Ferris*, 28 Barb. 29; *Noyes* v. *Anderson*, 124 N.Y. 175, 180, 26 N.E. 316, 317, 21 Am. St. Rep. 657), nothing except a covenant fair on its face to which both parties willingly consented. It is neither oppressive nor unconscionable. *Valentine* v. *Van Wagner*, 37 Barb. 60. In the absence of some act by the mortgagee which a court of equity would be justified in considering unconscionable he is entitled to the benefit of the covenant. The contract is definite and no reason appears for its reformation by the courts. *Abrams* v. *Thompson*, 251 N.Y. 79, 86, 167 N.E. 178. We are not at liberty to revise while professing to construe. *Sun Printing & Publishing Ass'n* v. *Remington Paper & Power Co.*, 235 N.Y. 338, 346, 139 N.E. 470. Defendant's mishap, caused by a succession of its errors and negligent omissions, is not of the nature requiring relief from its default. Rejection of plaintiff's legal right could rest only on compassion for defendant's negligence. Such a tender emotion must be exerted, if at all, by the parties rather than by the court. Our guide must be the precedents prevailing since courts of equity were established in this state. Stability of contract obligations must not be undermined by judicial sympathy. To allow this judgment to stand would constitute an interference by this court between parties whose contract is clear."

Where the balance was accelerated only six days after the grace period the clause still upheld by the Court in *Bolmer Bros.* v. *Bolmer Const. Co.*, 114 N.Y.S.2d 530.

The underlying proposition has also been stated that the clause is intended for the protection of the mortgagee and to make the security more effective. (*Stith* v. *Hudson City Savings Bank*, 63 Misc. 2d 863,313 N.Y.S.3d 804). Similarly, in *Armstrong* v. *Rogdon Holding Corp.*, 139 Misc. 549, 247

N.Y.Supp. 682, the principle was that equity will not relieve against strict performance.

See also:

Albertina Realty Co. v. *Rosbro Realty Corp., supra. Shell Oil Company* v. *McGraw*, 48 A.D.2d 236. *Caspert* v. *Anderson Apartments*, 196 Misc. 555, 94 N.Y.S.2d 521.

Citizens Savings Bank v. *104 E. 113th St. Corp.*, 246 App. Div. 247, 285 N.Y. N.Y.Supp. 271.

Trowbridge v. *Malex Realty Corp.*, 111 Misc. 211, 183 N.Y. Supp. 553, aff'd. 198 App. Div. 656, 191 N.Y.Supp. 97.

Kelmenson v. *Boulevard Construction Corp.*, 232 App. Div. 847, 249 N.Y.Supp. 46.

Albany Savings Bank v. *Clifton Park Equity Developers, Ltd.*, 46 A.D.2d 823, 360 N.Y.S.2d 512.

Although this right to accelerate gives considerable leverage to the mortgagee, it must actually be exercised and under appropriate conditions.

— There must first be a default. Until the grace period has expired, an exceleration would be invalid. [*King* v. *Giordano*, 179 (119) NYLJ (6-21-78) 15, Col. 3M.]

— Notice to accelerate is not a prerequisite. (*Albertina Realty Co.* v. *Rosbro Realty Corp., supra.; Ford* v. *Waxman*, 50 A.D.2d 585, 375 N.Y.S.2d 145) But, there must be some overt, unequivocal act exercising the right. [*Albertina Realty Co.* v. *Rosbro Realty Corp., supra.; Seamens Savings Bank* v. *Wallenstein Realty Corp.*, 169 Misc. 7, 6 N.Y.S.2d 706; *446 West 44th St.* v. *Riverland Holding Corp.*, 267 App. Div. 135, 44 N.Y.S.2d 766; *Dale Holding Corp.* v. *Dale Gardens*, Inc., 186 Misc. 940, 59 N.Y.S.2d 210; *Alperti* v. *Larsen*, 182 (51) NYLJ (9-12-79) 13, Col. 5M]. A letter stating that the right of acceleration is exercised would suffice. So would the sole act of actually instituting the foreclosure, but only if the complaint recites the acceleration. (*Walsh* v. *Henel*, 226 App. Div. 198 235 N.Y.Supp. 34).

— Although there are cases holding that once exercised, the acceleration cannot be waived, there may be special circumstances where a Court could find that the lender did in fact waive. (*Rockaway Park Series Corp.* v. *Hollis Automotive Corp.*, 206 Misc. 955, 135 N.Y.S.2d 588, aff'd. 285 App. Div. 1140, 142 N.Y.S.2d 634). This is always a factor to be considered when analyzing the facts of a particular case.

— When the acceleration is based upon a default of other than payment of principal and interest, the decisions are more nebulous. There *is* a general proposition that acceleration may be based upon any default contemplated by the mortgage. (*Mills Land Corporation* v. *Halstead*, 184 Misc. 679, 56 N.Y.S.2d 682; *Application of Cumberland Garage*, 73 N.Y.S.2d 571; *Jeffrey Towers, Inc.* v. *Straus*, 31 A.D.2d 319, 297 N.Y.S.2d 450; *Gratton* v. *Dido Realty Co., Inc.*, 89 Misc. 2d 401, 391 N.Y.S.2d 954). Among others, this has been applied specifically for insurance (*New York City Baptist Mission* v. *Tabernacle Baptist Church*, 17 Misc. 699, 41 N.Y.Supp. 513); lack of repair (*W.I.N. Corp.* v. *Cipulo*, 216 App. Div. 56, 214 N.Y.Supp. 718); alteration without consent (*Loughery* v. *Catalano*, 117 Misc. 393, 191 N.Y.Supp. 436, aff'd 207 App. Div. 895, 201 N.Y.Supp. 919). There is always room however to argue about whether a condition was actually breached and what its results are.

— The doctrine in *Graf* is considerabley watered down in the area of default for taxes. To be sure, acceleration *can* result for such default. (*Ford* v. *Waxman, supra.; Shaker Central Trust Fund* v. *Crusade For Christ, Inc.*, 215 N.Y.S.2d 13, 26 Misc. 2d 825; *Caspert* v. *Anderson Apartments, supra.; Jamaica Savings Bank* v. *Avon Associates, Inc.*, 178 (86) NYLJ (11-2-77) 6, Col. 3B; *Jamaica Savings Bank* v. *Alley Spring Apartments Corp.*, 183 (64) NYLJ (4-2-80) 13, Col. 1T). However, the Courts have gone to great lengths to deny the efficacy of acceleration for failure to pay taxes. (*Scheible* v. *Leinen*, 67 Misc. 2d 457, 324 N.Y.S.2d 197; *Germania Life Ins. Co.* v. *Potter*, 57 Misc. 204, 107 N.Y.Supp. 912, revd. 124 App. Div. 814, 109 N.Y.Supp. 435; *VerPlanck v. Godfrey*, 42 App. Div. 16, 58 N.Y. Supp. 784; *Seamen's Bank For Savings* v. *Wallenstein Realty Corporation, supra.*) For example, in the *Scheible* case, inadvertence with no damage shown to mortgagee was the basis to deny acceleration - which would never be a defense if the default were in payment of principal and interest. Hence, where the default is in taxes, there *may* be much broader latitude to save the mortgagor's position.

Defensive Posture and Surplus Monies

On occasion, the proceeds at the foreclosure sale may exceed the amount due the lender. As an illustration, let's use the same figures developed in the discussion of deficiency judgments. With all

items computed, the sum due the lender is $55,541.95. But the property has a market value of $100,000 so the typical brokers at the sale bid $82,000 leaving a reasonable margin for a re-sale. When the lender is paid its amount, the difference between the sale price of $82,000 and the lender's payment of $55,541.95, equalling $26,458.05, is "extra" money referred to as "surplus." What happens to it?

Initially it is deposited into court by the referee within five days of his receipt, pursuant to CPLR § 1354, subd. 3. It will then repose with the fiscal officer of the particular municipality, the treasurer or controller, as the case may be. It is then available to those having rights to claim against it according to substantive law.

The procedures involving surplus monies, its application and the methods to obtain it are found at RPAPL §s1354, 1361 and 1362. Presumptively, the surplus belongs to the owner of the equity of redemption, but the presumption can be rebutted by proof of equitable or legal interests which include claims of, among others, judgment creditors, mechanics lienors, subordinate mortgagee etc.

There is a very large body of law on the subject of priorities and the technicalities of obtaining surplus monies. The attorney counseling in this area would be well advised to carefully review the aforecited sections of RPAPL and the many case annotations. The important point to bear in mind however is that where a surplus is likely to be available, and where the property owner is the sole, or primary, claimant to the surplus monies, heavily litigating the foreclosure will increase legal fees and decrease the quantum of the surplus.

Obviously, counsel must weigh his client's defenses. If there is merit, of course everything that can legitimately be done to protect the client should be pursued. But a highly questionable defense which will only serve to delay may be counterproductive, especially if it engenders thousands of dollars in legal fees to the lender. Naturally, this assumes that the mortgage provides for legal fees in the foreclosure action.

Another factor to consider is that the longer a foreclosure takes to reach a conclusion, the higher the interest mounts. Thus, to the extent that service of process upon the mortgagor is difficult or time consuming, interposing a notice appearance and waiver in foreclosure - a simple form - can save time and counsel may wish to do that. However, should a solid defense later be uncovered, the mortgagor may be bound by the appearance in the action. Where there is a default in appearance, there may in the future be an opportunity to present a legitimate excuse for the default together with the meritorious defense thereby gaining an opportunity to be heard.

Defenses in Foreclosure

Since there could conceivably be as many defenses as there are factual situations in foreclosures, no discussion of defenses could ever by complete. Indeed, what is probably most important is to obtain the sense of how a foreclosure action is structured to appreciate the concepts that are less easily looked up in books, such as those items previously discussed - legal fees, tender, acceleration, redemption, deficiency judgments and surplus money proceedings. Nevertheless, a brief analysis of possible defense paths should be helpful to the attorney who must evaluate the position of the defaulting mortgagor seeking counsel.

Some Basics

There could be any number of technical defects in the complaint, too numerous to mention here. If there are in fact such defects, a general denial will put the plaintiff to his proof on a motion for summary judgment or at trial. Absent plaintiff's inability to prove his case, a general denial will do nothing more than cause plaintiff to incur the time and expense of the motion or trial. (Most foreclosure practitioners usually prefer a motion for summary judgment.)

Since the usual rules of pleading also apply to foreclosures, affirmative defenses such as payment, usury, tender, jurisdiction, lack of legal capacity, statute of limitations, etc., must be pleaded. A foreclosure is equitable in nature (*Bieber* v. *Goldberg*, 133 App. Div. 207, 117 N.Y.Supp.) and, of course, all equitable defenses would be available.

Statute of Limitations

Pursuant to CPLR § 213(4), the foreclosure must be instituted within six years from the date the cause of action accrued. Accrual occurs when the principal or any part thereof, or interest is not paid when due (*Ziegler* v. *Elliot Comp. Corp.*, 271 App. Div. 604).

Laches

In most instances this defense will not be available. The principle stated is that where a period of limitation controls, that is, where discretion is not available to the court in granting or denying relief, laches cannot be a defense. (*Wesselman* v. *Engel Co.*, 309 N.Y. 32; *Monroe County Savings Bank* v. *Baker*, 141 Misc. 522, 264 N.Y.Supp. 101; *Riordan* v. *Ferguson*, 147 Fed. 2d 983; *Griffo*

v. *Swartz*, 61 Misc. 2d 504, 306 N.Y.S. 2d 64; *Pollitz* v. *Wabash R. Co.*, 207 N.Y. 113.)

There are some exceptions, however. Laches might be available where hardship or loss was the result of the delay. (*Hoffman Brewing Co.* v. *Wuttge*, 200 App. Div. 357, 193 N.Y.Supp. 79. rev'd other grounds, 234 N.Y. 469) Stated another way, laches may be invoked when the failure to proceed after a long lapse rendered prosecution of the right inequitable. (*Hydraulic Power Co.* v. *Pettebone-Cataract Paper Co.*, 198 App. Div. 644, 191 N.Y. Supp. 12)

Duress

Although not likely to be a common factor, since a mortgage is a contract like any other, if duress constrained its execution, it would be voidable at the option of the threatened party - assuming, of course, appropriate proof of the duress. However, the claim must be asserted within a reasonable time of cessation of the threat, lest the contract be deemed ratified. (*Hudson River Yards* v. *Tillotson* 144 N.Y.S 2d 183)

Unconscionable Conduct

The mortgagee has a right to enforce his contract and that insistence alone is not unconscionable. (*Manhattan Savings Bank* v. *Wibom*, 266 App. Div. 861, 42 N.Y.S.2d 513). As noted in discussing acceleration cases, declaring the whole balance due even one day after the grace period is not considered unconscionable. However, where the particular facts lead to the conclusion that the plaintiff is not "doing equity" or is taking unconscionable advantage, foreclosure may be denied. Precisely what those facts might be cover a broad range of circumstances and one would have to consult the reported cases to determine if the facts at hand might be considered unconscionable. Some of those cases include: *McMurray* v. *McMurra* 66 N.Y. 175; *Fleischer* v. *Terker*, 259 N.Y. 60; *Weis* v. *Levy*, *106 App.* Div. 496, 94 N.Y.Supp. 857; *Benedict* v. *Kennedy-Van Sann Mfg. & Eng. Corp.*, 2 A.D.2d 27, 152 N.Y.S.2d 955; *Josephson* v. *Caral Real Estate Co., Inc.* 200 N.Y.S.2d 1016; *Farmers' Loan & T. Co.* v. *New York & N.R. Co.*, 150 N.Y. 410; *Union Trust Co.* v. *Johns*, 107 Misc. 12, 176 N.Y. Supp. 525; *Northern Properties, Inc.* v. *Kuf Realty Corp.*, 30 Misc. 2d 1, 217 N.Y.S. 2d 355.

While unconscionable conduct can be a defense if a court were to so construe the facts, nevertheless the courts have rejected the closely related defense of "unclean hands," and the decisions so ruling are recommended for analysis. *Jo Ann Homes at Bellmore,*

Inc. v. *Dworetz*, 25 N.Y.2d 112, 302 N.Y.2d 799; *New York State Housing Finance Agency* v. *Promenade Appartments, Inc,*; Sup. Ct. N.Y.Co., NYLJ, 6-21-79, p. 6, Schwartz, J.

Usury

This is a topic which by itself could easily be the subject of an entire article. Nevertheless, some basic concepts should be observed.

- Although usurious contracts are void (G.O.L. § 5-511), a specific exception is made as to banks. (See also Banking Law §s 235-b, 380 e and 108)
- Where the bank is the *knowing* recipient of usury the only penalty is forfeiture of the entire interest agreed to be paid, or if a usurious sum has actually been taken, recovery may be had of twice the entire amount of interest paid. (*Morris Plan Bank of Schenectady* v. *Faulds*, 47 N.Y.S.2d 920, rev'd on other grounds, *269* App. Div.238, 55 N.Y.S.2d 372; *Terminal Bank* v. *Dubroff*, 66 Misc. 100, 120 N.Y.Supp. 609; *Flushing National Bank* v. *Pinetop Bld. Corp.*, 54 A.D.2d 555, 387 N.Y.S.2d 8, aff'd 42 N.Y.2d 1038, 399 N.Y.S.2d 210; *Hempstead Bank* v. *DeBuona*, 72 A.D.2d 595, 421 N.Y.S.2d 95)
- The defense of usury is not available to a corporation. (*Scheidell* v. *Llewellyn Realty Corp.*, 177 N.Y.Supp. 529; G.O.L. § 5-521). It therefore follows that an individual guarantor

of a corporate mortgage cannot avail himself of the defense. (*Waterman* v. *Whitteman*, 25 A.D. 531).

— Of course, the defense of criminal usury - a rate of more than 25%-is available to any entity. (Penal Law § 190.40).

— A legitimate purchase money mortgage is not subject to a claim of usury since the sums due are regarded not as repayment of a loan, but part of the consideration for the sale. (*Mandelino* v. *Fribourg*, 23 N.Y.2d 145, 295 N.Y.S.2d 654)

— Determining what charges may or may not be factored into the interest rate to determine whether the *effective* rate is usurious is a more convoluted problem. In addition to reviewing extensive case law, historical notes 4.2 and 4.3 after G.O.L. § 5-501 in book 23A of McKinney's Consolidated Laws of New York will be enlightening.

— Any assertion of the defense of usury must be established by clear evidence of all the essential elements, so the burden is a heavy one. (*Inter-City Investor Corp.* v. *Kessler*, 56 A.D.2d 645, 391 N.Y.S.2d 894; *Giventer* v. *Arnow*, 37 N.Y.2d 305, 372 N.Y.S.2d 63)

Fraud

This is one of the most vexing areas of foreclosure litigation, because the result is so closely tied to the minutiae of facts as presented. There is the general proposition that a fraud perpetrated by the mortgagee upon the mortgagor at the inception will be a defense. (*Crowe* v. *Malba Land Co.*, 76 Misc. 676, 135 N.Y.Supp. 454). It was held in *Samuels* v. *Century Federal Savings and Loan Association*, 36 Misc. 2d 202, 231 N.Y.S.2d 904 that where fraud in the inducement of the sale permeated the purchase money mortgage, the mortgage was voidable but not void.

On the other hand, the mortgagee will point to *Jo Ann Homes at Bellmore, Inc.* v. *Dworetz*, 25 N.Y.2d, 302 N.Y.S.2d 799 for the proposition that a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation. Where that leaves the subject of fraud is therefore somewhat difficult to state with all encompassing clarity.

In any event, here is what the mortgagee may be expected to argue in addition to its citation of the *JoAnn Homes* case.

— A signer of a written instrument is conclusively bound by the terms of what he signed even if his mind never gave assent thereto. *Pimpinello* v. *Swift & Co.*, 253 N.Y.159.

— Where it is alleged that oral representations stated payment would not be sought from a guarantor, public policy considerations affecting accommodation guarantors to banks override any claim of fraud. (*Marine Midland Bank - Eastern Nat. Association* v. *Haufler Associates, Inc.*, 55 A.D.2d 803, 390 N.Y.S.2d 264).

— Any purported defense of fraud in the inducement must allege and prove that the fraud resulted in injury. (*Eigen* v. *Fisher*, 65 A.D.2d 781, 410 N.Y.S.2d 332)

— Any attempt to contradict the terms of the mortgage obligations by relying upon supposed oral representations is barred by the parol evidence rule. (*Wolf* v. *Mackey*, 61 A.D.2d 812; *Siren Realty Corp.* v. *Baltimore Productions Corp.*, 27 A.D.2d 519; *Messina* v. *Tannenbaum*, 37 A.D.2d 1041; *Jamestown Business Coll. Assn.* v. *Allen*, 172 N.Y. 291; *Central Hanover Bank & Trust Co.* v. *Duffy*, 258 N.Y. 600; *Juriaco* v. *119 Holding Corp., supra.*; 2 Warren's Weed New York Real Property, Sec. 1301).

— Where a buyer in a contract agrees not to rely upon representations he is barred from thereafter claiming fraud induced the signing. (*Wittenberg* v. *Rabinov*, 9 N.Y.2d 261, 213 N.Y.S.2d 430; *Carter Group, Inc.* v. *Sosnow*, 35 A.D.2d 699, 314 N.Y.S.2d 713).

— Cases on the standard merger clause in a contract of sale include *Eastman* v. *Brittan, 175 App. Div. 476, 162 N.Y.Supp. 587; Straus* v. *Abraham Levitt & Sons, Inc.*, 244 App. Div. 739, 278 N.Y.Supp. 953; *Abrams* v. *Gillig*, 199 N.Y. 314; *Poel* v. *Brunswick - B - C Co. of N.Y.*, 216 N.Y. 310; *Hart* v. *East Plaza, Inc.*, 62 A.D. 113)

— Bare allegations of fraud without sufficient detail as to the wrong will not sustain a cause of action. (*Knowles* v. *City of New York*, 176 N.Y. 430 *Gill* v. *Caribbean Home Remodeling Co.*, 73 A.D.2d 609; *Biggar* v. *Bureau*, 51 A.D.2d 601; *Meltzer* v. *Klein*, 29 A.D.2d 548)

The foregoing, however, does not leave unarmed the mortgagor who claims to have been victimized by a fraud. There is a general well settled principle that a mortgage may be cancelled where there has been fraud or misrepresentation in the procurement. (*Thaw* v. *Schwartz*, 278 App. Div. 948, aff'd 303 N.Y.678; *Cole* v. *Skinner*, 275 App. Div. 984; *Roscoe* v. *Safford*, 61 App. Div. 289.) If it can be shown that the mortgagor did not intend to sign the instrument as a mortgage, relief may be available. (*Ball* v. *Petrocy*, 226 App. Div. 347; *Blum* v. *Hoffkins*, 210 App. Div. 748, aff'd 244 N.Y. 531).

Where fraudulent representations as to completeness of a residence was alleged, even with a merger clause, a court would hear proof as to a fraud. (*Forest Bay Homes, Inc.* v. *Kosinski*, 50 A.D.2d 829, 376 N.Y.S.2d 205. See also: *Arena* v. *Hegyhaty*, 30 A.D.2d 808, 292 N.Y.S.2d 285).

For an example of a truly egregious fraudulent scheme, see *Berlin* v. *Dassel*, 55 A.D.2d 611, 389 N.Y.S.2d 131.

Other Defenses

Although the previous analysis together with the material under tender and acceleration cover a significant percentage of the most important possible defenses, the list cannot purport to be complete. Other possible categories to consider are breach of duty to another party, illegality, inequities to junior encumbrancers, adverse and paramount title, payment, want of consideration, estoppel and waiver of default, among others.

Conclusion

The problem of the mortgagor about to lose his residence or business if not one of the most difficult areas of the law is certainly one of the most emotional. Unfortunately, without being an expert foreclosure practitioner, it is hard to defend a foreclosure without having a sense of all the subtleties of foreclosure practice - which is what this article has addressed itself to.

When the defaulting mortgagor seeks your counsel, carefully review the mortgage documents and ask yourself whether the plaintiff, or a prospective plaintiff, has followed *its* obligations to the letter or by instituting the action *with* a recital of acceleration. Determine the validity of process service. Review all time limits and assignments, if any. Examine *all* circumstances giving rise to the mortgagee's claim and your client's position as to the claim.

Finally, advise your client as to all options which may be employed to settle or pay off the mortgage. While you may not cause the mortgagor to have no obligation to the lender, sage advice can preserve the property more often than is usually thought possible.