

CAN THE MORTGAGEE TAKE A CHECK AFTER ACCELERATION?*

**** by Bruce J. Bergman**

This continues to be one of the genuinely thorny and confusing issues for mortgage holders, although another case in New York offers clarification and answers the question "yes". But it needs some exploration.

First, let's not confuse this issue with accepting payment after sending the breach/cure letter so typically required in residential foreclosures and in more than a few commercial cases as well. As a reminder, if a borrower responds to a breach letter by sending less than all the past due sums, the mortgagee can accept the payment because it does not cure the default.

The instance of acceleration, however, is somewhat different. Recall that acceleration is an act which occurs only *after* the breach letter has been sent and the cure period has expired. (This assumes that a breach letter is required by the mortgage documents. Absent such a clause in the mortgage, in New York there is no obligation to send a cure letter as a prerequisite to acceleration.) Once an acceleration has been declared, what the mortgagee in essence has said to the borrower is that "we require that you pay the full amount of the mortgage (which would have come due 10 or 15 or 20 or 30 years from now) and we will not accept periodic installments as we had in the past."

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After acceleration, law in New York provides that anything inconsistent with that declaration could be a waiver. So, is it inconsistent to accept some payments after acceleration (assuming those payments do not cure the default)?

Lenders have understandably been wary about taking such payments lest it give rise to a waiver. Perhaps the most practical problem is that a borrower could argue that the reason partial payments were sent (and accepted) was because an arrangement had been made with the lender to accept this and forego foreclosure. While the lender would counter that no such understanding ever arose, courts could be sympathetic to borrowers asserting this argument and absent clear written proof that there was never such an agreement, it could be surmised that there would be some jeopardy to the mortgage holder.

On the other hand, some lenders welcome receipt of sums of money (representing considerable amounts across a broad portfolio of loans), willing to take the occasional protest (and possible loss) when a wily borrower makes the argument.

But the legal answer to the question posed is, no, post-acceleration acceptance of a sum which doesn't cure all arrears should not give rise to a defense to continuation of the foreclosure. [This was recited in a New York case in 1997; *CME Group Ltd. v. Cellini*, 173 Misc.2d 404, 661 N.Y.S.2d 740 (1997)] And a more recent case bolsters that position, ruling that acceptance of additional payments towards a mortgage after default and acceleration is *not* inconsistent with the mortgage holder's insistence that the entire debt immediately be paid. [*Lavin v. Elmakiss*, 302 A.D.2d 638, 754, N.Y.S.2d 741 (3d Dept. 2003)].

So, whether a mortgagee will choose to accept post-acceleration checks is a *business* decision. As far as the law is concerned in New York, taking those checks is not a waiver.