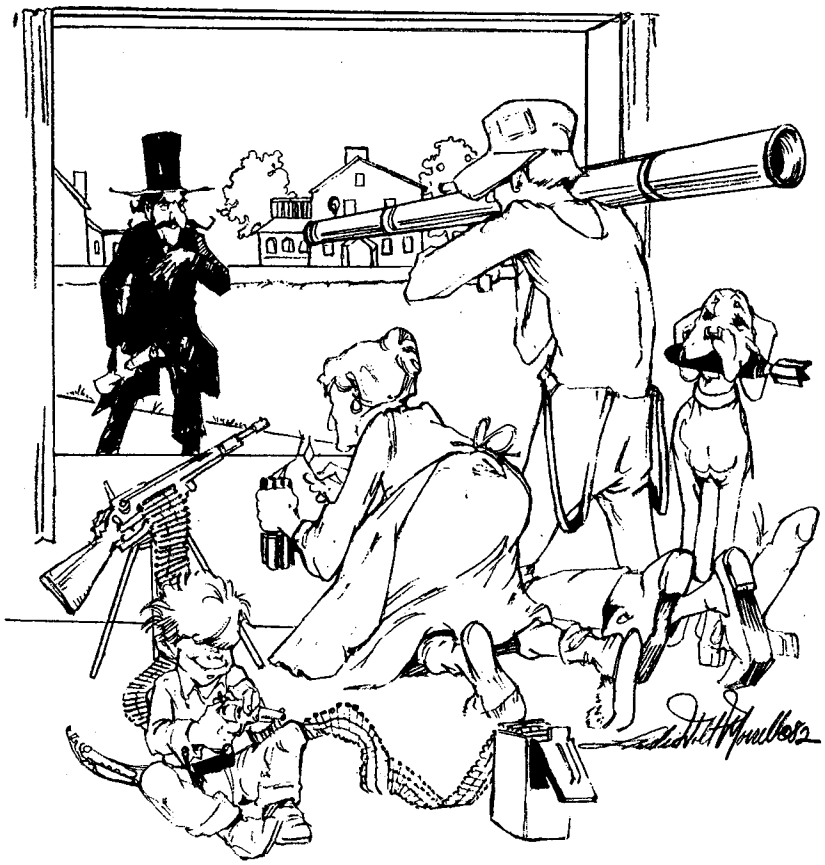
A practical guide for homeowners and small commercial mortgagors.

Defending Against Foreclosure Actions

Bruce J. Bergman



UNFORTUNATELY, IRRECONCILABLE breaches between borrowers and lenders have occurred with increasing frequency in recent years. Once the mortgagee starts foreclosure proceedings, it is most often not possible to save the mortgage. However, there are as many fact patterns as there are mortgages, so no answer covers every mortgage situation.

Institutional lenders that handle large portfolios usually do not foreclose until they absolutely must, and when they do, their procedures are so well-honed that defects in the foreclosure proceeding are the exception. Smaller lenders and holders of the purchase-money mortgages may be less sophisticated and more prone to err and, therefore, vulnerable to intelligent defenses. But even if a foreclosure cannot be defeated, the course of action that the borrower undertakes during the pro-

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cess (usually on the advice of counsel) can have a most serious effect on the settlement and on the owner's financial position when a settlement finally is reached or the foreclosure is concluded.

The practitioner whose experience with foreclosures is only fleeting stands a significant chance of offering advice which may be incorrect, incomplete or inadequate, and the consequences of such a device may be exceptionally severe. The most obvious consequence may be the loss of the borrower's home or business property.

Putting in a spurious or questionable defense in an effort to slow down the action and force a settlement may have deleterious consequences for the mortgagor while offering no benefits. For example, the litigation engendered by the borrower's answer to a foreclosure action increases the mortgagee's legal fees. If a mortgage contains a provision that the foreclosing mortgagee is entitled to reasonable legal fees, once the foreclosure succeeds, the mortgagee's legal fees increase the size of the foreclosure judgment and the possible deficiency, which could be the borrower's personal obligation. Hence the mortgagor is exposed to additional areas of harm by less-than-expert advice.

RESPONSIBILITY FOR MORTGAGEE'S LEGAL FEES

In most suits (except those in which punitive damages are awarded or when a statute specifically so provides), counsel fees are not recoverable. In foreclosures, however, they often can become the responsibility of the defendant mortgagor.

If the mortgage itself provides that lender's counsel fees are to be paid in a foreclosure, the courts will uphold that clause to the extent of reasonableness. If the mortgage has no such provision, the lender's legal fees are *not* recoverable in the judgment. However, the concept of acceleration emerges to open the door to reimbursement of lender's legal fees.

The standard form of mortgage in most jurisdictions contains a provision that upon the happening of certain events, such as the mortgagor's failure to pay principal and interest, the holder of the mortgage may declare the *entire* principal balance due and payable. Once the mortgagee makes this election, it no longer has any obligation to accept the arrears and reinstate the mortgage. If the mortgagee is free to reject the mortgagor's tender of past-due amounts, it is also at liberty to impose any conditions it chooses as a prerequisite to reinstatement. One obvious precondition is reimbursement for legal fees and disbursements—even if the mortgage contained no such provision. The mortgagor who takes umbrage at this demand is free to decline to pay, but then he won't have his mortgage

Most of the legal principles and procedures set forth in this article are based upon law and practice in New York State. While both law and practice can vary from jurisdiction to jurisdiction, the basics are quite similar. The nuances of case decisions, however, are subject to some variation and counsel should be consulted for specific problems.

reinstated.[1] Thus the mortgagor who contests the foreclosure may be increasing the legal expenses for which he may be liable.

Mortgage Clauses Concerning Legal Fees

Mortgages do not always provide that the lender will pay legal fees in the foreclosure. In New York, for example, the only language in the standard title company form of mortgage (which most private mortgagees use) specifically excepts legal fees in foreclosure.[2] The astute lender's attorney, however, will most often have inserted appropriate language into the mortgage document which will cover legal fees.[3] Clauses of this type can almost invariably be expected in mortgages employed by institutional lenders.

As a general proposition, a provision in the mortgage and/or the note for payment of legal fees is enforceable. The request for legal fees, however, is always subject to the test of reasonableness.

The courts will even enforce mortgage clauses that call for legal fees as some percentage of the mortgage amount due. What particular percentage will be found

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[1] Another typical condition of reinstatement is a mortgage modification agreement raising the interest rate to the prevailing maximum.

[2] The clause is number 12 in the standard form and provides:

That if any action or proceeding be commenced (except an action to foreclose this mortgage or to collect the debt secured thereby), to which action or proceeding the mortgagee is made a party, or in which it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by the mortgagee for the expense of any litigation to prosecute or defend the rights and lien created by this mortgage (including reasonable counsel fees), shall be paid by the mortgagor, together with interest thereon at the rate of six per cent per annum, and any sum and the interest thereon shall be a lien on said premises, prior to any right, or title to, interest in or claim upon said premises attaching or accruing subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage. In any action or proceeding to foreclose this mortgage or to recover or collect the debt secured thereby, the provisions of law respecting the recovering of costs, disbursements and allowances shall prevail unaffected by this covenant.

[3] Two typical alternate clauses which do impose such fees are:

It is agreed by the mortgagor that on the foreclosure of this mortgage there shall be included in the computation of the amount due the amount of a fee for attorney's services in the foreclosure proceedings as well as all disbursements, allowances, additional allowances, and costs provided by law.

In the event of the foreclosure of this mortgage an amount of . . . Dollars shall be added to the principal debt as attorney's fees. This shall be in addition to the right of the mortgagee to assess, tax and recover all disbursements, allowances, additional allowance and costs provided by law.

reasonable in a given case will, of course, vary. There is case law ruling that 5 percent of the principal balance as a legal fee is reasonable, and proportions as high as 15 percent have been accepted.

THE RELATIONSHIP OF LEGAL FEES TO DEFENSIVE POSTURE

To comprehend the size of the liability that the borrower may incur if the court imposes on him the legal costs of the foreclosure it is necessary to understand how foreclosing attorneys normally develop their fees. Although the mortgagee's counsel can bill a foreclosure action on a lump-sum basis, or on straight time, for residential or small commercial foreclosures, attorneys usually peg the fee to each stage of the case.

The typical identifiable steps in a foreclosure and an approximation of associated fees are given in Exhibit 1.

EXHIBIT 1
TYPICAL SCHEDULE OF ATTORNEYS' FEES IN A HOME MORTGAGE FORECLOSURE

Procedure	*Approximate Fee*
(1) Collection, and Acceleration	$ 350
(2) Summons and Complaint	600
(3) Answer, and Motion for summary judgment (or trial)	Time billing
(4) Appointment of referee to compute Referee's computation	875
(5) Judgment of foreclosure, and Publication of notice of sale	1,250
(6) Sale, and Closing	1,500

Suppose that the lender has turned a file over to counsel to analyze and order a foreclosure search, but the attorneys have not yet prepared the summons and complaint: the defaulting mortgagor can expect that one of the conditions for reinstating the mortgage will be that he pay a legal fee of $350 plus disbursements (say, the cost of a foreclosure search) of approximately $100. If the case is settled at this juncture, the mortgagor's additional costs are not too great.

Once the lender's attorney has prepared the summons and complaint he expects a fee of approximately $600 plus disbursements that now include the cost of process service and the court filing fee.

As the foreclosure progresses, the fees and disbursements get higher. Furthermore, the astute lender's attorney often refuses to reinstate the mortgage until full payment (of whatever amount has been agreed upon) is actually *in hand*.

The experienced attorney realizes that the defaulting mortgagor is usually in such dire straits that he is likely to promise to pay even if he is unable or unwilling to actually meet his obligation. Thus, he keeps the lender moving through the foreclosure, step by step, the mortgagor's "promises" notwithstanding. This means that the legal fees keep rising until a conclusion is reached.

The lesson, then, for the mortgagor is clear. Whatever defenses he may have, unless he is reasonably certain of success, he should resolve the matter as early as possible. In most situations, time is not likely to be on his side.

REDEMPTION

Of course, the defaulting mortgagor always has the right to redeem (i.e., the right to pay and discharge the mortgage debt) so long as the mortgage sale has not yet been held. Usually, he is hard pressed to find the necessary funds.

Selling the Property

Until there is an actual foreclosure sale, the defaulting mortgagor owns his house (or commercial parcel) just as he always did. And, unless a receiver of the rents and profits is appointed (which is rare in residential foreclosures, but not uncommon for commercial parcels), the mortgagor retains generally all the rights to his property that he always had.

This means that the mortgagor may sell his property at any time prior to the actual foreclosure sale. Only the final step of the foreclosure process (step (6) in Exhibit 1), the referee's sale followed by delivery of a referee's deed to the purchaser, effectively destroys the original owner's right of alienability.

If, prior to the referee's sale, the mortgagor can sell the property for an amount above the existing mortgage, he has a good chance of salvaging some money. He must, however, obtain the lender's cooperation. The lender must agree to hold the foreclosure in abeyance once the contract of sale is signed. If the contemplated transaction is not subject to the new buyer's obtaining his own mortgage commitment and if the closing date is not too distant, most lenders will be pleased to await the sale. If the sale contract contains some significant contingency, say a requirement for a zoning variance, the lender may not halt the foreclosure until the condition is fulfilled. If the lender's cooperation cannot be obtained, a closing would have to be consummated before the foreclosure sale.

Refinancing the Property

Refinancing may enable the defaulting borrower to pay off his debt. Although, obviously, refinancing during a foreclosure is difficult, the mortgagor may be able

to persuade some friend, business associate, or family member to advance a sum sufficient to satisfy the mortgage being foreclosed. He may then be able to negotiate a new mortgage.

The Right of Redemption

We list below seven propositions that explain the characteristics of the right of redemption:

☐ The right to redeem or "equity of redemption" is an incident of every mortgage and the legal right of the owner to redeem is a "favorite equity." This means that the mortgagor has a right to come into a court of equity to have the amount of the lien determined and discharged on record upon payment.

☐ The only right of a mortgagee is to be paid in full.

☐ If the mortgagee refuses to accept a valid tender, the mortgagor may avail himself of fairly consistent local practice and compel issuance of a satisfaction or assignment.

☐ When the mortgagee has indicated unequivocally that a tender would not be accepted, the mortgagor need not make a formal tender because the law does not require performance of an idle gesture or useless act. Similarly, tender may be dispensed with if the mortgagee requires a payment of some other obligation which is invalid.

☐ If a foreclosure has been begun (or has even been completed) but the defaulting mortgagor has not been excluded from his interest, that is, has not properly served with process, he has a cause of action for redemption.

☐ If the mortgagee has assigned the mortgage, the action to redeem may be brought against the assignee.

☐ There is a statute of limitations applicable to an action to redeem.[4] This limitation, however, applies to redemption only where the mortgagee, foreclosure purchaser, or someone claiming under them is in possession of the premises. If the mortgagor seeks redemption from one not in possession, the applicable period of limitations is six years.[5]

The listed propositions refer to the right of redemption, not the right to tender arrears. As previously noted, after acceleration, it is too late to tender mere arrears because the entire balance has been declared due.

The actual mechanics of redemption vary with the circumstances of the particular case. Once a foreclosure has been instituted, if a valid tender of the principal, interest, and all applicable costs is rejected, a counterclaim to redeem is appropriate because a tender is a bar to foreclosure.

In most jurisdictions, a mortgagee upon tender is required to give a satisfaction. If the lender refuses to give satisfaction, the most pragmatic approach that the borrower can take is to move in the foreclosure action for an order directing the plaintiff to accept the tender and upon receipt thereof to give an assignment or satisfaction.

In addition, to avoid the accrual of interest as well as to make his position stronger, the mortgagor should deposit an amount believed sufficient to satisfy the lender's claim with the clerk of the court in accordance with local practice.

Since an action to redeem is equitable in nature, it is susceptible to the equitable defenses of laches (delay) and estoppel. Hence, to the extent there is any control, prompt attention to redemption is recommended.

THE DEFICIENCY JUDGMENT

A property owner should always be aware of the possibility of a deficiency judgment. Clause 1 of the standard form of mortgage in New York contains the following recital: "That the mortgagor will pay the indebtedness as hereinbefore provided."

This language means in essence that the mortgage debt is the mortgagor's personal obligation. This is true (in New York, at least) even if the mortgagor never signed a mortgage note or bond or if the note or bond was lost. (Of course, if the mortgagor is a corporation, the principals obviously have no personal liability *unless* they gave their individual guarantees.)

If the lender sells the foreclosed property for its true market value, and the amount is less than the amount of principal, interest, foreclosure cost, and legal fees that was computed by the referee and confirmed in judgment, that shortfall is a deficiency for which the defaulting mortgagor may be personally liable.

The Lender's Hurdles

In New York, authority for obtaining a deficiency judgment is found in Section 1371 of the Real Properties Actions and Proceedings Law. Since details of the law differ from state to state, mortgagors should review the applicable provisions in their states. Getting a deficiency judgment is not easy. There are a number of hurdles that the lender must overcome.

[4] In New York, the period is twelve years, pursuant to N.Y. Civ. Prac. Law & Rules § 212(c).

[5] N.Y. Civ. Prac. Law & Rules § 213(1).

☐ The party liable for the deficiency (who could be a guarantor as well as the mortgagor) must either have appeared in the action or have been personally served.

☐ The judgment of foreclosure and sale must have made provision that the whole of the residue be paid. Not every judgment so provides.

☐ The plaintiff must move for a deficiency judgment within a certain period after the foreclosure sale. (In New York, this period is ninety days; the period is a statute of limitations rather than a jurisdictional requirement. If the defendant (mortgagor) does not specifically raise this objection, it is waived.)

☐ The plaintiff has the burden of proving the fair market value of the premises as of the date of the foreclosure sale.

Given that the mortgagor was unable to pay the mortgage, he is not likely to have the wherewithal to satisfy a deficiency judgment. The prevailing wisdom, therefore, is that deficiency judgments should not be pursued. But although they are not common, these judgments *are* obtained and collected upon.

THE VITAL CONCEPTS OF ACCELERATION AND TENDER

We will illustrate the issues of acceleration and tender by an example in which the circumstances are reasonable, if not common.

Mortgagor Jones owes his $750 monthly mortgage payment on January 1. For some reason he does not make the payment on the due date. The mortgage contains the usual grace period of fifteen days, after which the mortgagee has the right to declare the entire principal balance due. (This right is conferred by a standard acceleration clause.[6])

The sixteenth day passes and Jones still does not pay. He has now obligated himself to pay a 2 percent late charge (pursuant to a standard institutional mortgage clause and to Section 254-B of the Real Property Law in New York). The lender makes some phone calls and sends Jones a letter that attempts to collect the one-month arrears. Jones promises to send his check, but he fails to do so.

It is now February and the lender is continuing its requests. Jones finally sends his January and February payments, but he submits them on condition that the lender reduce the amount taken every month toward escrow. The lender refuses to accede to the condition and returns the check. It is now late March. With 2 percent late charges accruing, Jones owes three months payments plus late charges of $45 for a total of $2,295.

Jones relents, withdraws his condition, and mails a check for $2,200, the three months' mortgage arrears. The lender rejects the $2,200 as insufficient because late charges were not included and returns Jones' check. By this time the lender has concluded that this mortgage is no longer worthy of the staff time necessary to effect collection, so it exercises its right of acceleration and sends 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 $2,295. The lender rejects the check and mails it back to Jones, informing him that the file has been turned over to counsel and that it is instituting a foreclosure action. Based upon facts such as these, Jones' lawyer, relying on the hornbook maxim that foreclosure is an equity action, interposes an answer in the foreclosure. Surely, the lender can't be this cavalier. . . .

But given the events that we have recited, the lender is entirely correct in proceeding with the foreclosure, and *it will be successful* . Here are the principles which explain why.

The Tender Issues

☐ When the mortgagor "promises" to pay his obligation, he has done nothing. A promise or offer is not the equivalent of an actual tender.

☐ A tender that is submitted conditionally is not valid. It must be unconditional.

☐ A tender of less than the full amount that is validly due is not deemed a tender.

☐ A mortgagor may avoid accelerations if he tenders all arrears in full prior to acceleration. However, a payment of arrears subsequent to a proper acceleration need not be accepted.

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[6] 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 installment 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 mortgagee 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 installments 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.

The Acceleration Issues

Although the right to accelerate under the circumstances of our example may seem harsh, if the covenant is not oppressive or unconscionable and involves no penalty or forfeiture, it *is* enforceable. That was precisely the ruling in the trend-setting decision *Graf v. Hope Building Corporation.*[7] The facts of that case provide the essence of the judicial position accepted throughout the United States.

The plaintiffs were the holders of two consolidated mortgages. The agreement contained a clause that provided that the principal sum 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 a brief European trip 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 corporation informed the mortgagee of the discrepancy and indicated that it was forwarding the check for an amount less than the full payment, but when the principal returned from Europe, it would pay the balance. Then the promised check was sent to the mortgagee which deposited it. 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 twenty-one days expired, the mortgagee began a foreclosure action, and the defendant borrower immediately 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 mortgagor's tender, the court of appeals made the following statement:

> 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 attribute 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 rights 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.

Whenever the acceleration is based upon a default of other than a failure to pay 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. Among others, this has been applied specifically for insurance, lack of repair, or alteration without consent. However, there is always room to argue about whether a condition was actually breached and what its results are.

The doctrine in *Graf* is considerably watered down in the area of default for taxes. To be sure, acceleration *can* result for such default and cases have so held. However, the courts have also gone to great lengths to deny the efficacy of acceleration for failure to pay taxes. For example, in one case, inadvertence with no damage shown to mortgagee was the basis to deny acceleration. Hence, if the default is in taxes, there *may* be much broader latitude to save the mortgagor's position than if the default is the failure to pay principal or interest.

WHEN THE FORECLOSURE PRODUCES SURPLUS MONIES

On occasion, the proceeds at the foreclosure sale may exceed the amount due the lender. What happens to this excess?

It is deposited into court by the referee within five days of his receipt. It reposes with the fiscal officer of the appropriate jurisdiction (municipality) and is available to those having rights to claim against it according to substantive law.

The procedures involving surplus monies, its application, and the methods that must be used to obtain it are part of local practice statutes. 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 judgment creditors, mechanic's lienors, subordinate mortgagees, and others.

There is a large body of law on the subject of priorities and the technicalities of obtaining surplus monies.

[7] 254 N.Y. 1 (1930).

The attorney counseling in this area should review carefully the various practice statutes and the many case annotations. During the foreclosure process, mortgagor and attorney must remember that if a surplus is likely to be available, and if the property owner is the sole, or primary, claimant to the surplus monies, heavily litigating the foreclosure will increase the mortgagee's legal fees and thus decrease the quantum of the surplus.

Obviously, legitimate defenses must be weighed and pursued. But a highly questionable defense which serves merely to delay may be counterproductive if it engenders thousands of dollars in lender legal fees.

DEFENSES IN FORECLOSURE

Since there could conceivably be as many defenses as there are factual situations in foreclosures, no discussion of defenses can ever be complete. Nevertheless, a brief analysis of possible defense paths should help defaulting mortgagors to evaluate their positions.

Some Basics

There could be any number of technical defects in the mortgagee's complaint. 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. However, unless the plaintiff cannot prove its 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, and statute of limitations must be pleaded. A foreclosure is equitable in nature and, of course, all equitable defenses are available.

Statute of Limitations

In New York pursuant to Section 213(4) of the Civil Practice Law and Rules, 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.

Laches

In most instances, the defense of laches (delay) is not available to the borrower. The principle is that if a period of limitation controls, that is, if discretion is not available to the court in granting or denying relief, laches cannot be a defense.

There are some exceptions, however. Laches might be available where hardship or loss was the result of the delay. Stated another way, laches may be invoked when the mortgagee's failure to proceed after a long lapse rendered prosecution of the right inequitable.

Duress

If duress constrained execution of the borrower's obligations, the foreclosure would be voidable at the option of the threatened party—assuming, of course, there is 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.

Unconscionable Conduct

The mortgagee has a right to enforce his contract and that insistence alone is not unconscionable. (As we noted in discussing acceleration cases, declaring the whole balance due even as soon as one day after the grace period is not considered unconscionable.) However, if the particular facts lead to the conclusion that the plaintiff is not "doing equity" or is taking unconscionable advantage, foreclosure may be denied.

Although unconscionable conduct on the part of the plaintiff can be a defense, nevertheless the courts have rejected the closely related defense of "unclean hands."

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 in all states, a specific exception is made as to banks. If a bank is the *knowing* recipient of usury the only penalty is forfeiture of the entire interest; or if a usurious sum has actually been taken, recovery may be had of twice the amount of interest paid.

☐ The defense of usury is not available to a corporate borrower or to an individual guarantor of a corporate mortgage.

☐ The defense of criminal usury (a rate of more than 25 percent in New York) is available to any entity.

☐ A legitimate purchase-money mortgage is not subject to a claim of usury, because the sums due are

regarded not as repayment of a loan, but part of the consideration for the sale.

☐ Determining what charges may or may not be factored into the interest rate to determine whether the *effective* rate is usurious is a convoluted problem and beyond the scope of this article.

☐ 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.

Fraud

Fraud is one of the most vexing areas of foreclosure litigation, because the result of this defense 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 is a valid defense. On the other hand, the mortgagee may point to case law for the proposition that a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation. Thus the law offers contradicting signals.

In addition, the mortgagee may be expected to offer the following responses to a defense claiming fraud:

- A signer of a written instrument is conclusively bound by the terms of what he signed even if his mind never gave assent thereto.
- 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.
- Any purported defense of fraud in the inducement must allege and prove that the fraud resulted in injury.
- Any attempt to contradict the terms of the mortgage obligations by relying upon supposed oral representations is barred by the parol evidence rule.
- If a buyer in a contract agrees not to rely upon representations, he is barred from thereafter claiming that fraud induced the signing.
- Bare allegations of fraud without sufficient detail about the wrong will not sustain a cause of action.

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 if there has been fraud or misrepresentation in the procurement. If the mortgagor can show that he did not intend to sign the instrument as a mortgage, he may be able to obtain relief.

If fraudulent representations as to completeness of a residence are alleged, even with a merger clause, a court would hear proof as to a fraud.

Other Defenses

Although we have discussed many of the important possible defenses, the list is not complete. Other possible defenses 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. Such a mortgagor requires the aid of an expert foreclosure practitioner.

The borrower who contemplates a foreclosure defense should carefully review with counsel the mortgage documents and ask himself whether the plaintiff, or a prospective plaintiff, has followed *its* obligations to the letter of the stated requirements. Also, he should find out if there was an acceleration by plaintiff, whether by *unequivocal* letter or by instituting the action with a recital of acceleration. He should determine the validity of process service and review all time limits and assignments, if any. He should examine all circumstances giving rise to the mortgagee's claim and his own position as to the claim.

Finally, he should be aware of all options which may be employed to settle or pay off the mortgage. Sage analysis can preserve the property more often than is usually thought possible.