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## REAL ESTATE UPDATE



### Foreclosure

#### *When Is It Really Over? Defining Duration of Right to Redeem*

**W**E ALL KNOW the cliches: it ain't over till it's over; and the one about no conclusion until the corpulent chanteuse goes about her business — among more than a few. But how does this relate to the mortgage foreclosure case? When is it really over, and (other than a plaintiff's natural desire to reach the end) does it much matter when the final conclusion arrives? The respective answers, which should be simple but remain elusive in some quarters, are: when the hammer falls at auction sale and yes, it can matter mightily.

Much of the import of this subject revolves around the sacred right to redeem. As is well recognized, upon acceleration, the entire mortgage debt becomes due. In New York, neither statute nor case law establishes a right to pay arrears and reinstate the mortgage<sup>1</sup> (with reinstatement a concept sharply distinguished from redemption). Focusing for the moment upon reinstatement, and by way of perspective, a borrower is always free to tender arrears after default provided the tender is made before the mortgage holder manifests its acceleration.<sup>2</sup> Consequently, a borrower has a complete defense to foreclosure if, prior to acceleration, a valid tender of all sums due has been made.<sup>3</sup>

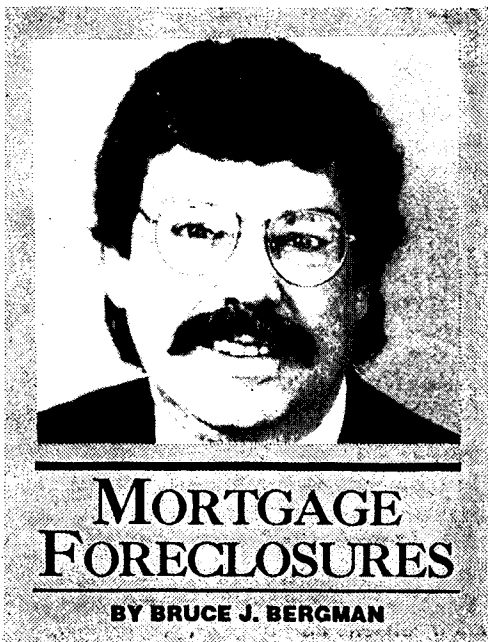
Significantly, however, subsequent to proper acceleration, a mortgagee is empowered to

reject a tender of arrears, because the mortgagee has become entitled to full payment of the mortgage balance.<sup>4</sup> That is to say, a mortgagee's unequivocal rejection of a post-acceleration tender of arrears is authorized.<sup>5</sup>

#### Redemption

Redemption, however, presents a different situation. Even after acceleration, it is not too late to redeem. That is, a mortgagor retains the ability to save the pledged property. Inherent in every mortgage is the right of the owner of the land to redeem it from the lien of that encumbrance. This right to redeem is a rule of equity favored by the courts.<sup>6</sup> As a practical matter, a foreclosing lender typically pursues a foreclosure sale of the property securing the mortgage only in order to satisfy the debt.

Underscoring the virtually sacred nature of the right to redeem are other precepts. The borrower's right of redemption cannot be waived or abandoned by any stipulation of the parties at the time of making the mortgage, even if the stipulation is expressly embodied in the mortgage,<sup>7</sup> or if made in open court.<sup>8</sup> In other words, a mortgagor cannot make a legally enforceable agreement as part of the same transaction in which the mortgage is created that would have the effect of



#### MORTGAGE FORECLOSURES

BY BRUCE J. BERGMAN

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depriving him of the equitable right of redemption.<sup>9</sup> Similarly unenforceable is an agreement made at the inception of the mortgage, either purporting to limit the time period for redemption<sup>10</sup> or limiting to a particular person the ability to exercise the right.<sup>11</sup>

Unclean hands on the part of the owner is not a basis to bar redemption.<sup>12</sup> Nor will redemption be intercepted where the source of the funds remitted by the owner upon redemption comes from some other person.<sup>13</sup>

Although most often the concept of redemption relates to the owner of the premises secured by the mortgage, who usually will also be the mortgagor, the right to redeem extends to all persons holding any equitable or legal interest in the property derived from the mortgagor.<sup>14</sup> An example of such a person is a tenant.<sup>15</sup>

Conversely, no person is empowered to redeem unless entitled to the mortgagor's estate or possessed of a subsisting interest under it.<sup>16</sup> Thus, a person who has transferred his entire interest in the property during the pendency of the foreclosure has no standing to redeem.<sup>17</sup>

Mindful then that there is enormous significance (and breadth) to the right of redemption, its duration becomes critical. That is, when is the ability to redeem extinguished? It is not when the judgment of foreclosure and sale issues.<sup>18</sup> Although that might seem obvious to many, it is certainly not apparent to all, and occasional aberrant decisions confuse the issue. The imprecision likely arises because standard provisions in foreclosure judgments forever bar and foreclose the equity of redemption. That is no doubt an explanation for the holding in one case that mortgagor/owners were not empowered to transfer the mortgaged property as of the date the lis pendens was filed because the judgment barred the equity of redemption as of that date!<sup>19</sup>

But the overwhelming case law is pointedly to the contrary and it is dismaying that the noted misperception is resurrected from time to time. It is the sale (an event itself fraught with indistinctness) which cuts off the right of redemption,<sup>20</sup> and that maxim is the general rule.<sup>21</sup> A judgment of foreclosure and sale is merely a method to enforce a mortgage lien and does not impair the right to redeem.<sup>22</sup>

The next level of decisional disarray, and the arena of more widespread concern, is encountered in defining the "sale." Is the sale the auction sale, when the property is struck down to the successful bidder, or is it that event followed by conveyance of the deed (and possibly even a subsequent confirmation of the sale)? The difference between the two moments is not simply a philosophical nicety. Rather, it contains genuine practical significance.

Although the dilemma was presciently addressed and disposed of as early as 1843<sup>23</sup> and again in 1865,<sup>24</sup> divergence was created

nevertheless by the Court of Appeals in the 1898 ruling in *Nutt v. Cuming*.<sup>25</sup> There, the right of redemption was said to end with the sale, but further, in a manner which seems gratuitous, the court added "confirmed and conveyance delivered..." That additional verbiage was then frequently parroted by later courts — even though no distinction may have been intended (or even have been in

contention) between the auction sale and the subsequent deed conveyance. Thus, some cases speak in terms of redemption being barred after sale and conveyance.<sup>26</sup>

Other decisions are less precise and tend only to beg the question. One group finds the right of redemption ending at upon "actual sale," without defining the term.<sup>27</sup> (A good argument could be made that "actual sale" is in contradistinction to a sale followed by delivery of a deed.) Two which likewise refer to the "actual sale," cite this writer's treatise which in turn concludes that sale means the auction sale —<sup>28</sup> from which perhaps it can be implied that these decisions do not follow *Nutt v. Cuming*.<sup>29</sup> Still other cases cite "foreclosure sale,"<sup>30</sup> or "sale."<sup>31</sup> In the last noted case, there was no mention whatsoever of a conveyance (redemption was being discussed more generally and peripherally), although the facts reveal that a deed was delivered.

Ultimately, however, the apparent mischief of the noted portion of *Nutt v. Cuming* succumbs to the more carefully conceived weight of case law ruling that redemption ends upon the auction sale itself, with no extension given until delivery of the deed.<sup>32</sup> The first clear distinction was drawn by the Court of Appeals in 1865 in *Tuthill v. Tracy*, thus:

... the ... equity of redemption was barred by the sale: that the making and recording the affidavits of sale and publication were not necessary to bar the equity of redemption; and that the same was barred by the sale, when the premises were struck off ...

That it is truly the auction sale alone as the line of demarcation for redemption was, if anything, even more clearly stated in *Bernard v. Jersey* (significantly decided after *Nutt v. Cuming*) where the question was framed as: ... whether a defendant's right to redeem is terminated by a sale to a bidder ... or survives the sale and is terminated only by the referee's conveyance to the purchaser.

The answer, derived from *Tuthill v. Tracy*, was that

... the foreclosure, and a sale by the master, barred the mortgagor's equity of redemption. A deed was not necessary to accomplish that result.

And an incisive, contemporary summary both underscoring and elucidating the point emanates from Supreme Court in New York County in *Citibank v. Press Realty Corp.* That case also includes a recitation of a number of Bankruptcy Court decisions, a forum where the precise issue arises with some frequency.

How though to explain away *Nutt v. Cuming*? To simply say that the Court of Appeals was wrong is perhaps tenuous and unsatisfactory; better to find that the case is ultimately not disharmonious with the more compelling rulings.

Such is just what was done in an enlightening bankruptcy case — *In re Cretella*. There, the court compared the offending recitation

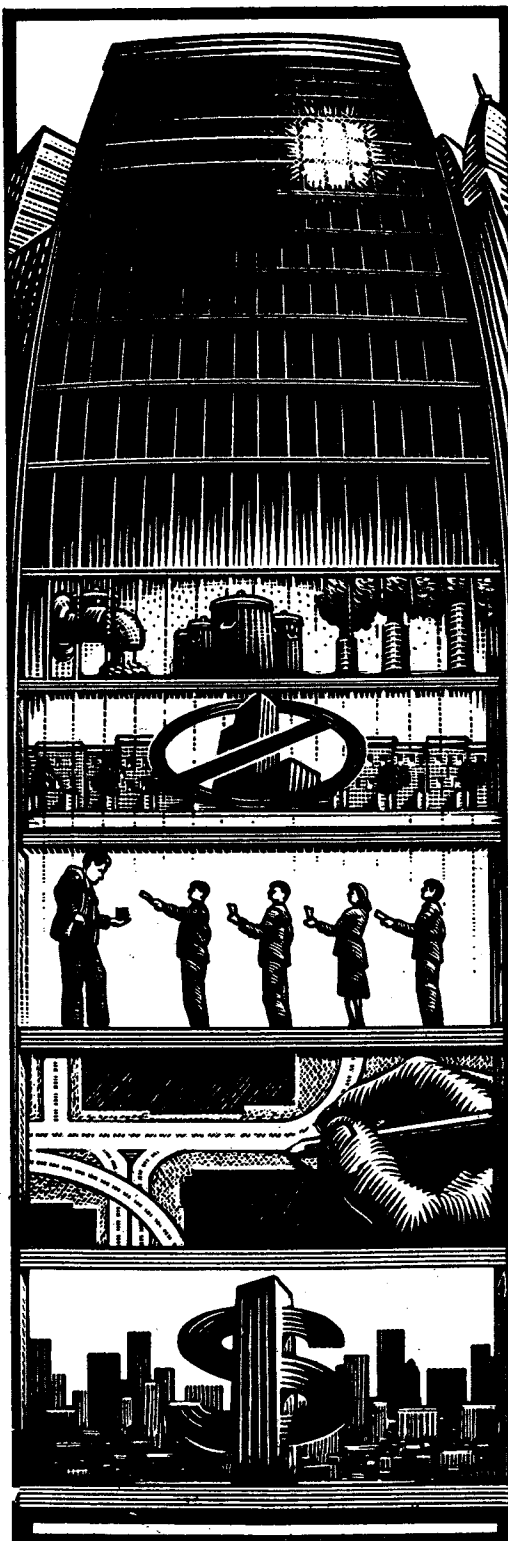


ILLUSTRATION BY JOHN MacDONALD

of confirmation and conveyance used in conjunction with sale, with other language just preceding:

The provision barring others of their interest in, or their rights of equity of redemption in the mortgaged premises of necessity relates to the final concluding act, that of the sale of the premises. (Emphasis added by the Cretella court.)

Relying upon that quote, Cretella opined that *Nutt v. Cuming* supports the view that the right to redeem ends upon the auction sale and before delivery of the deed. It certainly offers a more amenable resolution to a question which should not require decoding.

Throughout the discussion of the law here — and such is what composes most of each case — the practicalities and realities have faded.

But what actually happens is of paramount concern. Maybe it is not surprising that the practical aspect was mentioned in the earliest case considered — *Brown v. Frost* in 1843. There, in referring to the former owner of the equity of redemption, the court said that he could not prevent either completion of the sale or confirmation of the report of sale by tendering the sum due on the mortgage with interest and costs.

In the end, that is just the point. Once the auction is conducted, can the mortgagor (or anyone else possessed of the right to redeem) come forward, tender the sum due, under the sale and deny the bidder his rights?

The answer is no, and it has always been so, the misplaced phraseology of *Nutt v. Cuming* notwithstanding. Stability of judicial sales is favored. It may be that applicable law has in practice always tacitly been honored.

For those occasions, though, where the technicalities are litigated: the right of redemption ends with the auction sale.

.....●●●.....

(1) The mortgage itself could require acceptance of arrears even after acceleration. One primary example — for residential mortgages at least — is the widely used FNMA/FHLMC uniform instrument which allows reinstatement up to issuance of the judgment of foreclosure and sale, conditioned upon payment of all sums past due, inclusive of legal fees. Whether commercial mortgages permit reinstatement will, of course, be a function of what was negotiated.

(2) See, inter alia, *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 176 (1932); *Hudson City Savings Inst. v. Burton*, 88 AD2d 728, 451 NYS2d 855 (1982); *Jeferne Inc. v. Capanegro*, 89 AD2d 577, 452 NYS2d 236 (2d Dept. 1982); *Dime Sav. Bank of New York v. Norris*, 78 AD2d 691, 432 NYS2d 522 (2d Dept. 1980); *Sherwood v. Greene*, 41 AD2d 881, 342 NYS2d 990 (3d Dept. 1973); *Staten Island Sav. Bank v. Carnival*, 39 AD2d 779, 332 NYS2d 728 (2d Dept. 1972); *446 West 44th St. Inc. v. Riverland Holding Corp.*, 267 A.D. 135, 44 NYS2d 766 (1st Dept. 1943).

(3) See, inter alia, *Albany Sav. Bank v. Seventy-Nine Columbia Street Inc.*, 197 AD2d 816, 603 NYS2d 72 (3d Dept. 1993); *Marine Midland Bank v. Malmstrom*, 186 AD2d 722, 588 NYS2d 655 (2d Dept. 1992); *Dime Sav. Bank of New York v. Johnneas*, 172 AD2d 1082, 569 NYS2d 260 (4th Dept. 1991); *Gabriel v. 351 St. Nicholas Equities Inc.*, 168 AD2d 338, 562 NYS2d 660 (1st Dept. 1990); *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 176 (1932); *Logue v. Young*, 94 AD2d 827, 463 NYS2d 120 (ed Dept. 1983); *City Streets Realty Corp. v. Jan Jay Constr. Enterprises Corp.*, 88 AD2d 558, 450 NYS2d 492 (1st Dept. 1982); *National Bank of North America v. Cohen*, 89 AD2d 725, 453 NYS2d 849 (3d Dept. 1982); *Hudson City Savings Institution v. Burton*, 88 AD2d 728, 451 NYS2d 855 (3d Dept. 1982); *Dime Sav. Bank v. Deoley*, 84 AD2d 804, 444 NYS2d 148 (2d Dept. 1981).

(4) See, inter alia, *Albany Sav. Bank v. Seventy-Nine Columbia Street Inc.*, 197 AD2d 816, 603 NYS2d 72 (3d Dept. 1993); *Marine Midland Bank v. Malmstrom*, 186 AD2d 722, 588 NYS2d 655 (2d Dept. 1992); *Dime Sav. Bank of New York v. Johnneas*, 172 AD2d 1082, 569 NYS2d 260 (4th Dept. 1991); *Gabriel v. 351 St. Nicholas Equities Inc.*, 168 AD2d 338, 562 NYS2d 660 (1st Dept. 1990); *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 180 N.E. 176 (1932); *Logue v. Young*, 94 AD2d 827, 463 NYS2d 120 (ed Dept. 1983); *City Streets Realty Corp. v. Jan Jay Constr. Enterprises Corp.*, 88 AD2d 558, 450 NYS2d 492 (1st Dept. 1982); *National Bank of North America v. Cohen*, 89 AD2d 725, 453 NYS2d 849 (3d Dept. 1982); *Hudson City Savings Institution v. Burton*, 88 AD2d 728, 451 NYS2d 855 (3d Dept. 1982); *Dime Sav. Bank v. Deoley*, 84 AD2d 804, 444 NYS2d 148 (2d Dept. 1981).

(5) *Graf v. Hope Building Corp.*, 254 NY1, 171 N.E. 884 (1930); *Jamaica Sav. Bank v. Cohan*, 36 AD2d 743, 320 NYS2d 471 (2d Dept. 1971); *Nelson v. Vinel*, 26 AD2d 792, 273 NYS2d 652 (3d Dept. 1966).

(6) *Goodell v. Silver Creek Nat'l Bank*, 48 NYS2d 572, aff'd, 268 A.D. 1020, 53 NYS2d 529 (4th Dept. 1944).

(7) *Peugh v. Davis*, 96 U.S. 332 (1877); *Hughes v. Harlam*, 166 N.Y. 427 (1901); *Mooney v. Byrne*, 163 N.Y. 86 (1900).

(8) *Maher v. Alma Realty Co. Inc.*, 70 AD2d 931, 417 NYS2d 748 (2d Dept. 1979). See also *Basile v. Erhal Holding Corp.*, 538 NYS2d 831 (App. Div. 2d Dept. 1989).

(9) See, inter alia, *Hughes v. Harlam*, 166 N.Y. 427 (1901); *Mooney v. Byrne*, 163 N.Y. 86 (1900); *Maher v. Alma Realty Co. Inc.*, 70 AD2d 931, 417 NYS2d 748 (2d Dept. 1979); *60 Columbia St. v. Leofreed Realty Corp.*, 110 NYS2d 417, (Sup.Ct. 1952, aff'd, 281 AD2d 969, 120 NYS2d 925 (1st Dept. 1953); *Kirby v. Tricker*, 265 A.D. 149, 38 NYS2d 79 (2d Dept. 1942).

(10) *DeWitt v. Paterson*, 107 NYS2d 227 (Sup. Ct., 1951); rev'd on other grounds, 282 AD2d 827, 122 NYS2d 835 (4th Dept. 1953); *Conver v. Palmer*, 60 Misc. 241, 111 N.Y.S. 1074 (1907); aff'd, 123 A.D. 817, 108 N.Y.S. 480 (2d Dept. 1908).

(11) *Hughes v. Harlam*, 166 N.Y. 427 (1901); *Mooney v. Byrne*, 163 N.Y. 86 (1900).

(12) *207 Realty Assoc. v. 210 Central Park N. Realty Corp.*, 140 Misc2d 684, 531 NYS2d 712 (1988).

(13) *Id.*

(14) *Mackenna v. Fidelity Trust Co.*, 184 N.Y. 411 (1906); *Brainard v. Cooper*, 10 N.Y. 356 (1852); *Scharaga v. Schwartzberg*, 540 NYS2d 451

(App. Div. 2d Dept. 1989); *Polish National Alliance v. White Eagle Hall Company*, 98 AD2d 400, 470 NYS2d 642 (2d Dept. 1983); *First Fed. Sav. and Loan Soc'y of Port Washington v. Smith*, 83 AD2d 691, 441 NYS2d 309 (2d Dept. 1981).

(15) *Goldstein v. Soledad Place Corp.*, 157 Misc2d 801, 599 NYS2d 213 (1993).

(16) *Alkoff v. Miller*, 165 Misc. 774, 1 NYS2d 163 (1938); *McKee v. Murphy*, 34 N.Y. Super.Ct. (2 Jones & S.) 261 (1872); *Ettenheimer v. Heffeman*, 66 Barb. 374 (Gen. Trials 1867); *Grant v. Duane*, 9 Johns 591 (1812).

(17) *Bancplus Mort. Corp. v. Galloway*, 610 NYS2d 60 (2d Dept. 1994).

(18) *Nutt v. Cuming*, 155 N.Y. 309, 49 N.E. 880 (1898); *Dulberg v. Ebenhart*, 68 AD2d 323, 417 NYS2d 71 (1st Dept. 1979); *Banque Arabe Et Internationale D' Investissement v. One Times Square Limited Partnership*, \_\_\_ AD2d \_\_\_, 636 NYS2d 299 (1st Dept. 1996); *In Re Mosella*, 193 B.R. 147 (SDNY 1996), citing *Bernard v. Onderdonk*, 98 N.Y. 158 (1885).

(19) *SRF Builders Capital Corp. v. Ventura*, \_\_\_ AD2d \_\_\_, 639 NYS2d 59 (2d Dept. 1996).

(20) *Nutt v. Cuming*, supra. at note 18; *Dulberg v. Ebenhart*, supra. at note 18.

(21) *Banque Arabe Et Internationale D' Investissement v. One Times Square Limited Partnership*, supra. at note 18.

(22) *In re: Mosella*, 193 B.R. 147 (SDNY 1996), citing *Bernard v. Onderdonk*, 98 N.Y. 158 (1885).

(23) *Brown v. Frost*, 10 Paige 243 (1843).

(24) *Tuthill v. Tracy*, 31 N.Y. 157 (1865).

(25) 155 N.Y. 309, 49 N.E. 880 (1898).

(26) *Banque Arabe Et Internationale D' Investissement v. One Time Square Limited Partnership*, supra. at note 18; *Dulberg v. Ebenhart*, supra. at note 18.

(27) *Basile v. Erhal Holding Corp.*, 148 AD2d 484, 538 NYS2d 831 (2d Dept. 1989); *Finance Inv. Co. (Bermuda) Limited*, 145 AD2d 463, 535 NYS2d 632 (2d Dept. 1988); *First Fed. Sav. & Loan Ass'n of Port Washington v. Smith*, 83 AD2d 601, 441 NYS2d 309 (2d Dept. 1981); *Jamaica Sav. Bank v. Cohan*, 38 AD2d 841, 330 NYS2d 119 (2d Dept. 1972); *Belsid Holding Corp. v. Dahm*, 12 AD2d 499, 207 NYS2d 91 (2d Dept. 1960); *Bowery Sav. Bank v. Harbert Offset Corp.*, 147 Misc2d 633, 558 NYS2d 821 (1990).

(28) *Brandt v. 47-49 Charles Street*, 157 Misc2d 299, 596 NYS2d 315 (1993); *Goldstein v. Soledad Place*, 157 Misc2d 801, 599 NYS2d 213 (1993), each citing 1 *Bergman on New York Mortgage Foreclosures*, §4.07 and 27.02(2).

(29) *Supra.* at note 18.

(30) *Trustco Bank v. 11 North Pearl Associates, D&C*, 153 Misc2d 340, 580 NYS2d 847 (1992).

(31) *Schnitzer v. Fruehauf Trailer Co.*, 283 App. Div. 421, 128 NYS2d 242 (1st Dept. 1954); *Polish Nat'l Alliance of Brooklyn v. White Eagle Hall Company*, 98 AD2d 400, 470 NYS2d 642 (2d Dept. 1983).

(32) *Brown v. Frost*, supra. at note 23; *Tuthill v. Tracy*, supra. at note 24; *Barnard v. Jersey*, 39 Misc. 212 (1902); *Citibank v. Press Realty Corp.*, 139 Misc2d 558, 528 NYS2d 307 (1988); *In re Cretella*, 42 B.R. 526 (EDNY 1984); *In re Ghosh*, 38 B.R. 600 (EDNY 1984); *In re Smith*, 7 B.R. 106 (WDNY 1980); *In re Butchman* 4 B.R. 379 (SDNY 1980); 1 *Bergman on New York Mortgage Foreclosures*, §4.07 and 27.02(2).