Loose Lips Sink Mortgages — Revisiting the Danger of Oral Agreements in the Workout/Foreclosure Case*

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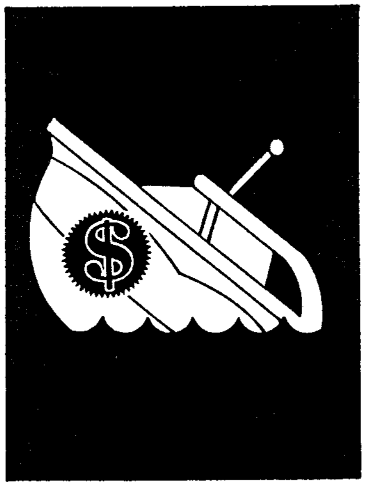

The egregiously mixed metaphor of the title is concededly inartful and worthy of shudders, but the point remains a valid one. And the lesson of the title is unfortunately slow to be learned, by some lenders at least.

We have had occasion in these pages in past issues to review this subject[1] and brief reflection upon prior thoughts can provide an equable segue to a new case which accentuates the concept.[2]

Differentiating Oral Waiver From Oral Agreements

In discussing the dangers of oral agreements, a distinction should immediately be drawn between such claimed agreements and assertions of oral waivers. The peril presented by the latter might appear to be the greater of the two, although case law seems to urge to the contrary.

The famous *Nassau Trust*[3] case clarified the point that a lender could always waive its rights, even orally, notwithstanding language in the mortgage prohibiting modification unless in writing. But the plaintiff lost that case in dubious reliance upon the mortgage, declining to even refute a borrower's claim of oral waiver. Subsequent case law has demonstrated both courts' cognizance that lenders will not often waive their rights and that casual statements may not, in any event, rise to the level of a waiver sufficient to defeat a foreclosure.[4] Such is not to banish oral waiver claims to insignificance. Rather, it suggests that the problem, serious though it is, finds favorable resolution in reliance upon accepted and emerging case law.

The menace of an oral agreement though, is probably more insidious, in major part because the lender must concede that there is an agreement about which to argue. When a mortgage falls into default, whether prior or subsequent to acceleration, a borrower's entreaties to "work something out" are understandably seductive. Lenders would most often prefer a reinstatement or some plan which portends eventual reinstatement, payoff or acceptable recasting. Under such circumstances, the less than meticulous might somehow agree to take some payments in some form of schedule, in exchange for refraining from further pursuit of their rights to foreclose. If the "agreement" — whatever it may be — is honored, there is no problem to address.

Frequently, however, whatever the arrangement was to be does not come to the conclusion the lender expected. But if the borrower disagrees with the tenor of the agreement claimed by the lender, there may very well be an issue of fact which then precludes summary disposition of the case, enmeshing the lender in just the type of litigation it never wanted and never should have been forced to confront. It is this disagreement which is the difficulty and which is different than a pure waiver claim.

The New Case

That the noted dilemma of dispute about oral agreements could be avoided was underscored in *Marine Midland Bank V. Bullard Orchards*,[5] reviewed at length in a prior article here.[6] The simple lesson then, and now, is that any agreement about repayment, satisfaction or recasting where a lender will refrain from enforcing its rights **must** be reduced to a clearly unassailably lucid writing. If it is not, the outcome of an argument concerning the meaning of the understanding is likely to be uncertain.

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Not surprisingly, it has happened again, this time in *New York Guardian Mortgage Corporation v. Olexa.*[7] Evaluation of the law in that case began commodiously enough for lenders. The court emphasized the maxim that upon a payment default by the mortgagor, even for one day, a mortgagee may accelerate and may commence foreclosure, with equity powerless to intercede.[8] The assertion was tempered, however, by the notion that tender of the entire amount then due, bad faith on the part of the mortgagee or an unconscionable act, would be a defense to summary judgment.[9] As is so often the case, the matter hinged untimely on the facts and that is where the lender committed fatal miscues.

The borrower had defaulted upon mortgage payments of some $500 per month. Under sympathetic circumstances, the lender allowed the borrower time to make up the arrears. Some payments were made, but a shortfall of two months remained. The lender advised that foreclosure would ensue unless arrears were remitted by certified check within 30 days.

Upon the borrower's request for reconsideration, the lender sent a letter on October 14, 1987, agreeing to accept arrears pursuant to a "stipulation plan." The borrower was to remit $1,866.49 by October 30, followed by six monthly installments of $1,038.07. In a letter dated October 30, the lender returned four checks aggregating $2,149.00, asserting that "they must be certified for such a large payment."

The borrower claimed that she attempted to comply with the plan, but on November 21 these payments were returned for lack of certification. Nevertheless, the borrower was given more time to resubmit in certified funds. On December 10, the lender returned a payment of $1,866.49 claiming breach of the payment terms by the borrower and advising that foreclosure would be begun.

How did the court dispose of the inevitable motion for summary judgment? In essence, it found the lender hopelessly mired in a confusing, irresolute posture.

The December 10 letter was found to be the lender's admission of a payment agreement, something the lender would have been constrained to concede in any event. What payments had to be made in certified funds, though, became a contentious issue. Here the lender's jeopardy became apparent because now the precise terms of the agreement became susceptible to factual determinations.

The court observed that the October 30 letter requiring certification referred to a total sum of returned checks of $2,149.00. But the court found an implication in the verbiage that a payment of some lesser amount without certification would be acceptable. Still further, the payment plan was initially made over the phone and only some days thereafter committed to a writing in the form of the October 14 letter. That raised in the court's mind the factual question as to whether the borrower was told of the certification requirement on the phone and whether she complied with the terms of the new payment agreement concerning certified checks.

It all becomes still more convoluted. The lender claimed breach of the new agreement (whatever precisely that was) through untimely submission of the first installment. The mortgage, however, provided a 15 day grace period for monthly payments and the lender received the first certified installment 11 days after the letter of November 21 was received by the borrower containing notification that certification was required. Was the grace period of the mortgage to apply to the repayment plan? While it could be argued that the court strained a bit to rescue the borrower, it found the question to be one of fact needing resolution. It then converted the inquiry into a legal finding that the borrower's acts were neither gross nor willful, which would result in forfeiture, thereby resurrecting intercession of equity.[10]

The final proverbial nail in the lender's coffin was the borrower's defense of bad faith and unconscionability. The court found that from the inception, the lender told the borrower that her file could not be located and that there would be communications with her. No one ever called back. Moreover, the court said, the lender regularly failed or refused to answer the borrower's calls and the attempts by her attorney to resolve the case after litigation began. In no uncertain terms, the court wanted to allow the hapless borrower an opportunity to establish all the defenses at trial.

Conclusion

Are the facts of this case confusing? They certainly are, which immediately demonstrates one of the lender's problems. Obviously, it treated the workout/repayment in a remarkably casual fashion. Unfortunately for lenders, it is often easy to divine the outcome when a court must choose between a strapped borrower, trying to save his or her home, all the while actually remitting payments, as opposed to a lender who was not especially conscientious to begin with.

To avoid the trap, a lender should simply be careful and amenably determined. Accommodating borrowers is often appropriate and, in these difficult times, perhaps even necessary. But committing repayment plans to cursory conversations or aimless letters, compounded by meandering changes of direction, will not provide the protection lenders most assuredly need. Whether it is denominated stipulation, forbearance agreement, repayment plan, or any other categorization, **writing,** definite and resolute, is the path to pursue.

Endnotes

1. "The Danger of Desultory Negotiations Before Foreclosure," 17 *Real Property Law Section Newsletter* 4 (Jan. 1989); "More on Waiver of Foreclosure—Emerging Solace for Mortgagees," 17 *Real Property Law Section Newsletter* 27 (April 1989).
2. New York Guardian Mortgage Corporation v. Olexa, ___ A.D.2d ___, 574 N.Y.S.2d 107 (3d Dept. 1991).
3. Nassau Trust Co. v. Montrose Concrete Products Corp., 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265 (1982).
4. Security Pacific Mortgage and Real Estate Services v. Canadian Land Co. of America, 690 F. Supp. 1214 (U.D.S.D.C., S.D.N.Y. 1988); N.Y. State Urban Devel. v. Marcus Garvey Brownstone, 98 A.D.2d 767, 469 N.Y.S.2d 789 (2d Dept. 1984); State Bank of Albany v. Fioravanti, 51 N.Y.2d 638, 417 N.E.2d 60, 435 N.Y.S.2d 947 (1980); Flintkote Co. v. Bert Bar Holding Corp., 114 A.D.2d 400, 494 N.Y.S.2d 43 (2d Dept. 1985); Chimart Associates v. Paul, 66 N.Y.2d

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570, 498 N.Y.S.2d 344, 489 N.E.2d 231 (1986); Crossland Savings v. Lo Guidice-Chatwal Real Estate Inv. Co., ___ A.D.2d ___, 567 N.Y.S.2d 39 (1st Dept. 1991); Crossland Savings v. SOI Dev. Corp., ___ A.D.2d ___, 560 N.Y.S.2d 782 (1990); Dimacopoulos v. Consort Dev. Corp., ___ 561 N.Y.S.2d 59 (2d Dept. 1990); City of New York v. Grosfeld Realty Company, ___ A.D. 2d ___, 570 N.Y.S.2d 61 (2d Dept. 1991).

5. 140 A.D.2d 870, 528 N.Y.S.2d 445 (3d Dept. 1988).
6. "The Danger of Desultory Negotiations Before Foreclosure," *supra* note 1.
7. *Supra* note 2.
8. Citing Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884; Hudson City Sav. Inst. v. Burton, 88 A.D.2d 728, 451 N.Y.S.2d 885.
9. City Sts. Realty Corp. v. Jan Jay Constr. Enters, Corp., 88 A.D.2d 558, 450 N.Y.S.2d 492; Dime Sav. Bank of N.Y. v. Norris, 78 A.D.2d 691, 432 N.Y.S.2d 522.
10. Citing J.N.A. Corp. v. Cross Bay Chelsea, 42 N.Y.2d 392, 397 N.Y.S.2d 958, 366 N.E.2d 1313.

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