More on Waiver of Foreclosure — Emerging Solace for Mortgagees*

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When a lender finally decides that it is time to accelerate and begin a foreclosure, there is an ever present danger of waiving that right through less than sedulous attention to written or oral statements made to defaulting borrowers. This was discussed in the January 1989 issue of the *Newsletter* in the article "The Danger of Desultory Negotiations Before Foreclosure." The message of the two leading cases underscoring lenders' peril was that mortgage terms **can** be varied even in the presence of a provision purporting to prohibit it [*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 451 N.Y.S.2d 663 (1982)], and that even when a lender denies allegations of waiver, the documentation must be clear and precise to defeat the claim. [*Marine Midland Bank v. Bullard Orchards, Inc.*, 528 N.Y.S.2d 445 (3rd Dept. 1988)].

What was evident in both of the cited cases was that **some** negotiations took place and that some writings confirmed, at least partially, the tenor of the wranglings. The respective lenders were no doubt chagrined by the decisions, but they couldn't argue, or in *Nassau Trust* didn't attempt to argue, that **nothing** happened. Consequently, disconcerting though the judicial pronouncements may be to the lending community, the decisions do not mean all is lost. Appropriate care in committing understandings to irrefutable writings, combined with skilled advocacy should defeat disingenuous waiver claims.

Perhaps a more frightening scenario emerges when a borrower transparently claims that a lender orally promised not to foreclose if certain things were done. Then, a lender is apparently placed in the unenviable position of proving a negative. To be sure, the lender would argue by affidavit that it is hardly in the habit of orally waiving its rights and that borrower's claim that lender did so strains credulity beyond any cognizable bounds. Such is an appropriate rejoinder, but where is case law for the brief to support the contention? Fortunately, a new case in the Southern District buttresses a lender's stance in this situation and serves well to demystify this nettlesome arena. (*Security Pacific Mortgage and Real Estate Services v. Canadian Land Co. of America*, 690 F. Supp. 1214 (U.S.D.C., S.D.N.Y. 1988)).

Although the case is somewhat complex, an outline of the basic facts is enlightening. In February of 1985, Security Pacific, as lender, and Canadian Land, as borrower, entered into a building loan agreement. Borrower's defaults began in July, 1986, which ultimately precipitated an acceleration letter in January, 1987. Further defaults ensued and by the time the lender was constrained to foreclose in April of 1987, it had advanced in excess of $52,000,000.00.

Canadian Land contested the foreclosure on a number of grounds, notable among them being a claim of oral waiver. Upon the motion for summary judgment, a managing director of Canadian Land asserted in an affidavit that an attorney for Security Pacific waived the right to foreclose by purportedly stating that if $700,000.00 in ground rent and overdue taxes were paid on one of the secured parcels, all with a view to permitting Canadian Land to negotiate a sale of the property to settle another suit on that building, Security Pacific would refrain from foreclosing. That money **was** paid, but for the reason, lender argued, to avoid termination of a ground lease.

Lender denied making the statement and the court granted summary judgment finding that no issue of material fact had been raised. The principles enumerated in the decision present considerable comfort to lenders.

First, even if borrower's allegations could be proven, the waiver would prohibit foreclosure founded solely upon defaults exiting at the time of the waiver. Subsequent defaults (which occurred in the subject case) form an independent basis to foreclose, thus rendering the waiver defense insufficient as a matter of law. Moreover, the tenor of the alleged waiver could not be construed to be a waiver of future defaults.

Second, even if the waiver could be interpreted to encompass subsequent defaults, an uncorroborated affidavit asserting waiver does not rise to the requisite elevated level whereby the non-moving party bears the burden of proof. (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Quarles v. General Motors Corp.*, 758 F.2d 839 (2nd Cir. 1985)).

Third, and more specifically, the court observed that New York stringently enforces this rule in the context of claimed waiver of foreclosure, underscoring the maxim that an uncorroborated affidavit asserting forbearance is inadequate to resist summary judgment. (citing, *inter alia, N.Y. State Urban Dev. v. Marcus Garvey Brownstone*, 98 A.D.2d 767, 469 N.Y.S.2d 789 (2nd 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 (2nd Dept. 1985)). Stated alternatively, summary judgment should not fail because of a technical issue of fact which is unable to create a meaningful likelihood of affecting the right to foreclose. (citing, *inter alia, Matsushita Elec. Indus. Co. v. Zenith Radio*, 4755 U.S. 574, 106 S. Ct. 1348, 89. L. Ed.2d 538 (1986); *Celotex Corp. v. Catrett, supra.*)

Fourth, and of vital practical application, the court opined that a waiver of the right to enforce a defaulted mortgage by foreclosure is most unlikely to be accomplished orally without some written memorialization — just the point lenders would urge. Combining the remoteness of oral waiver with substantial contrary evidence.in-

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troduced by the lender further persuaded the court as to the legitimacy of the lender's posture.

Finally, when the lender accelerated, it could be expected that the borrower, relying upon the supposed waiver, would have been incensed at the breach of the forbearance understanding and would have responded accordingly. But there was no protest of any kind by the borrower upon receipt of the acceleration letter. That silence was perhaps the proverbial icing on the cake which demonstrated the transparency of the borrower's assertions.

Since obviously the facts of every case vary, it cannot be said that this decision banishes all oral waiver issues to insignificance. But it does represent an especially astute judicial examination of a vexatious lender's quandary. When faced with an oral waiver matter, counsel to lenders can benefit by a rereading of this case which is a treasure trove of helpful arguments.

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Executive Committee Adopts Policy

At its January, 1989, meeting, the Executive Committee of the Real Property Law Section unanimously adopted the following policy positions:

It is the policy of the Real Property Law Section of the New York State Bar Association that all publications and documents should be gender neutral. In addition, it is the suggestion of the Executive Committee of the Real Property Law Section that all documents prepared by our members, including general memoranda and opinion letters, should be written in gender neutral form.