Mortgage Foreclosure Costs and Legal Fees for the Lender

By Bruce J. Bergman

How much it costs to foreclose a mortgage - and how much of the expense can be recouped - is of vital importance both to the mortgagee (lender) and the mortgagor (borrower). When the costs *are* reimbursible, the lender's burden is lightened while that of the defaulting borrower may be increased.

Just how expensive a foreclosure may be is a function of many factors. First, an uncontested case will be much less expensive than a contested matter, the latter having no limit. When uncontested, most attorneys will have fairly consistent legal fees for taking the action through its various steps. Even if billed on a time basis, there are reasonable boundaries on how many hours need be devoted to a typical foreclosure case. In this regard, two obvious variables emerge, i.e., what a particular law firm customarily charges - which, of course, varies - and whether the foreclosure is for a more complicated commercial parcel as opposed to a single-family residence.

In analyzing the expenses, a distinction must be made between legal fees and what statutes view generally as "costs" and "disbursements."

Costs

When a foreclosure reaches the point of judgement, counsel submits a "bill of costs" which is designed to add to the mortgage debt and interest the actual disbursements incurred in prosecuting the action. These *are* recoverable and include, among others:

- Service of process (the more defendants in the action, the larger this amount)
- Referee's fees ($50 to compute, $200 to sell)
- Court index number fee
- Certain variable costs, such as fee to guardian ad litem (if required) and publication of summons (if a defendant could not be located)
- Foreclosure search (around $100)
- Filing lis pendens
- The significant costs of publishing the notice of sale are added in later

In addition, there is an entitlement to what New York's practice statute (CPLR) denominates as "costs." For proceedings before a note of issue is filed, the lender receives $50 if the action is in New York City or $25 if in any other county in the state. Moreover, for each trial, inquest, or assessment of damages, he receives $150 in New York City or $75 anywhere else.

Still further, the lender is also entitled *as a matter of right* to an "additional allowance," computed as a percentage of the amount found to be due on the mortgage, up to a maximum of $150. But it doesn't stop there. There is also a *discretionary* allowance — normally granted as a matter of course — not to exceed 2.5 percent of the sum due on the mortgage, in any event not in excess of $300.

Finally, there is a *discretionary* allowance whereby a court *may* grant a sum not exceeding 5 percent of the mortgage sum and interest where the case is "difficult" or "extraordinary." However, case law reveals that numerous attempts to graft this award on to foreclosure judgements have been unsuccessful.

If at the foreclosure sale the property is sold for the lender's upset price, all the permitted costs and allowances - which are hardly substantial - are recouped. If there are no takers, the lender buys in at a nominal sum, hoping to perhaps make up these costs upon a private sale of the parcel.

Legal Fees

Whatever the costs and allowances may be, the lender must pay its counsel, and that is normally the largest expense encountered. Whether and in what amount these are recoverable is perhaps not as clearly understood as it should be.

The first point to note is that a lender may *not* be awarded legal fees unless the mortgage itself *specifically* makes provision for that. Unbeknownst even to some attorneys, the standard title company form of mortgage does *not* provide for legal fees to the lender in a foreclosure action — only in a case to protect the lien of the mortgage. (See paragraph 12 in the NYBTU mortgage.)

Obviously, institutional lenders and astute real estate lawyers know that a well-drafted clause in this regard is essential, and so it is safe to assume that in most instances this hurdle will have been overcome. Clauses of this nature are valid, have been upheld by the courts, and will support an award of legal fees. There is only one reported decision in this state to the contrary, but that decision of a judge sitting in Onondaga County is clearly an aberration.

This then leads to the question of how much these legal fees are to be. While a foreclosing plaintiff is free to make any arrangement with his counsel that it deems prudent, what the *lender* has agreed to pay is not necessarily the measure of what the court will award in the judgement. Rather, the test is reasonableness, i.e., the fees' relationship to the case and the services rendered.

At the very least, counsel should submit with the proposed judgement of foreclosure and sale an affidavit of the services, his fair, reasonable, and usual billing, and the necessity for the time expended. On the basis of the affidavit alone, some courts may accept the requested sum, or reduce the hourly rate, or excise some of the tasks performed to arrive at a fee. Other courts will require a hearing in which counsel must actually testify as to what he did.

Not infrequently, the legal fee clause in the mortgage will be expressed as a percentage of the loan. This is probably not the best way to proceed because the cases will construe that percentage as a ceiling on the fee - a possible detriment in a protracted or heavily litigated case. Moreover, the percentage will always be scutinized anyway by the courts according to the reasonability test. The concept, however, of making legal fees a percentage has been held valid.

What particular percentage will be found reasonable in any given matter will, naturally, vary and be dependent upon the circumstances. A review of cases shows that 5 percent has been ruled reasonable. A number of decisions have ruled that 15 percent was reasonable without a hearing. Another found that 15 percent *could* be acceptable, but that the facts there could only support a lesser sum. Still other cases found 20 percent to be appropriate, sometimes with, but sometimes without a hearing. Finally, there is a holding that 30 percent could be reasonable, but a hearing would be necessary to establish such a recovery.

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TISHMAN AURORA PLAZA PHASE I COMPLETED

Phase 1 of Tishman Aurora Plaza in Denver, Colorado has been completed. It consists of two four-story and one two-story buildings — a total of approximately 218,000 square feet. When all phases are completed, there will be eight buildings of two and four stories for a total of 600,000 square feet of first-class office space on a 30-acre site.

Perry S. Herst, Jr., president of Tishman West Management Corp., comments, "Aurora Plaza is more evidence of our belief in the future of Colorado business growth. Our Colorado commitment is in excess of $50 million as of this date, and additional plans are being developed."