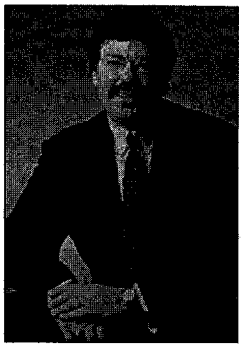
BERGMAN ON MORTGAGE FORECLOSURES:
New Roadblock in New York Evictions After Foreclosure

By Bruce J. Bergman



This is a point that occurs to us often—something we fervently believe. (Mortgage servicers, of course, agree with us heartily.) Post-foreclosure evictions should be less laden with difficulty than "usual" evictions. After all, the eviction after foreclosure is not a matter of lease interpretation or when or whether rent was paid, or whether lease terms have been breached or whether a Yellowstone proceeding is applicable. It is simply a situation where persons who have no right to occupy the now foreclosed premises are remaining in possession. In common parlance, they are hanging around when they don't belong there.

That being so, most unwelcome are further complications to slow up the process of a foreclosure sale purchaser (such as the foreclosing lender or servicer) proceeding to obtain physical possession of the property just purchased. But a recent case does indeed present such an impediment by ruling that the attorney for the foreclosure sale purchaser can*not* sign the required notice to quit. [*Washington Mutual Home Loans v. Calderon*, N.Y.L.J., Sept. 25, 2002, at 23, col. 3 (Owens Co., Civ. Ct., Housing Part, Katz, J.)]

Here's what this means to mortgage lenders and servicers in practical terms. Although there are two methods to prosecute evictions after foreclosure in New York [*see* RPAPL § 713(5) and RPAPL § 221], there are some places (particularly New York City) where the method may best be pursued in landlord and tenant court. That approach requires as a prerequisite the service of a ten-day notice to quit to the parties who are holding over at the foreclosed premises.

In turn, *someone* has to sign the notice to quit and typically and traditionally it was the owner's attorney (most often the foreclosing plaintiff's attorney) who would sign that notice to quit. It is apparent that first sending each notice to quit to a mortgage servicer to sign and return has the potential to add days or even weeks to the process of the eviction.

Traditionally, case law seemed to say that where the attorney for the party prosecuting the eviction was the same attorney who handled the foreclosure, then there was no surprise for the holdovers and there was no confusion about who was bringing the action and that was the key consideration. Thus, that attorney could sign the notice. The new case, however, says it isn't so and that absent some explanatory authority in writing—and attached to the notice to quit—the signature of the attorney on the notice to quit is insufficient so that any eviction based upon that notice to quit must fail.

Although this is a decision at a lower court level (housing part of civil court) it is published and is out there for other judges and the world to see. It suggests strongly that there is peril in an attorney signing the post-foreclosure notice to quit. The ready solution would be to obtain a limited power of attorney from each mortgage servicer and to annex it to each notice to quit. This would appear to eliminate the danger presented by this unfortunate new case.

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