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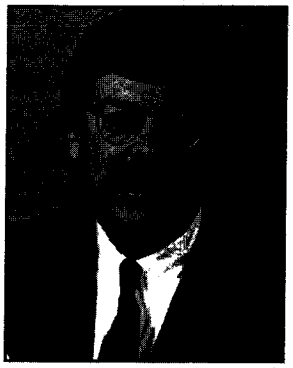
BERGMAN ON MORTGAGE FORECLOSURES . . .



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No, You Can't Modify the Mortgage*

Depending upon one's vantage point, the claim that "the lender agreed to (fill in all the things mortgagees are quoted as ever having said)" is either the bane of an existence or a possible savior in the foreclosure case. As highlighted in a new decision[1]—the real impetus for this piece—the reality should be neither.

A reason lenders fear the claim, while borrowers concomitantly are smitten with it, probably arises from the now ubiquitous 1982 Court of Appeals ruling in *Nassau Trust Co. v. Montrose Concrete Products Corp.*[2] Even though readers of this publication do not misinterpret *Nassau Trust*, it may indeed be widely misunderstood in other quarters; at least, such is the conclusion a plaintiffs' foreclosure practitioner reaches upon seeing the case cited constantly by borrowers as an elixir to cure all legal ills. But the real message of *Nassau Trust* was that a mortgage holder could always waive its rights, even orally, notwithstanding language in the mortgage prohibiting modification unless in writing.

Lenders may have been discomfited by *Nassau Trust* knowing that the plaintiff lost. That defeat, however, was founded upon the lender's misplaced reliance on the mortgage, combined with a declination to refute the borrower's claim of oral waiver. Later cases were more helpful to mortgagees, underscoring both courts' recognition that lenders will not typically waive their rights and that casual statements may not rise to the level of a waiver sufficient to defeat foreclosure.[3]

Although waiver remains a threat, a key distinction is always the difference between waiver and modification, which is the enlightening, if elemental, point of the new case, *FGH Realty Credit Corp. v. VRD Realty Corp.*[4] As it was in *Nassau Trust*, the mortgage provided that it could only be modified in a writing signed by the party to be charged. Default ensued and, upon appeal of denial of summary judgment, the borrower argued that the lender should be estopped from foreclosing because of an alleged oral agreement to reduce the interest rate. There was a reversal and summary judgment was awarded the mortgagee in the absence of any triable issue of fact.

The Second Department firmly observed that the mortgage barred oral modification (which the interest rate reduction would have been), and there was correspondence demonstrating that the agreement would not be binding until reduced to a writing. This is, of course, just the language lenders need to preserve traditional notions of stability and predictability.

Did the plaintiff need the correspondence to win? It appears not, and careful lenders will typically paper the file to support their positions anyway. Thus, so long as what the defaulting mortgagor urges as a

riposte to foreclosure be characterized as a modification of the mortgage, the usual protective verbiage in the mortgage will suffice to banish the defense.

Endnotes

1. FGH Realty Credit Corp. v. VRD Realty Corp., __ A.D.2d __, 647 N.Y.S.2d 229 (2d Dep't 1996).
2. 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265 (1982).
3. For extensive citations on point, see *Loose Lips Sink Mortgages—Revisiting the Danger of Oral Agreements in the Workout/Foreclosure Case*, 20 REAL PROP. LAW SECTION NEWSLETTER 3 (1992).
4. *Supra* at note 1.

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