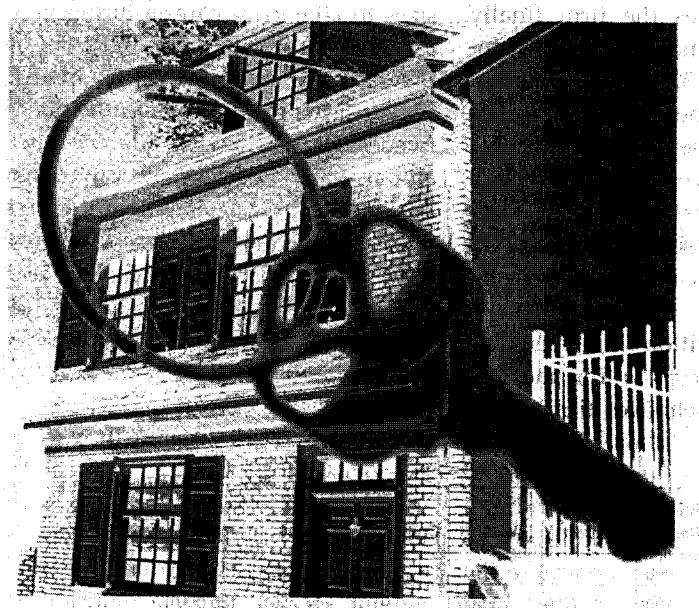
BY BRUCE J. BERGMAN



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Payoff on the Eve of Sale

Practitioners who can concentrate in one or a few fields know how difficult it can be to learn most of the law even in those restricted arenas. This truism highlights the enormous burden courts bear: they must be experts in every area of the law. But merely reading cases is sometimes insufficient. There are always the parallel universes of the real world and the unwritten, where precise understanding emerges only from experience, practice, custom, guidance from the learned and other ineffable sources, which combine to impart wisdom. Mortgage foreclosure is one of those pursuits where "being there" really helps.

It is this preliminary observation that leads with dismay to mention of a continuing series of cases declaring that a defaulting mortgagor cannot necessarily save his property on the eve of foreclosure sale solely by satisfying the mortgage. Rather, so the cases say, the mortgagor must also secure a stay of the sale, failing in which the payoff may have been futile.[1]

Real estate veterans will immediately find this puzzling, and correctly so. Inherent in every mortgage is the sacred, equitable right to pay the mortgage debt and unburden the property from the lien of that mortgage. The remedy of mortgage foreclosure afforded a lender is not punitive; it is designed to obtain recompense for as much of the mortgage debt as possible.

In the cases creating the problem that catches our attention here, even though the borrower remitted the mortgage debt, some form of mistake allowed the foreclosure sale to nevertheless proceed. When the borrower then sought to overturn the sale (even with the concurrence of the foreclosing plaintiff), the courts said, "No, you also needed that stay."

In some cases at least, borrowers who should not will nonetheless lose their property.

Mindful that the right to redeem survives until the moment the secured property is struck down at the auction sale, why would courts create some obligation to stay the sale when payoff alone is sufficient? We suggest that the answer emerges from pervasive unawareness of the exceptionally obscure methodology of "partial foreclosure," which leads courts to mix the proverbial apples and oranges and thereby commit error.

Understanding partial foreclosure is the key to solving this puzzle and, it can be hoped, to banishing the apparent confusion about mortgage redemption. When a borrower defaults, eventually, and about 99.99% of the time, the lender will accelerate the mortgage balance, that is, declare due the *entire* sum. For illustrative purposes though, examine this extreme situation. A lender holds a well above market rate mortgage (assume perhaps a 15% yield), with no provision allowing prepayment – certainly a desirable investment well worth preserving. The borrower is suddenly able to refinance at 6%, but the lender is unwilling to accept a payoff and, as noted, need not do so.

Knowing that default will elicit acceleration, the borrower purposely refrains from remitting mortgage installments, thereby triggering the right to redeem, trumping the otherwise inviolate principle that the mortgage cannot be prepaid.

But the lender has a riposte: partial foreclosure. Instead of accelerating, the lender initiates foreclosure founded upon the missed installments

alone, so that the purchaser at the foreclosure sale buys the property with the mortgage intact, reduced only by the missed installments (and those that became due during the course of the action), which becomes the purchase price at the foreclosure sale – weird, obscure, but effective for the purpose.

It is obvious that partial foreclosure will seldom be invoked. Nonetheless, its unusual nature required a special statute (Real Property Actions & Proceedings Law § 1341) to address procedure when the borrower pays off in a partial foreclosure case. The statute particularly recites the situation where in a foreclosure "any part of the principal or interest is due, and another portion of either is to become due. . . ." This is exactly the nature of partial foreclosure. It has nothing to do with virtually every other foreclosure anyone will ever see where the balance was accelerated and *all* the money has become due.

We now arrive at the heart of the confusion. In the cases declaring a stay of sale as requirement of redemption, the courts rely upon RPAPL § 1341. The section's misleading title is "Payment Into Court of Amount Due," underscoring why anyone less than a long-time foreclosure practitioner could readily misapprehend the section's true meaning. In short, though, it applies exclusively to partial foreclosure and has no relationship whatsoever to "regular" foreclosure. Thus, this section cannot be invoked in mortgage foreclosure cases to impose a stay as a condition of post-judgment redemption.

Until the Appellate Division explores the existence of partial foreclosure, it will continue to inject the stay requirement and, in some cases at least, borrowers who should not will nonetheless lose their property. ■

1. Delineation of those cases and a very detailed analysis supporting the conclusions expressed is too lengthy for this space. For that level of depth, attention is invited to *2 Bergman on New York Mortgage Foreclosures* § 27.10 (Matthew Bender & Co., Inc. rev. 2005).