Settling The Mortgage Foreclosure — A Lender's "How To" Perspective

By
Bruce J. Bergman, Esq.

Introduction

Mindful that most lenders prefer not to be harsh, and that borrowers are in most instances desirous of avoiding an ultimate foreclosure sale, the sage structuring of any mortgage foreclosure settlement is clearly a key element in successful prosecution of many foreclosure actions. but unlike other actions, "settlement" in a foreclosure should not generally mean the usual compromise where each party concedes some amount. Absent the atypical case where the legitimacy or quantum of the obligation is a genuine issue, or where the equity cushion has been extinguished, settlement in foreclosure should mean in essence either reinstatement upon lender's terms, or full payment to the lender of all sums secured by the mortgage, usually over some period of time. Conceptually, if the entire mortgage balance is paid, the lender succeeds in the foreclosure and there has been no settlement.

Lenders regularly involved with foreclosures either have experienced or are aware of cases which have extended for many months, or even years, while some settlement was contemplated. Since, however, delay portends danger for both lender and borrower as interest increases, avoidance of delay is essential.

Mr. Bergman is a partner in the law firm of Certilman Balin Adler & Hyman in East Meadow, New York and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is a member of the American College of Real Estate Lawyers and past chair of the Real Property Law Committee of the Nassau County Bar Association. He is the author of *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (1990).

The source of this time problem can result from either a less than meticulous approach to the strategy of settlement or lack of knowledge of the concepts. While most foreclosures are indeed settled, experience suggests that defaulting borrowers cannot or will not honor their obligations until their position is about to become irretrievable. Assuming sincerity on the borrower's part - which unfortunately is not always the case - they may be trying to obtain time to sell the property or refinance. Whether these goals are achievable can be problematical. Perhaps they hesitate to obtain a loan from family or friends or are loath to encumber some other valuable property. Sometimes hostile marital relations inhibit cooperation between obligers who are husband and wife.

Whatever the reason, and these may be as broad as human experience, the understandable trauma of foreclosure frequently leads borrowers in adversity to either say things they don't mean or make promises they just don't have the wherewithal to honor; hence, the admonition that continuous fortitude is critical to a favorable and expeditious conclusion.

What should *not* be done is to hold an action in abeyance pending a vowed resolution. On the contrary, the foreclosure should in most instances proceed as if no settlement was possible until the very moment a conclusion *actually* results.

The Settlement Stipulation

If a borrower claims to have both the desire and ability to reinstate the mortgage, the only way he can know precisely how much to remit is if the lender tells him so. This should be accomplished by submission of a reinstatement letter familiar to lenders. Upon learning of the sum necessary to reinstate, particularly when the borrower neglected to take into account the inevitable late charges and attorney's fees, he may be unable to simply send a check. Rather, he may ask to make the payments over time.

Assuming this is acceptable to the lender, as most often it will be, it is essential that the arranagement be reduced to a writing. Absent a writing, confusion, or worse, a possible waiver by the lender could ensue.[1]

Whether the resultant writing is called a stipulation or a forbearance agreement, there are elements recommended for inclusion with which lenders should be familiar.

Although the terms of any such settlement can vary widely, depending in part upon the circumstances encountered, there are some basics suggested for consideration as follows.

— Borrowers acknowledge service of process

If ever the stipulation or any subsequent continuation of the foreclosure becomes contentious, it is important to avoid jurisdictional questions. Because process service can frequently be an area of pitfalls, that issue should be disposed of here once and for all with the borrowers confirming valid service upon them.

— Borrowers waive defenses

Because default in the stipulation should either allow the lender to institute a foreclosure (if not yet begun) or continue a foreclosure previously in progress, the lender does not later wish to be burdened with claimed defenses. Thus, in consideration for the lender allowing reinstatement, the borrowers should affirmatively waive any defenses they now or may in the future claim to have. If an answer has already been interposed in the foreclosure it should specifically be withdrawn with prejudice, which means it cannot again be asserted.

— Receipt date and place of payments to be set forth

Typically, the first payment required by the stipulation (or forbearance agreement) will be paid at the time the document is signed. Whether the first check is to be payable to lender's counsel, with subsequent checks payable to the lender, the understanding should be absolutely clear to avoid confusion.

With payments to be periodically due thereafter - usually monthly - merely mentioning checks due on the first of the month, for example, could mean they can be mailed on that day. Given the vagaries of mail delivery, delays could readily be encountered. Moreover, a borrower could always argue that a payment was lost in the mails. One way to diminish this uncertainty is to provide that the payments must be *received* on the first day of each month. Such a provision requires the borrower either to personally deliver the check, or employ a mode of transmittal which assures delivery on the appointed dates.

(Continued on page 28)

SETTLING THE MORTGAGE FORECLOSURE–

(Continued from page 27)

— Express the form of payment

Because a borrower in default is most often in some distress, the possibility of "bad" checks being sent is hardly remote. The consequences to lenders of such remittances is obvious — extra cost and delay. This can be avoided by requiring payments to be either cash, certified or bank check or money order. Acceptance of regular checks is not recommended. The agreement should also specify that whatever the form of check submitted, it is taken subject to collection only.

— Provide time of the essence

Because the uncertainty generated by late payment should be avoided, payment dates should be denominated "time of the essence." Although the lender could choose to accept late payments, this language empowers the lender to deem the stipulation in default if a payment is tardy.

— Foreclosure not discontinued

Whether the borrower will faithfully adhere to the stipulation for its full duration can never been known until the full time contemplated has run its course. Therefore, to discontinue the foreclosure, either hoping or expecting that the borrower will honor the terms, could frequently mean that the lender will be forced to begin the foreclosure from its inception. Such is a burden the lender need not bear. Instead, the stipulation should provide that the foreclosure remains in place, ready to proceed upon and default by the borrower. In that way, the lender suffers no loss or detainment by its forbearance.

Alternatively, some lenders insist that the foreclosure proceed to the point of a sale, only *then* to hold in place awaiting full compliance with the stipulation. Although perhaps harsh, this is an option to consider.

— Procedures upon default

Since obviously a borrower could breach the stipulation, it is important that the document specify precisely what the lender can do in that event. The agreement can provide that upon any default continuing past five days, the lender is free to proceed with the foreclosure without notice. (Credit for payments made pursuant to the stipulation would, of course, be noted.) If a borrower vigorously argues for notice of default - and if the lender is inclined to agree - it is suggested that the number of such notices have a specific limit. Absent such a limitation, the lender would be virtually assured of having to send default notices every month for the life of the stipulation.

— Specify incidents of default

Failing to timely remit a payment is an obvious default. Less apparent, although no less critical, is borrower's neglect to maintain the senior mortgage current, or failure to pay real property taxes or insurance or the breach of *any* other covenant of the subject mortgage. Consequently, each of these should be specified in the stipulation as defaults authorizing the lender to continue the foreclosure.

— Provide for reinstatement

The purpose of the stipulation is to fund all arrears and bring the mortgage current. Therefore, the borrower is entitled to have the stipulation provide that upon time compliance with all provisions of the agreement the mortgage shall be deemed reinstated.

— Provisions for signing

Ideally, the stipulation will be signed by the borrowers either at the lender's office or at the office of its counsel. If that occurs, there will be little room for argument about the legitimacy of the signatures. Not infrequently, though, circumstances require the stipulation to be sent through the mails. In that instance, it is recommended that provision be made for acknowledgement of borrowers' signature before a notary public. Still further, if the borrowers are represented by counsel, his or her signature should appear on the stipulation as confirmation that borrowers were represented by an attorney. This reduces the possibility of the aggreement being later attached by the borrowers for claimed lack of understanding.

Conclusion

No discussion of settling a mortgage foreclosure action can encompass every conceivable nuance applicable to every case, particularly when the policies of lenders, and the abilities or intentions of borrowers, can be so disparate. But if a reinstatement is possible, a lender is well served by having a basic knowledge of the goals to achieve and how to protect those goals. The suggestions of this article have set forth a basic framework which is at least a solid point of beginning.

BUSINESS OF BUSINESS

SILVER & FREEDMAN'S BRIEF CASE

Employment and Labor Law Update

Mandatory Progressive Discipline Policy Construed Against Employer

The recent case of *Hollington v. Metropolitan Life Insurance Co.* reminds employers that while a well drafted handbook is essential, a poorly crafted policy can be extremely dangerous. In *Hollington,* a 15 year employee was terminated immediately after she stormed into a subordinate's work area, shouted obscenities at the subordinate, and made violent, threatening gestures toward the co-worker.

The employer's management guide included a detailed progressive discipline policy that *mandated* warnings, penalties and documentation prior to discharge. In fact, the policy expressly stated that except in unusual cases involving serious misconduct, "termination should not be considered unless the employee has previously received a final warning." Because of the language in the employer's policy, the court could not summarily dismiss the employee's claim; rather, the issue of whether the employee's conduct constituted "serious misconduct" was a question which had to be submitted to a jury.

Had the employer adopted a progressive discipline policy which was less rigid or compulsory, it may have been able to dismiss the employee's claim well before trial, saving tens, or even hundreds, of thousands of dollars in legal costs alone. A more flexible progressive discipline policy, permitting employers to skip disciplinary steps, provides a fair mechanism without creating restrictive contractual obligations. *Hollington* teaches employers to have *all* handbook language reviewed in order to avoid such costly traps.