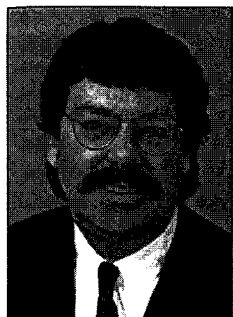


BERGMAN ON MORTGAGE FORECLOSURES:

The Irsome Case of the Hyperactive Referee

By Bruce J. Bergman



Sure, that \$50 fee for the referee to compute is archaic and inadequate. But then, foreclosing plaintiffs and veteran referees recognize both that

the tasks are most often not extensive and that there is some element of public service involved. None of this is, however, to belittle the referee's role. Although plaintiff's counsel prepares the figures, the referee should verify them with care and assure that plaintiff derives all the sums to which it is entitled, but nothing more.

It all seems quite elemental. In the mortgage foreclosure case, a referee is appointed to compute and determine whether the property is to be sold in parcels. Sometimes, though, a referee may decide to explore other issues—such as service of process—and then apply for a greater fee deemed commensurate with the additional effort. Plaintiff's counsel will explain to the referee (politely above the astonishment) that the job is clearly constrained and the fee really is confined to that \$50. There is no doubt about this, but where is it written so that even the committedly overzealous will be persuaded?

If such pointed clarity didn't exist before, it does now.¹ This is a classic situation and could hardly be more focused in its meaning. Here was a foreclosure which elicited a summary judgment motion inclusive of a demonstration that the mortgage barred oral modification. The order granting summary judgment appointed a referee to compute. When the defeated borrower decided nevertheless to press the issue of a claimed oral modification of the note and mortgage, the referee took testimony on the point! Having launched into this exploratory excursion, the referee sought recompense—28.5 hours at \$250 per hour.

Incredible as it seems (and hence this column), Supreme Court confirmed the referee's report and awarded the requested fees. The Second Department disagreed. Because a referee's duties are defined by the order of reference,² ruled the Appellate Division, the referee had no authority to take testimony concerning oral modification of the mortgage. Regarding payment for more than 28 hours of time, absent stipulation by the parties or a specific rate set by the court in the order of reference, "... a referee's fee must be limited to the statutory per diem fee of \$50."³

As an exclamation point to the holding, Supreme Court was directed to issue a new order of reference for a new computation before a new

referee and a recalculation of the referee's fee—no doubt here about the court's view. Although applicable statutes were never ambiguous, some might have argued that unusual instances could require interpretation; pleasingly, not anymore.

Endnotes

1. *Al Moynie Holdings Ltd. v. Deutsch*, 254 A.D.2d 443, 679 N.Y.S.2d 400 (2d Dep't 1998).
2. *Id.*, citing CPLR 4311; *Lloyds Bank v. Kahn Lbr. & Millwork Co.*, 220 A.D.2d 645, 632 N.Y.S.2d 966.
3. *Id.*, citing CPLR 8003[a]; *In re Charles F.*, 242 A.D.2d 297, 660 N.Y.S.2d 594; *Scher v. Apt*, 100 A.D.2d 582, 473 N.Y.S.2d 521.

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