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The Judgment Is Final

Borrowers, Or Their Attorneys, Should Speak Now Or....

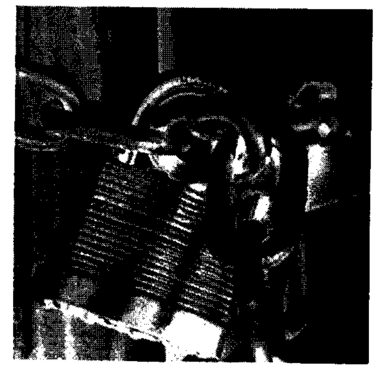
BY BRUCE J. BERGMAN, © 1999

Obstreperous borrowers are no surprise to mortgage lenders and servicers. A multitude of defenses, sometimes outlandish, are encountered in foreclosure cases from time to time and probably more often than most foreclosing plaintiffs would ever prefer. Although meeting those defenses can sometimes be time consuming and expensive, in most instances, the lender or servicer prevails.

Adding to the annoyance of all this are defenses asserted late in the case. While eve-of-sale orders to show cause suggest to the contrary, there ought to come a time when the ability to delay a foreclosure action with claimed defenses ends - and there is - which is the message of a recent case in New York. [New Horizons Investors v. Marine Midland Bank, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998)] At least an existing lesson is underscored.

The case

Here are the facts which tell the tale and lead to the conclusion which is pleasing to lenders and servicers, particularly in judicial foreclosure states.



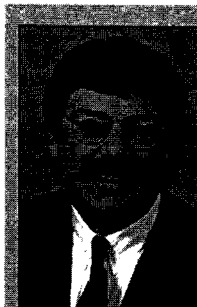
A corporation borrows a substantial amount of money from a bank and secures it with a mortgage upon a commercial building with the obligation guaranteed by three principals of the corporation. Default ensues and a foreclosure is instituted. Wisely, the bank named the guarantors in the action as defendants for the deficiency liability. (It is necessary in New York to include guarantors in the foreclosure to pursue the deficiency although this is sometimes neglected.)

The corporation defaulted in the foreclosure, as did one of the guarantors, but another guarantor answered and a third appeared in the case, thus subjecting himself to the jurisdiction of the case. Summary judgment disposed of the lone answer, a judgment of foreclosure and sale was ultimately entered, and the action proceeded to a foreclosure sale.

The bank then brought an action for a deficiency (although it was defeated because there was no deficiency between the market value of the property and the amount due to the bank.) In any event, while the motion for the deficiency was pending, the guarantors of the mortgage commenced a separate action against the bank alleging (among other things) that the bank breached its contractual obligations on the loan and violated its duty to act in good faith by refusing to give a reasonable extension of the mortgage and refusal to enter into a stipulation of settlement which would have limited the personal liability of those individual guarantors.

The court decides

Merits aside (although it would seem that the guarantors' claim was baseless), the bank moved to dismiss the action brought against it on the theory that the issue had already been decided - res judicata. The court agreed. That doctrine provides that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred,



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even if based upon different theories or if seeking a different remedy..."[1]

Critically, the court ruled that the judgment of foreclosure and sale is final as to all questions at issue between the parties together with all matters of defense which were or might have been litigated in the foreclosure action which are thereby deemed concluded.[2] Thus, the claimed issues concern rights and obligations under the mortgage agreement and could have been raised as equitable defenses in the foreclosure action.[3] But they were not.

The guarantors (the plaintiffs in this new suit) neglected to raise these claims as defenses before the judgment of foreclosure and sale was granted in the foreclosure action. And that precluded them from endeavoring to litigate these points in any other action.[4]

An end to liability

So there really does come an end to the ability to do battle with a mortgagee (successfully anyway) and that time is the judgment of foreclosure and sale.

None of this means, of course, that a borrower cannot make a motion after the judgment of foreclosure and sale - just that if the claimed issue is a point they could have earlier raised in the action, they won't succeed.

Additionally, all this presupposes that jurisdiction was obtained.

Any defendant can come forward and, if they can demonstrate that they were not properly served in an action, the case can beset aside. But if a party was served in a case, they had to raise their defenses before the judgment and if they haven't, they cannot be heard later on for the first time.

[1]New Horizons Investors v. Marine Midland Bank, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998), citing O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158.

[2]New Horizons Investors v. Marine Midland Bank, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998), citing Gray v. Bankers Trust Co., 82 A.D.2d 168, 170-171, 442 N.Y.S.2d 610; GreenPoint Sav. Bank v. Clarke, 220 A.D.2d 384, 631 N.Y.S.2d 888; Cherico v. Bank of New York, 211 A.D.2d 961, 621 N.Y.S.2d 235.

[3]New Horizons Investors v. Marine Midland Bank, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998), citing Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265; Pellicane v. Norstar Bank, 213 A.D.2d 610, 624 N.Y.s.2d 214; Massachusetts Mut. Life Ins. Co. v. Gramercy Twins Assocs., 199 A.D.2d 214, 606 N.Y.S.2d 158.

[4]New Horizons Investors v. Marine Midland Bank, 248 A.D.2d 449, 669 N.Y.S.2d 666 (2d Dept. 1998). SM