Those Insiduous Claims of Oral Representations — Some Emerging Comfort for Lenders*

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In these changing times when the threat of lender liability claims is supposed to drive mortgagees cringing in despair to a dank legal corner, borrowers have become more assiduously emboldened in asserting all the promises made by officers which should intercept foreclosure. You have heard these before in a mortgage foreclosure action (and if you have not, you will); this mortgage foreclosure cannot proceed because:

> "The officer told me the mortgage would be extended." or
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> "I was told by Mr. __ that the lender would forbear from foreclosing." or
>
> "They said nothing would happen until I was able to sell some other piece of property." or
>
> "I was assured that future advances would be made."

The claim by a borrower that oral representations were made by a lender's officer (or officers) as a basis to defeat a foreclosure is an understandable source of much dismay in foreclosure litigation. The foreclosure process — so frequently contentious under the best of circumstances — is hardly rendered more amiable by such claims. It places lenders in an uncomfortable posture, particularly when the officer who purportedly made the representations is no longer in the lender's employ. But there are some cases of recent vintage which supply welcome solace for beleaguered lenders.

Perhaps it is the level of distress in real estate these days which seems to elicit more of "The lender said to me. . ." defenses. Whatever the reason, we are seeing more common assaults on the foreclosure process based upon this posture.

It is true that a lender **can** waive its rights — even orally.[1] Critical to an understanding of this dilemma is the concept that a document (*i.e.*, a mortgage) which provides that it cannot be changed orally cannot be modified without a writing. But a modification is different than a **waiver**. So, unless a lender can refute the assertion that it waived its rights, the defense **could** prevail.[2]

To be sure, lenders' officers should **never** make oral promises outside of, in addition to or at variance with, the provisions of the mortgage documents. If there is ever a workout, restructuring or forbearance being considered, whatever the agreement is to be should be reduced to a clear writing. Nothing here should be left open to untoward interpretation.[3] If there are ambiguities, one can opine that courts lean towards protecting oppressed borrowers rather than the perceived "deep pocket" lenders.

Begin then with the assumption that when a borrower responds to a foreclosure by averring certain oral declarations on lender's part, it is just not true and the officers to whom the statements are attributed will say so. But even if the avowed representations were not made, or at least are denied, do we not still have a clash of opinions and assertions sufficient to raise issues of fact which will in turn defeat a motion for summary judgment? Most often the answer is no. The courts may not be especially sympathetic to lenders, but there is an historical framework designed to preserve some measure of sanctity in written agreements.

Case law has long been established providing that a mortgage is a contract, to be enforced as written. It is to be interpreted in consonance with what the parties intended.[4] The language the parties to the mortgage used governs its construction.[5] A term otherwise absent from the contract cannot be inserted by a court under the rubric of "construction"[6] and unambiguous language must be honored in determining the intention of the parties.[7]

Critically, of course, prior or contemporaneous repre-

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sentations supposedly made are not admissible to vary the terms of the mortgage.[8]

Still more recent case law focuses upon the typical representation claim. First, whatever the borrower says, it won't be so easy to simply present what was claimed to have been said and expect to win. The Court of Appeals ruled in *Chimart Associates v. Paul*, 66 N.Y.2d 570, 489 N.E.2d 231, 498 N.Y.S.2d 344 (1986), that procedurally there is a heavy presumption that a deliberately prepared and executed written instrument manifests the intention of the parties and a correspondingly high order of evidence is required to overcome that presumption.

More recently, in *Crossland Savings v. LoGuidice - Chatwal Real Estate Inv. Co.*, __ A.D.2d __, 567 N.Y.S.2d 39 (1st Dept. 1991), a borrower averred that the lender orally promised to grant permanent financing and refrain from foreclosing — even though the mortgage documents controverted the claim. In granting summary judgment to the lender, the court rejected the defendant's assertions as uncorroborated hearsay which contradicted the specific preclusion of oral modification contained in the mortgage. It also found that the mortgage negated the borrower's conclusory and unsupported claims of bad faith, fraud, mutual mistake and estoppel.

When a borrower tries to circumvent the parol evidence rule by claiming that what the lender said amounts to a fraud, another recent case protects the lender. In *Crossland Savings v. SOI Dev. Corp.*, __ A.D.2d __, 560 N.Y.S.2d 782 (1990), it was held that a statement by lender's loan officer to borrower's principal that future permanent financing would be given was not fraud in the inducement which could bar foreclosure. Representations that are mere expressions of opinion of present or future expectations are not to be considered promises when examining the issue of fraud in the inducement.

A favorable approach was also taken by the court in *Dimacopoulos v. Consort Dev. Corp.*, __ A.D.2d __, 561 N.Y.S.2d 59 (2d Dept. 1990). There, a construction lender had broad discretion as to the timing and manner of loan advances, which were expressly conditioned upon construction stages being achieved. Construction ceased and, consequently, so did loan advances. In ruling for the lender, the court found no support for the borrower's assertions either that the representations were made or that there was detrimental reliance upon them with a prejudicial change of position based upon such representations.

As recently as May of 1991, this issue was again addressed. In *City of New York v. Grosfeld Realty Company*, __ A.D.2d __, 570 N.Y.S.2d 61 (2d Dept. 1991), the borrower's bare and unsubstantiated assertion that the lender made certain assurances by which it indefinitely waived its right to foreclose was held to contradict the express terms of the mortgage. The claim was therefore found insufficient to defeat the lender's summary judgment motion.

There is, not surprisingly, more to all this than set forth here and it is not quite as easy for the lender to prevail as these cases suggest. The arena of oral representations is one of the more difficult and perilous aspects of mortgage foreclosure litigation. The point, though, is that lenders need not necessarily despair. Case law **does** help.

Endnotes

1. Nassau Trust Co. v. Montrose Concrete Prod. Corp., 56 N.Y.2d 175, 436 N.E.2d 1265, 451 N.Y.S.2d 663 (1982).
2. *Id.*
3. *See* "The Danger of Desultory Negotiations Before Foreclosure," *Real Property Law Section Newsletter*, Vol. 17, No. 1 (January 1989) NYSBA; "More on Waiver of Foreclosure Emerging Solace for Mortgagees," *Real Property Law Section Newsletter*, Vol. 17, No. 2 (April 1989) NYSBA.
4. Connelly & Blitzer Realty Inc. v. Elwyn, 111 A.D.2d 555, 489 N.Y.S.2d 427 (3rd Dept. 1985); Hatton v. Quad Realty Corp., 100 A.D.2d 609, 473 N.Y.S.2d 827 (2d Dept. 1984); Brayton v. Pappas, 52 A.D.2d 187, 383 N.Y.S.2d 723 (4th Dept. 1976); DeClow v. Haverkamp, 193 App. Div. 83, 189 N.Y.S.2d 617 (4th Dept. 1921).
5. Connelly & Blitzer Realty, Inc. v. Elwayn, *supra*; Brayton v. Pappas, *supra*; Sullivan Co. v. International Paper Makers Realty Corp., 307 N.Y.2d 20, 199 N.E.2d 573 (1954); Nau v. Vulcan Rail & Constr. Co., 286 N.Y. 188, 36 N.E.2d 106 (1941).
6. Brayton v. Pappas, *supra*; Sullivan Co. v. International Paper Maker Realty Corp., *supra*.
7. Brayton v. Pappas, *supra*; Kosher Rest. & Caterers Corp. v. Gluckstein, 306 N.Y. 250, 112 N.E.2d 276 (1953).
8. The parol evidence rule is obviously a more expansive topic than need be addressed here. For rulings closely in point see Wolf v. Mackey, 61 A.D.2d 812, 402 N.Y.S.2d 45 (2d Dept. 1978); Messina v. Tannenbaum, 37 A.D.2d 1041, 326 N.Y.S.2d 75 (3rd Dept. 1971); Siren Realty Corp. v. Biltmore Productions Corporation, 27 A.D.2d 519 (1st Dept. 1966); Marine Midland Bank - Southern v. Thurlow, 53 N.Y.2d 381, 425 N.E.2d 805, 442 N.Y.S.2d 417 (1981).

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