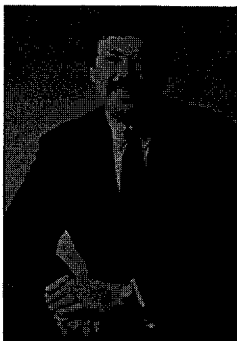


BERGMAN ON MORTGAGE FORECLOSURES: (Those Sneaky) Legal Fees Paid Under Protest

By Bruce J. Bergman



If a borrower ever insists on paying "under protest," counsel and client probably don't want to accept it. Here's an example of why.

The collection of legal fees in the foreclosure process should be a routine—if imperfect—pursuit. When borrowers desire to reinstate, they must pay the lender or servicer's legal costs. Likewise, upon satisfying the mortgage, there must be recompense for the legal expense incurred (assuming, of course, a proper legal fee provision is in the mortgage in the latter instance).

Once the judgment of foreclosure and sale has been issued, upon satisfaction, borrowers need pay only the legal fees adjudged due by the court. If there was a valid legal fee clause in the mortgage, the court is empowered to make an award, although sometimes the amount is pointedly ungenerous.¹

But here is the scenario which gives pause. Prior to foreclosure judgment, borrower wants to save

the property through refinance of the mortgage. Lender thereupon renders a payoff letter for all sums due on the mortgage, a portion of which is legal fees. (The mortgage says the legal fees in foreclosure should be "in a reasonable amount.") Borrower pays all. But the attorneys fees (paid directly to counsel) are remitted under protest.

Later, borrower sues, seeking a refund of legal fees paid. Lender's counsel moves to dismiss the action asserting that the borrower, having paid the sums, is barred from suing for recovery. Unfortunately, the court disagreed, finding a need for a hearing upon the reasonableness of those legal fees. [1300 Avenue P Realty Corp. v. Stratigakis, 186 Misc.2d 745, 720 N.Y.S.2d 725 (App. Term, 2d Dep't 2000)] Because borrower needed to preserve a closing to refinance, and paid under protest, there arose an issue of fact (the court said) as to whether the payment of attorney's fees was voluntary. So, the payment under protest did become a problem for the lender.

Maybe in the end this isn't something to worry much about. Mortgage lenders and servicers generally recognize that a payment made under protest is conditional

and therefore should not be accepted. And typically they won't take it. But if the temptation of money in hand—combined with payment under protest—ever beckons, recall the danger of accepting the payment. The foreclosure might suddenly not be over after all.

Endnote

1. There is, of course, much more to the subject of legal fees in the mortgage foreclosure case. If this review raises other questions, attention is invited to 2 *Bergman on New York Mortgage Foreclosures*, Chap. 26, Legal Fees, Matthew Bender & Co., Inc. (rev. 2004)

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henschel, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

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