

THE CONSEQUENCES OF SITTING ON A FORECLOSURE JUDGMENT

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While as a general rule foreclosing parties seek to move through the action as quickly as possible – all for good and obvious reasons – there are worthy countervailing compulsions (or unworthy blunders) which can interfere with this goal. Among these are pressures from various sources to pursue settlement, public relations constraints or, sometimes, as parenthetically mentioned, just an error. (There is no issue – certainly with the borrower - about refraining from conducting the foreclosure sale pursuant to a forbearance agreement where the hiatus is mutually volitional pursuant to contract.)

It is, therefore, not so infrequent that a foreclosing lender or servicer finally arrives at the foreclosure judgment stage and then, perhaps for one of the reasons cited, holds in place. A few weeks or months of inaction is not meaningful. But what about a year, or two, or much more? Although it seems unlikely, it *does* happen and then the questions, or attacks, emerge.

The concern is relevant obviously to the plaintiff who needs to know that its judgment remains viable, but also to the property owner, junior mortgagees and other subordinate interest holders who may be burdened by the delay in conducting the foreclosure sale.

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The two main – and meaningful – issues which arise relate to the interest rate borne by a judgment and the efficacy of the judgment with the passage of time.

THE INTEREST RATE

This aspect is more a matter of business and strategy, but mortgage lenders, servicers and their counsel should be familiar with the principles.

Before a mortgage foreclosure action reaches the plateau of judgment (and that encompasses most of the time consumed in the case) the mortgage obligation bears interest at either, or a combination, of the note rate and the default rate, if provision for the latter is properly expressed in the mortgage documents. Although this is a prelude to addressing questions of the interest rate on the judgment, it adds useful perspective¹.

Prior to maturity of the mortgage obligation (via the natural end of the term or by acceleration) the interest due is pursuant to the contract², that is, the note. Subsequent to maturity, however, interest is due as damages for breach, and therefore, it is calculated at the judgment rate³. Similarly stated, and as particularly applicable to this exploration, interest is calculated at the note rate on each payment owed from the due date until acceleration, and then at the statutory (judgment) rate from acceleration *until* judgment⁴. That judgment rate meanwhile is 9%. (This should not be confused with New York's maximum legal rate of interest of 16%⁵.)

This then leads naturally to the subject of default interest as it may be further addressed in the mortgage documents. Upon acceleration (or natural maturity), should

the mortgage contract be silent as to the rate of interest then applicable, the legal (i.e., judgment) rate is the required computation⁶. But the mortgage can (and often does) change this and the rule then becomes that where the contract provides for a specified rate of interest to apply upon default, that specified rate will be enforced, until the judgment issues⁷.

We now arrive at the rate of interest borne by the entered judgment, for the purposes of this examination, a judgment allowed to languish. The rule is that where the contract provides that interest will accrue at a particular rate until the principal is paid (typical traditional language invoking default interest) such denominated rate continues only until the contract (the mortgage) is merged into the judgment⁸.

Where the parties intend to depart from the established principle that the contract merges into the judgment, whereby the contract or specified default rate will continue to control, that intention can be enforced⁹. Accordingly, where the loan documents pointedly direct that a contract default rate is to apply both before and after entry of the judgment, that contract rate – even if higher than the judgment rate – will prevail¹⁰. *But*, the provision must be clear and unequivocal and in the absence of such clarity, the judgment rate must apply¹¹.

The key application of all this then is to a case where a high default rate is invoked, but then will fade away and be replaced by accrual at 9% upon entry of judgment. If the note rate or default rate were less than 9%, entry of the judgment increases the interest the obligation bears. Then, if the foreclosure sale is delayed, it is

not to the detriment of the lender. If, however, the judgment rate of 9% is less than had previously applied, not uncommon in commercial cases or hard money residential loans, then delay in pursuing the foreclosure sale results in accrual of interest at a rate which might be less palatable to the plaintiff. Therefore, delaying a foreclosure sale by choice can have financial repercussions.

There is yet another significant factor regarding interest. That is, interest can be curtailed or even eliminated by the court. This is an elemental concept, founded both upon statute and case law¹².

The statute, CPLR 5001(a), provides that in an equitable action, which includes mortgage foreclosure, "interest and the rate and date from which it shall be computed shall be in the court's discretion." Case law supports this¹³ and adds the qualification that resolution of the interest question is dependent upon the facts of each case, including the wrongful conduct of any party¹⁴. In particular, it has been ruled that if delay after judgment of foreclosure and sale is attributable solely to the plaintiff, interest on the judgment can be denied¹⁵. This is a possible real world peril to a plaintiff which, to use the vernacular, sits on a judgment.

In any event, the point here is that mortgage lenders and their counsel should specifically be aware of the relationship of a judgment to the interest it bears. This can then be consciously considered if delay in setting the sale is contemplated.

DURATION OF A FORECLOSURE JUDGMENT

It doesn't have one¹⁶. This is a surprising and perplexing conclusion. There is a sense that everything has a life; nothing is eternal. Indeed, a money judgment as a matter of statute (and case law) is effective as a lien upon real property only for ten years¹⁷, although it can be extended¹⁸. (It is valid as against personal property for twenty years.)

The vital maxim here, though, is that a foreclosure judgment is not a money judgment¹⁹ – and so does not suffer the same durational infirmity.

That one might be incredulous at the apparently eternal life of a foreclosure judgment is confirmed by a recent decision where a foreclosure judgment vintage 2002 was being assaulted in 2015 with the argument that it was inefficacious for want of renewal. On this point, the court ruled that its research revealed no applicable law limiting the period within which a foreclosing plaintiff may sell the mortgaged property after entry of the judgment of foreclosure and sale.²⁰

All this noted, there remains an inescapable queasiness about keeping a foreclosure judgment inactive. The thought, or fear, is that eventually, after years, some court will find a way to declare the hoary judgment invalid. Such an event did occur in a case in Kings County [*Bardi v. Estate of Morgan*, 17 Misc.3d 927, 847 N.Y.S.2d 431 (Sup. Ct. 2007).] There it was declared that where a foreclosure auction sale was conducted more than one year after judgment, the notice of sale is deemed invalid²¹.

This is the only reported decision of its kind and it is based on no authority. It is merely what the judge in that case wanted to do. It should not be considered as precedent. Nonetheless, borrowers seize upon the holding and cite it when assailing the legitimacy of older judgments.

Then there is the possible peril posed by invocation of the doctrine of “laches”. Delay or inaction of one party (read lender), detrimentally relied upon by another party (read owner/borrower) can bar enforcement. Critically, delay alone, no matter what its duration, does not preclude equitable relief (foreclosure is an equitable action) absent the element of prejudice²². There are no cases, however, condemning an old judgment where a borrower relied on the inaction and would suffer if a sale were now based upon that judgment. But it might be imprudent to assume it would never happen.

CONCLUSION

Mindful that there is no binding authority condemning an aging foreclosure judgment as ineffectual, and armed with the knowledge that a foreclosure judgment usually bears interest at 9%, and also observing that undue delay can result in reduction or elimination of interest, foreclosing plaintiffs might nonetheless feel free as a matter of law to postpone holding a foreclosure sale for as long as it pleases them. But that still, at least, opens the door for borrowers or other defendants to attack the amount of interest and possibly the efficacy of the aging judgment. While the opinion here is that no law diminishes the validity of even a very old judgment (unless laches can be invoked) lengthy delay can hardly be recommended.

¹ The extent of and nuance pertaining to the interest rates and when they are applicable to a mortgage obligation are a subject unto themselves and are not economically explored here at length. Reference is therefore invited for a more extensive analysis to 1 *Bergman on New York Mortgage Foreclosures*, §1.11, LexisNexis Matthew Bender (rev. 2015).

² See, *inter alia*, *Heimbinder v. Berkowitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dept. 1999), citing *Ward v. Walkley*, 143 A.D.2d 415, 417, 532 N.Y.S.2d 426, quoting *Stull v. Feld*, 34 A.D.2d 655, 656, 309 N.Y.S.2d 985; *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230; *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207, *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900, 600 N.E.2d 627; *Emery Fishmarket Inn of Granite Springs, Inc.*, 173 A.D.2d 765, 570 N.Y.S.2d 821 (2d Dept. 1991).

³ *Heimbinder v. Berkowitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dept. 1999), citing *Ward v. Walkley*, 143 A.D.2d 415, 417, 532 N.Y.S.2d 426, quoting *Stull v. Feld*, 34 A.D.2d 655, 656, 309 N.Y.S.2d 985; *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230; *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207, *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900, 600 N.E.2d 627; *Emery Fishmarket Inn of Granite Springs, Inc.*, 173 A.D.2d 765, 570 N.Y.S.2d 821 (2d Dept. 1991).

⁴ *Hammerstein v. Henry Mountain Corporation*, 11 A.D.3d 836, 784 N.Y.S.2d 657 (3d Dept. 2004); *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230, leave to appeal denied, 81 N.Y.2d 711, 601 N.Y.S.2d 580, 619 N.E.2d 658 (1993).

⁵ GOL§5-501(1) and BL 14-a(1). But then there are a host of exceptions to the legal rate; see 1 *Bergman on New York Mortgage Foreclosures*, Chap. 6, LexisNexis Matthew Bender (rev. 2015).

⁶ See, *inter alia*, *Metropolitan Sav. Bank v. Tuttle*, 290 N.Y.497, 49 N.E.2d 983, *reh'g* denied, 291 N.Y.634, 50 N.E.2d 1018 (1943); *Title Guarantee & Trust Co. v. 2846 Briggs Ave., Inc.*, 283 N.Y.512, 29 N.E.2d 66, *reh'g* denied, 284 N.Y.685, 30 N.E.2d 725 (1940); *Ferris v. Hard*, 135 N.Y.354, 32 N.E.129 (1892); *Heimbinder v. Berkowitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dept. 1999), citing, *inter alia*, *Ward v. Walkley*, 143 A.D.2d 415, 417, 532 N.Y.S.2d 426, quoting *Stull v. Feld*, 34 A.D.2d 655, 656, 309 N.Y.S.2d 985; *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230; *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207, *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900, 600 N.E.2d 627; *Chipetine v. McEvoy*, 238 A.D.536, 657 N.Y.S.2d 88 (2d Dept. 1997).

⁷ See, *inter alia*, *Danieowich v. PBL Development*, 292 A.D.2d 414, 730 N.Y.S.2d 408 (2d Dept. 2002); *Heimbinder v. Berkowitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dept. 1999), citing, *inter alia*, *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230; *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207, *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900, 600 N.E.2d 627; *Ward v. Walkley*, 143 A.D.2d 415, 417, 532 N.Y.S.2d 426 (2d Dept. 1988); *Citibank N.A. v. Liebowitz*, 110 A.D.2d 615, 487 N.Y.S.2d 368 (2d Dept. 1985); *Levine v. State of New York*, 106 A.D.2d 709, 484 N.Y.S.2d 678 (3d Dept. 1984).

⁸ *Heimbinder v. Berkowitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dept. 1999), citing, *inter alia*, *Ward v. Walkley*, 143 A.D.2d 415, 417, 532 N.Y.S.2d 426, quoting *Stull v. Feld*, 34 A.D.2d 655, 656, 309 N.Y.S.2d 985; *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230; *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207, *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900, 600 N.E.2d 627.

⁹ *Banque Nationale De Paris v. 1567 Broadway Ownership Associates*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dept. 1998); *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dept. 1991); *Westinghouse Credit Corporation v. D'Urso*, 371 F.3d 96 (2d Cir. 2004). For example, in *C&M Air Systems v. Custom Land Dev. Group II*, 262 A.D.2d 440, 692 N.Y.S.2d 146 (2d Dept. 1999).

¹⁰ *NF Acquisitions v. Oakdale Motorsports*, 12 Misc.3d 1185A, 2006 N.Y. Misc. LEXIS 2027 (N.Y. Sup. Ct. April 13, 2006).

¹¹ *Banque Nationale De Paris v. 1567 Broadway Ownership Associates*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dept. 1998); *Marine Management v. Seco Management*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dept. 1991).

¹² CPLR 5001(a); *Sloane v. Gape*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dept. 1995); *South Shore Fed. Sav. & Loan Ass'n v. Shore Club Holding Corp.*, 54 A.D.2d 978, 389 N.Y.S.2d 29 (2d Dept. 1976); *Bosco v. Alicino*, 37 A.D.2d 552, 322 N.Y.S.2d 414 (1st Dept. 1971), citing *Shubert v. Lawrence*, 27 A.D.2d 292, 297, 278 N.Y.S.2d 292, 297, 278 N.Y.S.2d 537, 542; *Spadanuta v. Incorporated Village of Rockville Centre et al.*, 20 A.D.2d 799, 800, 248 N.Y.S.2d 405, 407 (1964), *aff'd*, 15 N.Y.2d 755, 257 N.Y.S.2d 329, 205 N.E.2d 525 (1965).

¹³ See, *inter alia*, *Danieowich v. PBL Development*, 292 A.D.2d 414, 730 N.Y.S.2d 408 (2d Dept. 2002); *Bank of New York v. Spiro*, 267 A.D.2d 339, 700 N.Y.S.2d 207 (2d Dept. 1999); *Grossman v. Pendant Realty Corp.*, 221 A.D.2d 240, 634 N.Y.S.2d 61 (1st Dept. 1995); *Sloane v. Gape*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dept. 1995); *South Shore Fed. Sav. & Loan Ass'n v. Shore Club Holding Corp.*, 54 A.D.2d 978, 389 N.Y.S.2d 29 (2d Dept. 1976); *Bosco v. Alicino*, 37 A.D.2d 552, 322 N.Y.S.2d 414 (1st Dept. 1971).

¹⁴ See, *inter alia*, *Danieowich v. PBL Development*, 292 A.D.2d 414, 730 N.Y.S.2d 408 (2d Dept. 2002); *Bank of New York v. Spiro*, 267 A.D.2d 339, 700 N.Y.S.2d 207 (2d Dept. 1999); *Grossman v. Pendant Realty Corp.*, 221 A.D.2d 240, 634 N.Y.S.2d 61 (1st Dept. 1995); *Sloane v. Gape*, 216 A.D.2d 285, 627 N.Y.S.2d 785 (2d Dept. 1995); *South Shore Fed. Sav. & Loan Ass'n v. Shore Club Holding Corp.*, 54 A.D.2d 978, 389 N.Y.S.2d 29 (2d Dept. 1976); *Bosco v. Alicino*, 37 A.D.2d 552, 322 N.Y.S.2d 414 (1st Dept. 1971).

¹⁵ *ERHAL Holding Corp. v. Rusin*, 252 A.D.2d 473, 675 N.Y.S.2d 138 (2d Dept. 1998), citing *Juracka v. Ferrara*, 120 A.D.2d 822, 824, 501 N.Y.S.2d 936; *Ariola v. Petro Trucking Corp.*, 50 Misc.2d 216, 217-218, 270 N.Y.S.2d 309 (Sup. Ct. Kings Co. 1966).

¹⁶ There is a practical exception to this maxim, contained in a local rule confined to Kings County – Kings County Uniform Civil Term Rules, Part F, Rule 12, which provides that: “Notices of Sale may be filed with the Clerk within one year of entry of the Judgment of Foreclosure and Sale. Permission of the Court must be obtained for any filings thereafter.” This does not actually mean that a foreclosure judgment expires, just that a sale will not be countenanced in Kings County without further application. In a 2014 case, permission was granted where the delay in conducting the sale was elicited by borrower bankruptcy filings; See, *Rossrock Fund II LP v. Toledo*, 44329/07, NYLJ 1202715494163 at 1 (Sup. Ki., Decided December 23, 2014). What would happen if the delay was the fault of the plaintiff is uncertain, although per *Bardi v. Estate of Morgan*, *supra.*, it would require a new referee’s computation and entry of a supplemental judgment reflecting the new calculation.

¹⁷ CPLR §5203(a); *Premier Capital, LLC v. Best Traders, Inc.*, 88 A.D.3d 677, 930 N.Y.S.2d 249 (2d Dept. 2011); *Nelson, L.P. v. Jannace*, 87 A.D.3d 731, 929 N.Y.S.2d 592 (2d Dept. 2011).

¹⁸ CPLR 5014; *Premier Capital, LLC v. Best Traders, Inc.*, *supra.*, at note 16.

¹⁹ *Citibank v. Cambel*, 119 A.D.2d 720, 501 N.Y.S.2d 133 (2d Dept. 1986); *Wyoming County Bank & Trust Co. v. Kiley*, 75 A.D.2d 477, 430 N.Y.S.2d 900 (4th Dept. 1980); *In Re Ellerstein*, 105 B.R. 214 (W.D.N.Y. 1989). For further detail, see 3 *Bergman on New York Mortgage Foreclosures*, §27.01[2], LexisNexis Matthew Bender (rev. 2015).

²⁰ *Bank of New York as Trustee Under the Pooling and Servicing Agreement Series 1999-F v. Odzer*, 2996/02, NYLJ 1202715494627, at 1 (Sup., Na., Decided January 5, 2015).

²¹ While this case was affirmed on appeal [61 A.D.3d 625 (2d Dept. 2009)], the possible question of a stale judgment was apparently not at issue.

²² *Capital Crossing Bank v. Aurora Hospitality, LLC*, 45 A.D.3d 1266, 845 N.Y.S.2d 634 (4th Dept. 2007), citing 149 *Clinton Ave. N. v. Grassi*, 51 A.D.2d 502, 506, 382 N.Y.S.2d 185.