

# FORECLOSURE REPORT

## SOMETHING STRANGE ABOUT EVICTION AFTER FORECLOSURE

by Bruce J. Bergman

The unwelcome foreclosure case becomes closer to a nightmare if, when the action is finally over, it is difficult or impossible to evict some tenants who may be languishing in your property. But this really shouldn't be a problem—except that some frightening cases have emerged in New York over the last five years, threatening, it seems, well-established principles. So how is this for lender/servicer bad dream?

Your counsel is meticulous. Just as important, so too is your lawyer's process server. The pleasing result is that all tenants at the premises in foreclosure are carefully served (along with all other necessary parties). The foreclosure sale is ultimately conducted and with no bidders present, the lucky lender inherits another REO property.



Bruce J. Bergman

Desirous of speeding to a resale to recoup the investment, servicer inspects the premises. (Let's say it's a two-family house, although the example could apply to a ten-family dwelling or a substantial commercial property as well. The concept is the same.) Interestingly, the two families relaxing in residence say they had signed a lease with the owner (your defaulting borrower) just a few weeks before. So they claim to be puzzled as to who the servicer is and why questions are being asked. They know nothing about

any foreclosure, were not served in this foreclosure action and have no intention of leaving. After all, they just moved in!

This is an old story and, fecilitously, does not present a hurdle—unless a court falls down in interpreting accepted law and practice. (But, as noted, more on that in a moment.) The reason the

tenant's claim in the cited scenario can't be a roadblock is a handy document technically called in New York a notice of pendency, generally referred to as a lis pendens. A like paper, with a similar effect, is fairly uniform throughout the states.

As it is in New York (for example), the lis pendens is a paper filed (with the County Clerk) in an action affecting title to real estate (such as a mortgage foreclosure) which serves to give notice (even if not actually seen) that the action has begun. The result of that notice—which is the key—is that one who obtains an interest in the property after the filing of the lis pendens is bound to the action as if he had been made a party. So, any purchaser or encumbrancer subsequent to lis pendens filing is cut off by the foreclosure sale.

Thinking about it highlights just how important this idea truly is. Before a foreclosure is begun, a search is obtained so the mortgage holder can be apprised of all junior interests. In that way, all subordinate parties (mortgagees, judgment creditors, mechanics lienors, tenants, etc.) can be named and served in the action, with their interests then extinguished by the foreclosure sale—which is the ultimate goal of a foreclosure.

But what if someone acquires an interest in the property after the search is completed? Suppose, for example, the borrower convinces someone to give him a mortgage—or more likely, arranges for a "friendly" mortgage to be recorded. Or, assume the borrower sells the property, perhaps to a speculator or to a relative. Is the new mortgagee or the new owner free of the foreclosure, untouched by the sale because they weren't named in the case? (Remember, the plaintiff couldn't know about them because their interests arose after the search was done.)

The answer is "no," because the lis pendens takes care of the dilemma. And if it didn't, foreclosures would never end. It would be too easy for a shifty borrower to frustrate a foreclosing lender by successive "sales" of the premises to an unending stream of compliant family members, friends and strawmen.

So too does the lis pendens take care of all the tenants who may descend on the property during the foreclosure, except that two courts in New York missed the point. For whatever reason (and we needn't burden you here with the twisted logic), in two separate eviction after foreclosure cases (in 1991 and 1994—both reported on

the front page of the widely read New York Law Journal) the courts held that tenants who came in after the foreclosure (and the lis pendens) could not be evicted, unless they just didn't pay rent! [Green Point Sav. Bank v. DeFour, N.Y.L.J., Aug. 31, 1994, at 23, col. 3 (Sup. Ct., Kings Co., Aronin J.; Green Point Sav. Bank v. Leselrod, N.Y.L.J., July 31, 1991, at 25, col. 3 (Sup. Ct. Suff. Co., Oshrin, J.)]

One of the courts agreed that a lis pendens is supposed to bind all subsequent interests, but opined that since no prior case law dealt specifically with tenants, the principles did not apply. Well, in New York there are at least two earlier cases which did particularly address the rule that tenants are bound by a lis pendens—just like the holders of any other interest. [Flushing Sav. Bank v. CCG Realty Corp., 82 A.D. 907, 440 N.Y.S.2d 699 (2nd Dept. 1981); Holly Realty Co. v. Wortmann, 121 N.Y.S. 572 (N.Y.C. Mun. Ct. 1910)]

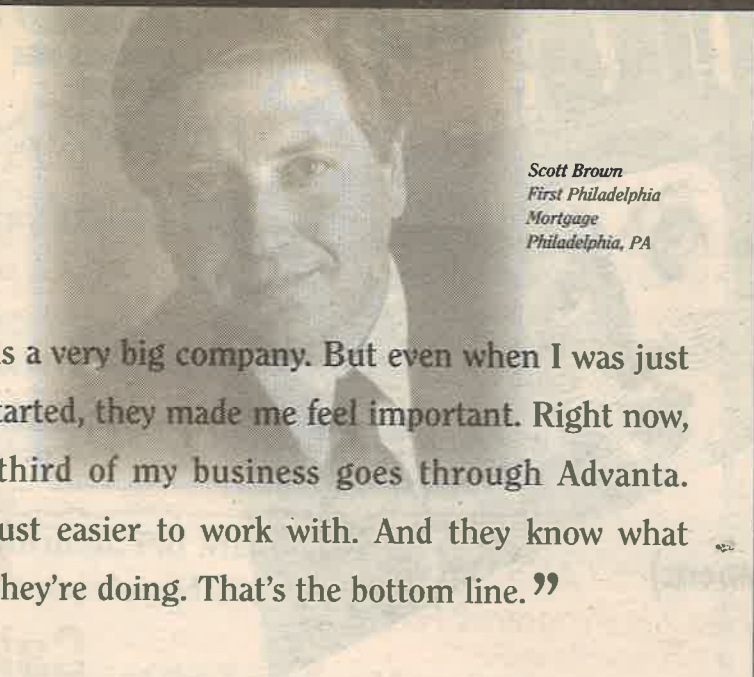
So what does this mean for the already unpleasant and sometimes cumbersome eviction after foreclosure arena? The simple but disquieting answer is that sometimes courts become confused. They will make mistakes like this on occasion. What renders it more insidious, though, is that these erroneous decisions were so widely publicized (at least in New York), tending, therefore, to lead others astray.

But the folly of these legal miscues will eventually be exposed. Then, what should always have been clear will emerge even more apparent. In the meanwhile, when next you must proceed with an eviction after foreclosure, do so knowing your position is correct, even if not every court recognizes that. □

©Copyright 1996 by Bruce J. Bergman, all rights reserved.

Mr. Bergman, author of the two-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (Rev. 1996), is a partner with Certilman Balin Adler & Hyman in East Meadow, New York, outside counsel to a number of major lenders and servicers and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is also a member of the National Foreclosure Professionals, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

THROUGHOUT THE EAST AND NATIONWIDE,  
BROKERS WHO KNOW CALL ADVANTA FIRST.



Scott Brown  
First Philadelphia  
Mortgage  
Philadelphia, PA

"Advanta is a very big company. But even when I was just getting started, they made me feel important. Right now, about a third of my business goes through Advanta. They're just easier to work with. And they know what they're doing. That's the bottom line."

Call your Advanta account executive today:  
(800) 552-5562

# ADVANTA

Advanta Mortgage

A Division of Advanta National Bank USA



A through D credit • High DTI • High LTV • Loan amounts up to \$400,000  
Nationwide Specialists in Non-Conforming Credit Mortgages<sup>SM</sup>