

## The Cat is Out of the Bag: Elimination of Interest Slams Lenders Again

In his Mortgage Foreclosure column, Bruce Bergman warns of the severe consequence potentially facing lenders who unduly delay the foreclosure action: elimination of interest for the period of delay.

By **Bruce J. Bergman** | December 18, 2018 at 02:30 PM



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While lenders generally pursue foreclosures with dispatch, all may not be aware of the severe consequences lurking if the action is unduly delayed by the foreclosing party: elimination of interest for the period of delay. While this concept was always floating around—obscurely a creature of statute (mentioned, *infra*)—encountering it in case law was rare. It is therefore reasonable to observe that the notion was just not widely recognized; certainly not a typical response in a mortgage foreclosure action. Attorneys defending foreclosures have, however, in recent years awakened to

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the precepts and so foreclosing plaintiffs are encountering it to their dismay, at least where the plaintiff may have volitionally delayed the case. Four recent cases highlight this increasingly common peril.

### A "Hidden" Danger

But first, lest lenders despair for the wrong reason, let us immediately emphasize that delay occasioned by a recalcitrant borrower or by pursuit of settlement avenues is not the variety of detainment which can lead to the mentioned draconian punishment. Rather, it is electional tarrying by the foreclosing party, unexplained or inexcusable delay, which elicits the cancellation of interest.

To some extent the danger reported here is perhaps slightly hidden. There is no statute which says that "a delay in prosecuting a mortgage foreclosure action leads to elimination of interest." But there is a section of New York's practice statute which provides that in an action at equity (foreclosure is an action in equity) computation of interest is within the court's discretion (CPLR §5001). In turn, case law interpreting this language states pointedly that the delay of a foreclosing lender can lead a court to reduce or eliminate interest for the period of delay found. Thus, although in a sense arcane, the principle is very real.

### Teaching Scenario

Conceptually, this idea of interest elimination is probably best understood and thereby remembered by posing an extreme and concededly unrealistic scenario. It involves both facts and motivations which are seldom to be encountered, but they provide the underpinnings of the thinking.

Suppose that a borrower is loaned one million dollars secured by a mortgage on a property worth ten million dollars. The note rate is 8 percent and the default is 18 percent. (Observe that the default rate could be lower, or considerably higher; there is no cap on default interest. Lenders typically do not go above 24 percent but that is a generous enough return of course.) The borrower defaults and a foreclosure is commenced.

It is obvious that the borrower could refinance this property or sell it with such substantial equity, but for whatever reason it chooses not to do so. There could be any number of reasons for this, personal or otherwise, although sometimes in foreclosures purely irrational behavior is encountered.

In any event, the lender recognizes that the situation is not going to be resolved. Meanwhile, it is earning 18 percent interest with essentially absolute security. The equity will not be eroded for many, many years. There is accordingly an apparent incentive for the lender to proceed through the action very slowly. Earning a positively assured return of 18 percent is a bonanza, something virtually impossible to assure in any investment vehicle.

The lender might therefore perceive that moving very deliberately indeed is to its benefit. And so, after everyone is served, instead of promptly pursuing the appointment of a referee, the lender holds in place for a year, or two, or more. When finally the referee is appointed, the foreclosing party waits six months, or a year, or two, or more, to address the computation stage. When that is achieved there is a like delay in pursuing the judgment and there may even be further delay after that. The mortgage would have to have provided that the default rate didn't merge with the judgment or otherwise the rate would be 9 percent, but that is another issue.

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Ultimately, it is this type of situation that the statute and the case law are designed to avoid. To be sure, institutional lenders would not think in these terms; the outline is offered solely to elucidate the point.

### Caselaw

The delay subject to condemnation can be found at any stage of the foreclosure action as the history of cases on this subject reveals. While once upon a time this remedy was only rarely invoked, it has become better known over the years with the rise in the contention and volume involving foreclosure cases. The four matters mentioned at the inception here are striking examples of the trend.

In one case (*Greenpoint Mtge. Corp. v. Lamberti*, 155 A.D.3d 1004, 66 N.Y.S.3d 32 (2d Dept. 2017)) a foreclosing lender waited three years after defendant's answer was served to move for summary judgment. That unexplained delay led to a court declaration that interest for that period could not be computed for the lender.

In another case (*Citicorp Trust Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 65 N.Y.S.3d 237 (2d Dept. 2017)) a full *four* years of interest was tolled for an unwarranted delay from an appellate affirmance of summary judgment for the foreclosing plaintiff until the date of a referee's computation.

In the most recent decision on the point (*BAC Home Loans Servicing, L.P. v. Jackson*, 159 A.D.3d 861, 74 N.Y.S.3d 59 (2d Dept. 2018)) a foreclosing lender suffered the penalty when interest was extinguished for a four-year unexplained delay, beginning with 60 days after an initial (albeit rejected) RJL was filed, through the date a subsequent RJL was filed—a period during which a borrower would otherwise be entitled to a settlement conference.

The final case example involved a condominium suffering because of case delay. (*Citimortgage v. Gueye*, 52 Misc.3d 1203 (A), 38 N.Y.S.3d 830 (2016)). Remarkably, the foreclosing plaintiff consumed *seven years* in prosecuting an unopposed mortgage foreclosure action. As part of that, it waited *three years* to even file an RJL. Faced with this undue protraction, and a cross motion by the condo to eliminate interest for the detention periods, the court did just what the condo asked. It examined each aspect of hiatus and attributed extinguishment of interest for the appropriate durations.

### Conclusion

While the underpinnings of all of this may be a bit recondite, the lesson of the noted cases is readily understandable and worthy of emphasis. While a lender is free to pursue settlements and compromises, it cannot allow a foreclosure to linger without reason for unduly extended periods of time. If a case will be forgotten or neglected, a borrower aware of applicable law may attack the delay period and may secure an elimination of interest for that suspension. Care is certainly in order.

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