Bergman on Mortgage Foreclosures: A Few Facts on Loans

By Bruce J. Bergman

A Usurious Loan—Really?

I am reminded of a NYSBA CLE program in which I participated a few years ago when a portion of an all-day session assigned to me included a discussion of usury. This happens to be a difficult and arcane topic, although there is a way to present it in understandable fashion. Nonetheless, the post-presentation comments of the attendees indicated a wonderment as to why usury was being offered: "I don't encounter that in my practice" observed a few. While it is true that usurious loans are not an everyday occurrence, case law confirms that it *does* happen and the subject *is* litigated—and a recent case underscores the point.[1]

To be sure, the case is not a mortgage foreclosure matter (it was a suit on a note but the point is the same) and the example is particularly egregious. Concededly too, this will rarely be a concern for institutional lenders but it can be an issue for private lenders and their counsel.

Here, a promissory note was executed to repay principal of $200,000 with interest at the rate of 100 percent, or 50 percent per annum for two years. The obligor was an individual but the note provided that the borrower's corporation would honor full payment of the loan. When default ensued and the plaintiff moved for summary judgment in lieu of complaint, the court addressed a host of very basic usury maxims, which in turn offers a salutary overview of meaningful basics.

First was the recitation that the maximum interest rate before civil usury is invoked is 16 percent—any rate in excess of that is usurious. That noted, it must be observed that the exceptions to this rule are both significant and nuanced and attention should be paid to those. The elemental aspect, though, is that a loan from an individual lender to an individual borrower in an amount under $250,000.00 is subject to the 16 percent rule.

Next, the court noted that criminal usury, the only usury defense available to a corporation, would apply when a person knowingly charges interest on a loan or forbearance at a rate exceeding 25 percent.

There is, however, a presumption against a finding of usury so that one seeking to impose a usury defense bears a heavy burden of proving it by clear and convincing evidence. The borrower bears the burden as well of proving each element of usury by clear and convincing evidence—usury will not be presumed.

However, where a loan agreement is usurious on its face—as was patently so here—usurious intent will be implied and usury will be found as a matter of law.

At a stated interest rate of 50 percent per annum, usury on the face of the note could not have been clearer.

And then comes the consequence of such a loan. The rule is that a usurious contract is void and relieves the borrower of the obligation to repay both principal and interest. (But note there are exceptions for certain institutional lenders.) Critically, where usury has occurred "the borrower can simply keep the borrowed funds and walk away from the agreement."

It is rather startling that both a lender and its counsel (assuming it had legal advice) could charge such an absurd rate of interest. Most cases of usury are far more subtle involving additional fees which, when added to the note interest rate, cross the line from a legal to an unenforceable percentage. In any event, these things are possible and having at least an elemental sense of the basics is worthy.

Endnote

1. *Roopchand* v. *Mohammed*, 154 A.D.3d 986, 62 N.Y.S.3d 514 (2d Dep't 2017).

Bruce J. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

Bergman on Mortgage Foreclosures:
Loan Modification Application Does Not Save Statute of Limitations

The statute of limitations has lately proven so deadly to lenders that it elevates the importance of those acts or events which can toll or revive the period of limitations. These include, among others, any part payment of the mortgage or a writing which acknowledges the debt.[1]

This would immediately suggest that a mortgage modification agreement would serve to start the statute of limitations running fresh. That would typically be so because such an agreement is invariably a clear acknowledgement that the debt exists, and a promise to repay it, albeit in a now slightly different fashion.

But what so often precedes a mortgage modification is an *application* for that modification. If a borrower is seeking to modify the mortgage, one would think that inherent in that is an acknowledgment that the debt exists—why else would the borrower seek to modify the obligation?

At the same time, though, the application itself is typically not an unconditional promise to pay—an aspect which is needed to revive the statute of limitations. The application seeks permission to enter into an agreement which might indeed become that acknowledgement, but the application itself does not represent that.

While the principle is not necessarily new (a case citing that goes back to at least 1991) it is only a recent ruling which places the concept in the context of the mortgage modification application which, after all, is far more common today than it was decades ago.[2]

Here, the rule was affirmatively stated that the loan modification application was not an acknowledgment of the debt *and* an unconditional promise to repay the debt sufficient to reset the running of the statute of limitations.

That being so, where a foreclosing lender is in jeopardy that the statute of limitations will extinguish the debt, and that coincides with the possibility of pursuing a mortgage modification, the lender will need to think about obtaining an acknowledgment of the debt and the promise to pay either in the application (not easy to do) or in some accompanying clear writing.

Whether this will be obtainable is, of course, somewhat problematic. But it needs to be understood that the application itself, which may or may not lead to a full modification agreement, is likely to be insufficient to save the day.

Endnotes

1. There really is much to this exigent subject and for those for whom a complete presentation of the law would be helpful, attention is invited to 1 *Bergman On New York Mortgage Foreclosures* §5.11[6], LexisNexis Matthew Bender (rev. 2018).
2. *U.S. Bank National Association v. Kess*, 159 A.D.3d 767, 71 N.Y.S.3d 635 (2d Dep't 2018).