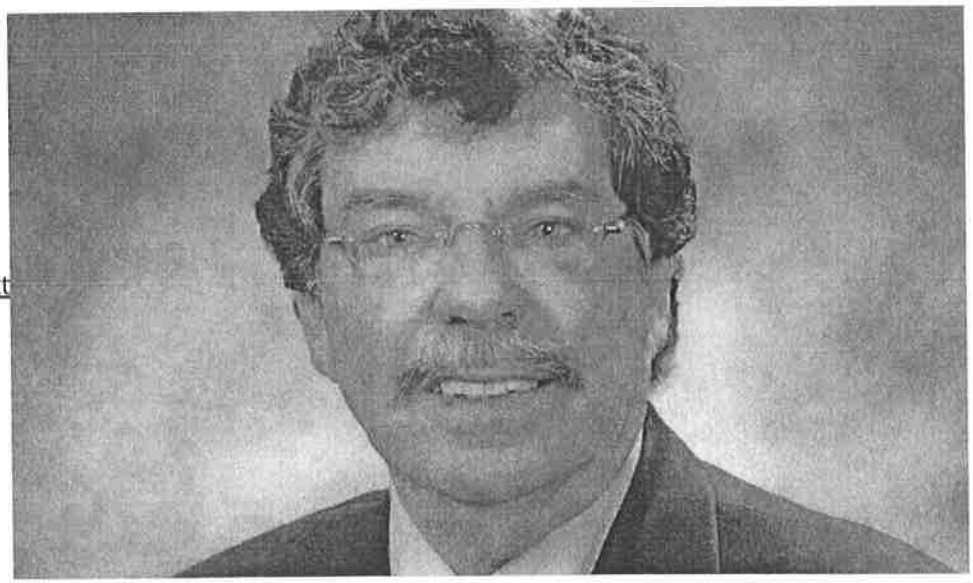
Expert Opinion

Discontinuing the Foreclosure Action—Easy Right?

In his Foreclosure Litigation column, Bruce Bergman explains that although foreclosure discontinuance motions wit prejudice are granted in an "overwhelming number of instances," it remains in the court's discretion. Thus, if damag prejudice to a defendant might result, discontinuance may be denied.

By **Bruce J. Bergman** | July 30, 2019 at 12:25 PM



Bruce J. Bergman

What could be more mechanical, pro forma and perhaps even boring than discontinuing a foreclosure action? For whatever reason, the foreclosing plaintiff wants the action to go away and the borrower in particular would typically be delighted that the threat to his property will become, at a minimum, less imminent. But of course, something lurks here which elicits this exploration. Problems can arise when a defendant argues against discontinuance and asserts that he is being damaged or prejudiced by a discontinuance.

Standard Procedure

To be sure, discontinuances of foreclosure actions are typically standard exercises. The mortgage is satisfied, or there is a short sale or a mortgage modification, or the matter is settled in some other fashion. Overwhelmingly, this means that the foreclosure needs to be withdrawn, more accurately, the action needs to be discontinued (and the lis pendens cancelled). This is accomplished (most often) by court order, often based upon a stipulation signed by all parties who have appeared, or if that is unavailable, pursuant to a motion. (For the procedural aspects of the discontinuance, see *Bergman On New York Mortgage Foreclosure* §24.11, LexisNexis Matthew Bender (rev. 2019)).

General principles supporting discontinuance are well accepted and off-cited: a motion for leave to discontinue without prejudice should be granted unless there are reasons to justify denial (*Wells Fargo Bank* v. *Fisch*, 103 A.D.3d 622, 959 N.Y.S.2d 260 (2nd Dept. 2013)); a plaintiff should be permitted to discontinue an action without prejudice unless there would be resultant prejudice to a defendant (*Matter of Sheena B.*, 83 A.D.3d 1056, 922 N.Y.S.2d 176 (2d Dept. 2011)); usually a party cannot be compelled to litigate, so that a discontinuance should be granted absent special circumstances—particular prejudice or other improper consequences flowing from the discontinuance would underwrite denials of dismissal (*Kane v. Kane*, 163 A.D.2d 568, 558 N.Y.S.2d 627 (2d Dept. 1990)). For a typical example of discontinuance granted in a foreclosure action, albeit contested by a borrower, see *New York Mortgage Trust, Inc.* v. *Dasdemir*, 116 A.D.3d 679, 985 N.Y.S.2d 86 (2d Dept. 2014).

Discontinuance Denied

Standard maxims typically prevail, but might a court *refuse* to discontinue an action? And if it does, why would it happen and what might by the danger? Some cases present troubling examples for foreclosing plaintiffs, comfort for defendants who may oppose a foreclosure discontinuance. In *GMAC Mortgage, LLC* v. *Bisceglie*, 109 A.D.2d 874, 973 N.Y.S.2d 225 (2d Dept. 2003), the case proceeded to the lender's motion for summary judgment. Such a motion of course requires certain pertinent facts to be presented by affidavit of a person on behalf of the plaintiff with personal knowledge of the facts, that person's knowledge usually not an issue. The deponent in this instance, however, was a "limited signing officer." Summary judgment was granted and to that moment this remained an unremarkable case.

But then the lender moved to discontinue the action without prejudice, intending, it would seem, to reserve the right to begin anew if necessary. The stated ground for the discontinuance by the lender's attorney was a direction from the client to discontinue and close the file "due to an issue with the default notification."

To this point it still seems like an innocuous matter. The lender apparently made a mistake and wanted to fix it—quite honorable it would appear.

The court recited and acknowledged the usual rules applicable to the discontinuance scenario, principles reasonable enough to not normally be an impediment to disposal of the action. But here is where the glitch emerges. The borrower defendant opposed the discontinuance motion (even moved to discontinue the action with prejudice). The argument (significantly, unrefuted by the lender) was that the lender's affidavit in support of the summary judgment motion was signed by a

limited signing officer (read robo signer) who in actuality had *no* personal knowledge of the facts. Also unrefuted was the borrower's assertion that the lender was the subject of an investigation into improper use of a limited signing officer who signed affidavits without the requisite knowledge.

The court therefore concluded that the *real* reason the lender pursued discontinuance without prejudice was to avoid the adverse consequences of its improper use of a limited signing officer.

In addition to the lender's misstatement, and harkening back to the standards employed when contemplating discontinuance, the court found that the borrower did indeed suffer prejudice in expending costs and legal fees to defend the summary judgment motion.

The result of all this was that discontinuance was not permitted, the summary judgment order was vacated and the lender prohibited from making another motion for summary judgment. It was thus banished to the time consuming pursuit of a trial —all for want of a proper affidavit.

Concededly, the prior case is an extreme example, not likely to be commonplace. But neither is it totally isolated. In *U.S. Bank National Association* v. *Gioia*, 42 Misc.3d 947, 982 N.Y.S.2d 699 (Sup. Ct. 2013), a foreclosing plaintiff delayed a case for some two years which precluded the action from reaching the mandated settlement conference stage for a home loan foreclosure. When such a conference was finally scheduled, plaintiff moved to discontinue, opposed by the borrower who wanted the settlement process to proceed under the court's direction.

Concluding that the plaintiff's failure to prosecute denied prompt pursuit of settlement and caused interest to accrue, thus making a loan modification all the more difficult, damage to the borrower was found. This was deemed to be prejudicial and so discontinuance was denied to allow the case to proceed through the settlement process.

Another example of discontinuance denied is *Citimortgage, Inc. v. Sultan*, 46 Misc.3d 626, 8 N.Y.S.3d 393 (Sup. Ct. 2014). There, the foreclosing plaintiff was having difficulty demonstrating that it had standing, or even the date of the mortgagor's default. In sum, the discontinuance effort was designed to avoid a potentially adverse determination; better, the court believed, to litigate to the issues rather than discontinue.

Conclusion

The point is not intended to be overstated, foreclosure discontinuance motions without prejudice will properly by granted in an overwhelming number of instances. However, the result is still within a court's discretion, so if damage or prejudice to a defendant might result, discontinuance may be denied. Malfeasance on a plaintiff's part which somehow interferes with required settlement procedures can be one basis to bar discontinuance. Intent to avoid litigation which might defeat plaintiff's position is another.

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