

BERGMAN ON MORTGAGE FORECLOSURES:

Mortgage Modifications Grants Standing

BY BRUCE J. BERGMAN



In this column we are wont to say, regularly, that mortgage lenders and their counsel need not be told about the perils of standing attendant to a mortgage in New York, although of necessity we nonetheless comment upon it with equal regularity. The mishaps are many and there is always room for a missing endorsement or a misplaced or un-affixed allonge, among any number of other miscues which can torpedo a declaration of standing.

A recent case, however, adds a twist which is very *helpful* to a mortgage holder and may in more than a few cases preserve standing even if it might otherwise be faulty. [*Wells Fargo Bank, N.A. v. Graffioli*, 167 A.D.3d 969, 90 N.Y.S.3d 224 (A.D. 2d Dept. 2018)].

It is well recognized that mortgage modifications are commonplace. Whether they are entered into more often prior to a foreclosure being initiated or afterwards is a statistic which need not be explored here. In the new case there may indeed have been an issue as to standing which could have placed the foreclosure action in jeopardy. However, the assignee of the mortgage and the borrowers had, well before the foreclosure was

instituted, entered into a mortgage modification agreement.

In that regard, and quite critically, the court ruled that the mortgage holder established that the modification agreement created a direct contractual relationship between that mortgage holder and the borrowers relating specifically to the subject promissory note and the mortgage. Further, the court found that by entering into the modification agreement, and making monthly installment payments pursuant to that agreement, the borrowers expressly acknowledged the plaintiff's status as the holder of the subject note and mortgage well before the commencement of the foreclosure action.

Therefore, contrary to the borrowers' contention, the plaintiff had thereby established its standing to maintain the action.

The helpful new lesson, then, is that a pre-foreclosure modification agreement may very well serve to cure a standing infirmity. It is a point to remember.

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