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BERGMAN ON MORTGAGE FORECLOSURES . . .

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Deficiency Judgments — Still a Morass*

Anybody can make a mistake — and apparently too many do — in the sometimes strange world of deficiency judgments. Yes, it is a bit of an obscure animal, but much less so than it was in the days when foreclosed property typically retained an equity cushion.

The operative commandment is: thou shalt move for the deficiency judgment within 90 days of delivery of the foreclosure deed.[1] Failing to do that is **fatal**, at least so long as a party not timely served with the post-foreclosure motion objects. Two recent cases [2] crash this admonition upon the hapless and offer this opportunity for a salutary lesson.[3]

That many stumble in this vicinity may not be so surprising. Foreclosures have a propensity to be tough enough without worrying about plans which are effectuated only when the foreclosure is completed. Even then, conclusion is itself a contingency because some foreclosures are settled through reinstatement or satisfaction; so such foresight becomes unnecessary on more than a few occasions.

Assuming, though, that a foreclosing lender is both wise and diligent, some analysis should ensue. Will the property be worth less than the debt when finally a foreclosure sale occurs? Sometimes that is an easy question, but often it is not. A preforeclosure appraisal is a likely necessity to approach an accurate response. Should the exploration reveal a shortfall as probable, its meaning is reduced — or non existent — unless those responsible for the debt have readily reachable assets. Thus, a review of the credit file and maybe some further checking (if that's possible at all) should be required. In any event, the prospective deficiency needs to be large enough to underwrite the effort to chase it.

With all these considerations bouncing around — or maybe, more accurately, comfortably resting unattended — it may be that the foreclosing lender fails to advise or direct counsel to prepare and serve the deficiency judgment. If the lender awakens from its slumber only as the sacred ninetieth day arrives, that may be a reason for the last minute faux pas. On the other hand, it could be that the neglect reposes with counsel who was otherwise timely ordained to proceed. Whomsoever is at fault, we know it has recently been twice reported.

In *River Bank America v. Pan American Mall, Inc.,*[4] counsel ran afoul of service dictates. The foreclosure sale deed was delivered to the plaintiff/purchaser on August 24. Plaintiff attempted service on a defendant's attorney on November 19, four days before the 90 days would have expired. (Service, by the way, is authorized upon either the defendant or his counsel). But that attempt did not fulfill the requirements of CPLR 308(2) because there was no mailing.

On November 22 — the last available day — delivery of the motion was made to a person of suitable age and discretion at this defendant's residence. The mailing, however, did not occur until November 23. Finding that both delivery and mailing must be completed within the 90 days, service was held untimely and no deficiency could be awarded against that defendant.

It wasn't such a close call in *Savings Bank of Utica v. 561-575 Delaware Avenue, Inc.*[5] There, the deed was delivered to plaintiff's counsel on February 22. The deed wasn't recorded though until May 28. With more than 90 days having elapsed from delivery of the deed, plaintiff argued that the deed delivered on February 12 was not "proper" because it was unaccompanied by an executed gains tax affidavit. Creative though the contention was, the court rejected it as irrelevant, holding the deed's validity unaffected by inability to record until a later time.

Plaintiff also tried another avenue, positing that the deed had never been delivered to the "purchaser." That issue isn't new and the expected decision was that acceptance and retention of the deed, without objection, by the plaintiff's law firm, all created an agency relationship. In short, delivery to the purchaser's attorney has the same legal effect as delivery to the purchaser.

Given the perspective of viewing these cases as we have done should expose the miscues as readily avoidable. But that is what we assume on each occasion we see decisions like this and write about them. Perhaps, ultimately, the principles will be so ingrained in the collective legal consciousness that these dangerous gaffes will become rare instead of common.

Endnotes

1. RPAPL §1371(2).
2. River Bank America v. Pan American Mall, Inc., NYLJ Feb. 14, 1994, at 34, col. 1 (Sup. Ct., Queens Co. [LeVine, J.]); Savings Bank of Utica v. 561-575 Delaware Ave., Inc., __ A.D.2d __, 607 N.Y.S.2d 528 (4th Dept. 1994).
3. Not surprisingly, the nuances of deficiency judgment d ctates go well beyond the point here. We tried to cover them all in, and attention is invited to 2 *Bergman on New York Mortgage Foreclosures*, Chap. 34.
4. NYLJ Feb. 14, 1994, at 34, col. 1 (Sup. Ct., Queens Co., [LeVine, J.]).
5. __ A.D.2d __, 607 N.Y.S.2d 528 (4th Dept. 1994).

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