BY BRUCE J. BERGMAN

Does Discovery Interfere With Lender's Summary Judgment in Foreclosure?

It can, but usually does not, at least in the residential mortgage foreclosure case.[1]

But first a word as to why this is meaningful to lenders and servicers—and borrowers—when much of the time this issue is addressed by their counsel.

Mortgage foreclosure cases in New York are too time-consuming even when a defendant borrower does not oppose the case. However, and as lenders and servicers well know, an answer from the borrower is frequently interposed. Once that occurs, the answer must be disposed of for the case to proceed. Typically, this is addressed by a motion for summary judgment, the plaintiff's assertion that there are no issues of fact. Indeed, the foreclosure is stalled until summary judgment can be granted.

Along with an answer, defaulting borrowers will not infrequently either make discovery demands (interrogatories, notices for depositions, among others) or oppose the motion for summary judgment on the ground that discovery is needed to reveal certain facts or facts claimed to be known only to the foreclosing party. If discovery must indeed proceed, then it will add many, many months—or much more—to the course of the proceeding, which already will incur six months, or much more, to dispose of the motion for summary judgment. In sum, if discovery claimed to be needed by a defendant will intercept the summary judgment process, the length of the foreclosure will be greatly increased.

So, does it happen that way? As noted, it can in more complex commercial cases, but it is far less likely in the residential matter.

In the new case, principles, albeit rather standard, were restated but they are worth knowing. One concept is that an award of summary judgment is not deemed premature merely because discovery has not been completed.

Next, a defendant seeking discovery is required to present some evidentiary basis to suggest that the discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion for summary judgment were exclusively within the knowledge and control of the moving party, i.e., the foreclosing plaintiff.

Finally, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process will not suffice to deny the motion for summary judgment.

Lenders and servicers (and certainly their counsel) will readily recognize that in the overwhelming number of instances, defendants' assertions regarding discovery fall into the categories mentioned: the borrower will not have evidence showing that essential facts—or any others—are solely within the knowledge of the foreclosing plaintiff. Nor will their expectation that somehow something will turn up be a basis to halt the summary judgment process.

While none of this means that a discovery effort by a defaulting borrower cannot impede foreclosure, case law is clear (restated by the case cited here) that discovery demands typically will not halt the foreclosure case.

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The Strategy of Discontinuance and a Good Ruling

While discontinuing a mortgage foreclosure action is usually just a ministerial act, it can also be a meaningful strategy. In that regard, cases have warned in the past that discontinuance might not be all that easy—it can be successfully opposed. A recent ruling, however, highlights some helpful principles for lenders in that regard.[2]

To be discussed here are strategy and mechanics, strategy to be the initial subject.

Sometimes the foreclosing party realizes that it may be in some difficulty because of delay, or it may be unable to prove service of some notice or it may have detected some other infirmity—upon which basis it would prefer to begin the action all over again.

To show how prudent this can sometimes be as a strategy, note an actual case where a borrower opposed a foreclosure on the ground that the lender had not sent the required 30-day notice. When the trial court ruled against the plaintiff upon summary judgment by determining that proof of the 30-day notice had *not* been made, the lender elected to *appeal* the decision. That consumed a year, much expense and resulted in affirmance, that is, the appeals court agreed that proof of the notice was not made. Now the lender was faced with a trial on that subject with no assurance that it could prove mailing of the notice, this after all the time and expense.

Instead, when the original motion was lost, the lender could have simply discontinued the action, making sure that it could prove this time service of the notice, thereby saving so much time and expense. This is, of course, but one example of when discontinuance can selectively be of aid to the foreclosing party.

As noted, and as confirmed by the new case, an action may be voluntarily discontinued upon terms and conditions as the court deems proper. Absent a showing of special circumstances, including prejudice or other improper consequences, a motion for voluntary discontinuance *is* generally granted.

That noted, there are cases wherein the lender's motion to discontinue was *denied*. It *can* happen, and that obviously presents danger. The lesson of those cases was what should be avoided, whenever that is possible. The recent case mentioned, however, shows how some borrower opposition to discontinuance may not be so potent after all.

Here, the action had been pending for approximately three years at the time the discontinuance motion was made. The borrower argued that it was prejudiced by the delay, but the court believed no evidence existed of prejudice or any other improper consequences flowing from the discontinuance. In particular, the borrower wanted to pursue discovery, but the court found that could be attended to in a subsequent foreclosure action. So, delay alone, while portentous, is not a basis to deny discontinuance of an action.

In addition, the borrower had filed a counterclaim, wanted to preserve that, and objected to the discontinuance on that ground. Here, though, the court held that the argument about the counterclaim lacked merit because the borrower had not pursued a default (the plaintiff didn't answer the counterclaim) on her counterclaim within one year. Therefore, the counterclaim was deemed to have been abandoned.

Still further on that point, the interposition of a counterclaim in and of itself is not deemed dispositive with respect to discontinuance. Rather, the discontinuance must work a *particular prejudice* against a defendant. In this case, defendant was not prejudiced because she would be able to assert her counterclaim in any subsequent foreclosure.

Care in timing a discontinuance is still very much in order, but the principles expressed here can, in some cases, be helpful.

Endnotes

1. The recent decision eliciting this discussion is *Wells Fargo Bank, N.A. v. Gonzalez*, 174 A.D.3d 555, 104 N.Y.S.3d 167 (2d Dep't 2019).
2. *Green Tree Servicing LLC v. Shiow Fei Ju*, 182 A.D.3d 840, 122 N.Y.S.3d 764 (3d Dep't 2020).