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FORECLOSURE

Some Times, The Good Guys Win

Recent Court Ruling Shines A Ray Of Hope On Loan Administrators

BY BRUCE J. BERGMAN

Lenders and servicers hardly need to be reminded how often the pursuit of mortgage enforcement can be exquisitely frustrating.

Bruce J. Bergman

Those on the side of the mortgage holder like to believe their position is morally, philosophically and legally correct. What borrowers - and sometimes the courts - neglect to remember is that a lender actually advanced monies. A loan was made and the borrower has now breached the obligations on his side, usually the requirement to pay.

It is not as obvious as it seems to urge that when faced with a mortgage default, the lender or servicer has only two basic choices. One is to do nothing at all, relying upon providence or serendipity to somehow come to the rescue. Or, collection of the debt can be pursued.

Collecting correctly

This latter posture can take a number of forms.

The lender or servicer could elect to sue on the note for a money judgment. Instituting a mortgage foreclosure action, though, is typically the prudent course. Alternatively - or simultaneously - dialogue, workout arrangements, stipulations, forbearance agreements or whatever other form settlement might take, is another or an adjunct option.

It is, of course, clear that eventually a mortgage holder faced with a default must take some affirmative action. When that action is taken, the servicer should hardly be perceived as oppressive or as the wearer of the black hat. The money was loaned and there is an imperative to secure its repayment.

The frustration mentioned earlier arises when, despite the most diligent and sincere efforts to efficiently and forthrightly prosecute a foreclosure, not only can a borrower (or others) be extraordinarily dilatory and obstructionist, but courts are sometimes persuaded by the disingenuous entreaties.

'I knew nothing'

To recite what mortgage professionals have too often encountered to their dismay, observe that many a case is begun with calls and letters to the borrower urging that payments are late and inviting a prompt remittance.

(When later the borrower argues "I knew nothing about any default," is it reasonable to believe that?)

Any mortgage which might be sold in the secondary market will mandate the mailing of a notice of default to the borrower as a prerequisite to acceleration. When a cure is not forthcoming, an acceleration letter is almost invariably sent. So at that point, a borrower has been sent at least two letters, and probably a number more, all of which convey the basic premise: "You are in default and a foreclosure will result."

Knowing that the most facile defense to foreclosure in judicial foreclosure states is the claim of lack of service, counsel to lenders and servicers typically strive mightily to obtain the best possible process service. Even if they weren't motivated by professionalism and fairness, it is just wise business to do it right.

(In some states, anything short of in-hand delivery of the pleadings also requires a mailing, so there is potential for our defendant to receive still another double shot of notice.)

The borrower responds

Next in the progression, it is hardly unknown for a borrower to engage an attorney or real estate broker, or some other emissary, to contact servicer's counsel affirming some promised or hoped for solution to the problem.

- There may be a request for payoff or reinstatement figures.
- A plea for an extension of time to appear or answer is not uncommon.

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■ There may also be correspondence back and forth.

Notwithstanding what is close to a blizzard of paper, many borrowers default in the foreclosure action. Although that means they have no entitlement to notice of the remaining plateaus in the foreclosure (in New York, for example, appointment of a referee; referee's computation; judgment of foreclosure and sale; and notice of sale) servicer's counsel is well advised to mail a notice of sale to the borrower anyway.

When all of this is done, and finally a foreclosure sale is conducted, might a defaulting borrower wish to continue languishing interminably at the premises rent free?

Lenders and servicers know that sometimes the answer is yes.

And could the borrower at that late moment first have the nerve to claim lack of service?

Again, the answer is in the affirmative.

A ray of sunshine

Even with the undeniable natural sympathy for the person who loses property in a foreclosure, a case of more recent vintage (in New York) squarely confronts the issue and rules a foreclosure valid and unassailable! ***[Hand v. Potter, N.Y.L.J., Dec. 8, 1993, at 26, col. 2 (Sup. Ct., Queens Co., Milano, J.)]***

Perhaps the best way for a lender or service to derive vindication and comfort from the very salutary ruling is to read the relevant portions of the holding. They make the points with elan and present the position just as a servicer might.

"In ruling upon whether a foreclosure judgment is to be set aside, the Court must review all of the proceedings and circumstances. Defendant alleges she was never served because she was out of the state with her family at the time of service. Although the defendant denies service, an affidavit of service has a presumption of validity. No affidavits were provided by movant to corroborate she was with her family in North Carolina at the time of service.

"Movant claims she was not aware of the proceeding. Evidence has been presented to the contrary that the movant herself was involved in several meetings in an attempt to negotiate a resolution of her difficulties and a number of additional notices were sent to her during the proceeding.

"Neither has movant demonstrated good faith by making any offers of payment to any party and she has not submitted any explanation of any meritorious defense of which she can avail herself.

"Although this proceeding is over two years old, movant did not seek judicial intervention until a Civil Court holdover proceeding was commenced.

"As movant has lived for free in this house during the proceedings, and in light of the other circumstances set forth previously, movant's application must be denied."

It is pleasing to know that the specious can be uncovered, the transparent seen through. The good guys can win in the end. How refreshing! SM