REAL ESTATE UPDATE

When Fees Aren't Enough

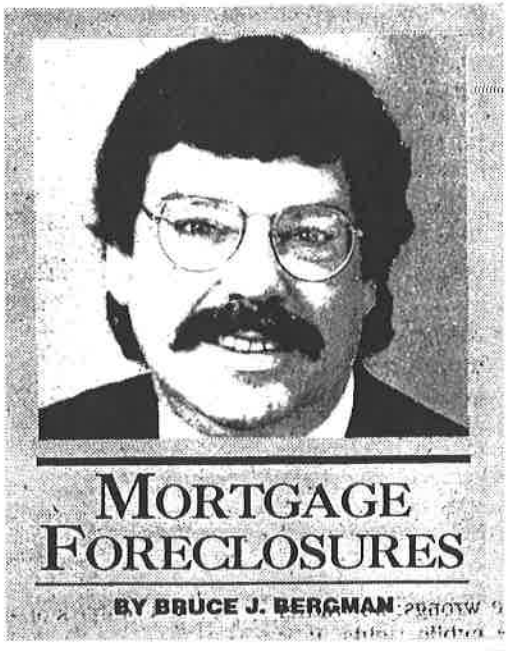
The Extraordinary Allowance in the Foreclosure Judgment

ALTHOUGH NEW YORK may or may not be the epicenter of real estate law and litigation in the U.S., it is certainly a venue of substantial importance and influence in these arenas. In turn, the observation suggests exploration of issues cosmic as a focus commensurate with the magnitude of cases in New York.

Most of the time that is probably what is expected, but sometimes even major players can benefit from emendation and, just plain folks can find themselves in a foreclosure case on the plaintiff's side too. So the concentration here will be on an issue perhaps typically more relevant to non-institutional cases, the extraordinary allowance which can be requested in some uncommon but meaningful circumstances.

3d Layer of Compensation

Foreclosure methodology is such that by the time the judgment of foreclosure and sale is pursued, most matters of any note (save perhaps the award of legal fees) have been disposed of. Consequently, to a great extent in usual cases the judgment becomes, or is perceived as, akin to form work. For some, that means the intricacies of available costs, disbursements and allowances are not repeatedly analyzed with unusual effort and most of the time they do not have to be. Before reciting those instances where special attention is worthy, brief background will set the stage.



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After costs and disbursements, allowances could be thought of as a third layer of compensation available for award to a foreclosing plaintiff in the judgment.[1] These allowances are divided into three categories, one of which is mandatory (not needing our attention here) and two of which are discretionary. CPLR §8302 and 8303 are the source of the statutory authority for these allowances.

The initial discretionary allowance [CPLR §8303(a)(1)] is for a maximum of 2½ percent of the amount due, not to exceed $300 — not a particularly meaningful sum. Even though not mandatory, the allowance is typically awarded as a matter of course. There is certainly no reason why the foreclosing party should not leave a blank space in the judgment for the amount to be inserted by the court.

Now comes the unusual allowance. This is discretionary [CPLR 8303 (a)(2)], not to exceed 5 percent of the sum recovered, awardable to any party to a difficult or extraordinary case where a defense has been interposed.

Here the first snare appears. It is apparent both from the language of the statute itself and case law that a plaintiff cannot receive both the "standard" allowance provided for in CPLR 8301 (a)(1) and the extraordinary allowance under CPLR 8301 (a)(2).[2]

That renders the request for the allowance somewhat awkward because if the extraordinary allowance is denied, plaintiff must have taken the precaution of presenting the standard allowance in the alternative. It does not mean much in a major commercial case, but it can be of some import in the smaller residential matter.

The catch is thereupon succeeded by a hurdle. Definitions in case law of difficult or extraordinary are neither expansive nor encouraging, hardly surprising for the practical reason that the award is so infrequently pursued.

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The determination for granting this award will depend upon the facts encountered, although the presence of a legal point not previously explored and determinative of the case would constitute a difficult or extraordinary case sufficient to justify the allowance.[3] In a non-foreclosure case (although the concept should find application in foreclosure), the allowance was granted based upon what a court found to be the extraordinary nature of the case, its obvious difficulties and the amount of time and expense devoted to its preparation, all as demonstrated in the case's voluminous record.[4]

But, for example, where only a few witnesses testified at a two-day trial and plaintiff's proof consisted only of documents prepared at the inception of the loan, the primary issues were not especially complicated or novel so no additional allowance would be available.[5] Similarly insufficient to support an award under the difficult or extraordinary standard was a case where usury was the only defense[6] and where the litigation was decided on undisputed facts without trial.[7]

Most often, none of this would appear to be of exigent consequence. If a plaintiff derives a genuinely reasonable legal fee from the judgment, the extraordinary allowance would be a bonus, and probably an unwarranted one. Although in some quarters that would be welcome, foreclosures are not intended to supply windfalls and courts would understandably decline to support such a profligate award.

A Possible Hook

Because almost any well drafted mortgage — read that institutional — will contain a legal fee provision, the extraordinary allowance would generally have no practical significance. But even for the skilled, there just might be a place to employ this allowance. Suppose, for example, that the lender's mortgage contains a percentage legal fee clause.

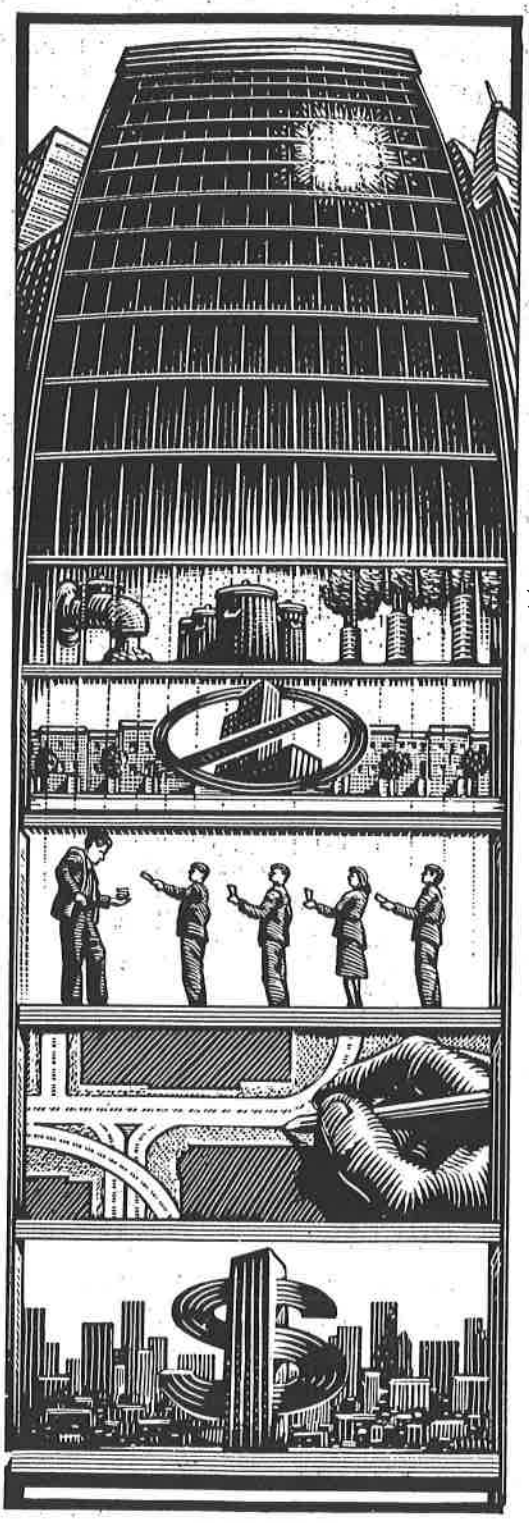

ILLUSTRATION BY JOHN MacDONALD

The defendant interposes defenses creating novel or difficult issues and by the time of application for judgment, plaintiff's legal fees on a quantum meruit basis far exceed the sum which the percentage fee would support.

Because the percentage legal fee is a cap or maximum,[8] upon recompense for this item, plaintiff will have sustained a substantial loss in the course of its foreclosure action, the shortfall consisting of legal fees incurred over the maximum which the court is empowered to award. This would appear to be a factual situation where even the seasoned plaintiff might wish to consider applying for the additional allowance in lieu of that otherwise obtainable.

As earlier suggested by the plain folks reference, this leads to the situation of a non-institutional mortgage. For example, assume a less then artfully drafted mortgage which either has no legal fee provision at all or one which is simply ineffectual. Nevertheless, the borrower interposes a convoluted and time consuming defense, causing the plaintiff to incur considerable legal expense. Absent the ability to recoup a legal fee, award of the extraordinary allowance here would certainly diminish the plaintiff's unfortunate loss. Some rescue then, for the unsophisticated would be provided through invoking pursuit of this unusual compensation.

Insufficient to support an award under the difficult or extraordinary standard was a case where usury was the only defense.

In the end, there are some instances where this obscure allowance could have meaning and at those times it's well worth knowing about.

(1) For a detailed review of the first two categories, disbursements and costs, see 2 Bergman on New York Mortgage Foreclosures, §27.05.

(2) *Niagara County Sav. Bank v. Thornwood Dev. Corp.*, 119 A.D.2d 998, 500 NYS2d 899 (4th Dept. 1986); *Hempstead Bank v. Ryan*, 42 A.D.2d 779, 346 NYS2d 541 (2d Dept. 1973); *Delisio v. Clyde Milling Corp.*, 24 A.D.2d 823, 264 NYS2d 146 (4th Dept. 1965).

(3) *National Bank of Far Rockaway v. City of New York*, 46 NYS2d 153 (1943), aff'd 269 A.D. 692, 54 NYS2d 400 (2d dept.), aff'd 295 N.Y. 624, 64 N.E.2d 653 (1945).

(4) *Sterling Optical Co. v. Marcus*, 56 Misc.2d 54, 287 NYS2d 961 (1968).

(5) *Kenneth Pregno Agency Ltd. v. Letterese*, 112 A.D.2d 1032, 492 NYS2d 824 (2d Dept. 1985).

(6) *Gross v. Lichtman*, 55 A.D.2d 670, 390 NYS2d 182 (2d Dept. 1976).

(7) *Lacks v. Lacks*, 71 A.D.2d 980, 420 NYS2d 387 (1st Dept. 1979).

(8) *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 NYS2d 936 (4th Dept. 1977), citing *First Nat'l Bank of East Islip v. Brower*, 42 NY2d 471, 398 NYS2d 875, 368 N.E.2d 1240.