More Foreclosures Dismissed as Abandoned: A Salutory Lesson

In his Foreclosure Litigation column, Bruce Bergman notes how there has been a surprising number of cases lately where foreclosures are dismissed as abandoned for lenders' failure to adhere to a particular time frame. He writes: "This is one arena where lenders really should not lose, because when they do, it is their own fault. The system is tough enough without the foreclosing plaintiff shooting itself in the foot."

By **Bruce J. Bergman** | January 12, 2021

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There can be little doubt that as a general proposition foreclosing plaintiffs endeavor to prosecute foreclosures with diligence. Certainly in New York the progress is slow no matter how dedicated a lender and its counsel may be, exacerbated by borrower defensive tactics. But with interest incessantly accruing and threatening the equity, moving along apace is typically the foreclosing lenders' goal. This is one arena where lenders really should not lose, because when they do, it is their own fault. The system is tough enough without the foreclosing plaintiff shooting itself in the foot.

Nonetheless, there are a (perhaps) surprising number of instances—especially of late—where foreclosures are dismissed as abandoned for lenders' lax adherence to a particular timeframe.

There is a section of New York's practice statute [CPLR §3215(c)] mandating that a default judgment must be pursued within one year. The precise language is noteworthy: If a plaintiff "fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned...upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." This is serious stuff.

Foreclosing parties should by now recognize that the judgment of foreclosure and sale is something that comes later in the action so that the preliminary step of pursuing an order of reference is deemed to be pursuit of the judgment. Therefore, it is that order of reference stage which must be attended to in one year. Because some of this can be arcane, for a detailed explanation see *2 Bergman on New York Mortgage Foreclosures* §20.02 [1][a], LexisNexis Matthew Bender (rev. 2019)

The problem can dissipate if the foreclosing party has an excuse for delay—a good one that is—and case law confirms that the determination of whether an excuse is reasonable is committed to the sound discretion of the motion court. But the instances of excuses failing are too common, thereby presenting a roadmap of how not to do it.

Quadrozzi Concrete Corporation Individual Account Plan and Trust v. *Javash Realty, LLC*, 164 A.D.3d 1491, 85 N.Y.S.3d 217 (2d Dept. 2018) is an extreme example, but still cannot be ignored. There, the foreclosure was commenced in 2004, the defendants did not file an answer—thus they were in default—but the plaintiff did nothing until it filed an amended complaint in 2015 (!) an extraordinary 11-year delay. There were, however, some communications between the borrower and the plaintiff, including a letter in 2007 from the borrower's attorney to the plaintiff concerning taxes and mortgage payments as well as negotiations in 2010 for a new mortgage. While that might look like an excuse, this case tells us that it is not.

Rather, the court ruled it undisputed that the plaintiff failed to move to enter judgment within one year of the default and contrary to the plaintiff's contention, it failed to offer a reasonable excuse for its delay in seeking judgment. The 2007 letter and any communications between the parties in 2010 did not constitute a reasonable excuse for the multiyear delay preceding those communications. Nor did that same evidence constitute a reasonable excuse for the multiyear delay *subsequent* to those communications. Even the payment of various sums due under the note over the years was not an excuse for the plaintiff's neglect.

In a sense, *HSBC Bank USA, N.A.* v. *Jean*, 2018 N.Y. App. Div. Lexis 6528, 85 N.Y.S.3d 125 (2d Dept. 2018) may even be more frightening because the time periods were more constrained. There, plaintiff commenced the foreclosure in March 2012 and moved for an order of reference in September 2013. Plaintiff moved for judgment of foreclosure and sale in October 2015 at which time the defendant cross-moved to dismiss the complaint as abandoned—pursuant to CPLR 3215(c)—for not having moved for judgment within one year.

The court found it undisputed that the plaintiff did not take proceedings for entry of judgment until it moved for an order of reference more than one year after the defendants' default. Moreover, the plaintiff submitted no opposition to the defendants' cross-motion to dismiss for abandonment and thus failed to make the requisite showing of sufficient cause by which it might excuse its delay. It would seem here that the foreclosing plaintiff had no excuse and if that was the reason it didn't oppose the motion to dismiss, it certainly ran afoul of the statutory mandate.

As to the two cited cases, while avoiding an 11 year delay might seem obvious, even 6 months could defeat the action if there is no excuse for that hiatus. But the lender missteps go on.

In *BAC Home Loans Servicing LP* v. *Bertram*, 171 A.D.3d 994, 98 N.Y.S.3d 311 (2d Dept. 2019), the plaintiff presented only conclusory and unsubstantiated assertions that certain unspecified periods of delay were attributable to compliance with a then newly adopted administrative order. These were found insufficient to excuse a lengthy delay. Moreover, the court observed, even accepting the plaintiff's assertions that the action was also delayed for certain periods of time due to FEMA foreclosure holds after two major hurricanes, the plaintiff still provided no explanation for the period for approximately sixteen months from the time the FEMA holds were no longer in effect until the plaintiff filed a request for a mandatory judicial conference.

In *IXIS Real Estate Capital, Inc.* v. *Herbst*, 190 A.D.3d 691, 95 N.Y.S.3d 297 (2d Dept. 2019), it was found that the plaintiff failed to take *any* proceedings for entry of judgment within one year after the borrower defaulted. While the plaintiff offered various excuses for its delay, all involved events which transpired *after* the one year statutory deadline had already passed and were therefore legally insufficient to justify the failure to take proceedings for a default judgment within one year after default.

In *Deutsche Bank National Trust Company* v. *Iovino*, 171 A.D.3d 1011, 98 N.Y.S.3d 604 (2d Dept. 2019), the foreclosing plaintiff argued that the case was stalled in the mandatory settlement conference part for an extended period of time. However, that was held not to be a reasonable excuse for the plaintiff's extensive delay because the records showed that at the conclusion of the settlement conference (March 2013), the plaintiff was empowered to proceed with the prosecution of the action—but that was more than two years before it actually initiated proceedings for the entry of a default judgment. In sum, there was a two-year delay, but without an excuse. Of yes, the plaintiff also argued that the borrower filed for bankruptcy which stayed the case; true enough, but in order had issued in April 2013 lifting the stay and the plaintiff *still* waited two years to seek the entry of a default judgment.

That a plaintiff must move to the default judgment/referee stage within one year after defendants have defaulted is hardly that burdensome. If there are good reasons why a plaintiff is impeded from honoring the rule, then the excuse will serve to save the day. But if the excuse is feigned, or otherwise lacking merit, then the case will be subject to dismissal. Foreclosing plaintiffs certainly need to pay attention to this aspect of the foreclosure process in New York.

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