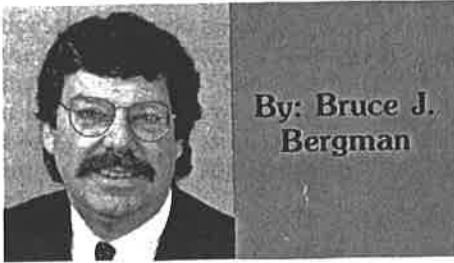


A FORECLOSURE SETTLEMENT STORY FOR THE SECOND MORTGAGE



By: Bruce J. Bergman

Settlement - it's so often a good idea for the mortgagee, at least if you give nothing away, or maybe concede very little. This view certainly applies in these continuing times when the equity in the secured premises may have evaporated.

Concededly, the subject here is somewhat of an oddball situation, spawned by a party seeking to stretch creative thinking beyond reasonable limits. The question raised by a new case is whether a junior mortgagee can affirmatively obtain benefits from a settlement stipulation entered into between borrower and senior mortgagee. The answer, in New York anyway, is "no", and the concept is likely to be consistent in most states.¹

Aside from the intriguing and perhaps illuminating twist in this case, the real underlying message to lenders and servicers pursuing a delinquency or prosecuting a foreclosure is to have your own settlement agreement. Do not assume that someone else's settlement will necessarily save or protect your position. Obviously, settlement of a foreclosure case frequently - or indeed, most often - is the best course of action for both lender and borrower. As knowledgeable observers are wont to emphasize, such settlements do not have to mean major concessions on the lender's part. Rather, they permit payment of arrears or full satisfaction of the mortgage to be made over time.

Another inevitable message is the vociferous urging that any settlement

arrangement (forbearance/stipulation/stand-still agreement/ etc.) be in writing. And it must be clear.

Where a lender faced with a mortgage default is in a second or more junior position, it may or may not choose to begin a foreclosure. Whether there is equity in the property, and how much, will provide guidance. So, a subordinate mortgagee might be content to allow a senior lender to institute foreclosure. The pressure of that case could be sufficient to elicit a reinstatement or payoff, either by a sale of the property or a refinance. It is possible; therefore, that a stipulation of settlement in the senior foreclosure could be beneficial to the junior mortgagee. It may force the borrower to confront the crisis and resume payments upon all the mortgage obligations.

But there are limits to the propitious aspects of that other stipulation, which is just the point of the new case. Here's the scenario.

Borrower was indebted to senior lender upon three separate mortgages. He defaulted upon the obligations and a stipulation emerged. That agreement consolidated three mortgages to form a single lien. It also granted additional security to the senior lender in the form of a deed in lieu of foreclosure to be held in escrow. (The deed in escrow was probably not a smart strategy, but that is a topic for another day.)

Throughout these events there was a junior mortgage in existence (which after the consolidation effected by the stipulation rendered it a second mortgage.)

The second mortgagee had no role in or relationship to the stipulation.

When the borrower defaulted anew, the foreclosure of the now consolidated senior mortgage proceeded and this is where the junior mortgagee fashioned its chimera. The junior moved to compel specific performance (i.e., enforcement) of the stipulation which, the junior argued, would by its own terms preclude foreclosure. (After all, the second mortgagee wanted to find some way to halt the foreclosure to avoid extinguishment of its inferior lien.)

Not surprisingly, the court wouldn't buy the argument. The ruling was straightforward. Subordinated mortgagee was not a party to the stipulation. Nor was it a third party beneficiary of the stipulation. Neither did the stipulation affect the junior's rights. (It could have proceeded at any time with its own foreclosure.) Finally, the stipulation in no way bootstrapped the subordinate mortgage into a superior position. Nice try, but the senior foreclosure went ahead.

To highlight the message, settlement of a senior foreclosure can have a salutary effect upon a junior position. But it is neither an offensive weapon for a subordinate lender nor a substitute for a direct stipulation with the borrower. In sum, the closest a second mortgagee can come to assuring a settlement is to enter into a precise writing with the party whose performance is required.

Copyright 1994 by Bruce J. Bergman, all rights reserved.

¹ *Esco Credit Corp. v. Diamantis*, 189 A.D.2d 798, 592 N.Y.S.2d 428 (2d Dept. 1993)

Mr. Bergman, a partner with Certilman Ballin Adler & Hyman in East Meadow, New York, is outside counsel to a number of major lenders and servicers and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is a member of the American College of Real Estate Lawyers and author of the two-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (1990).

EQUITY Advertising Rates & Specs.

15% Agency Commission

PUBLICATION MONTHS	AD CLOSING DATES
CONFERENCE SSM MARCH, JUNE, SEPT., DEC.	FEB. 10, MAY 10, AUG. 10, NOV. 10

AD SPACE RATES - 1995		
Black & White with your negatives 1 TIME 4 TIMES PAGE \$550 \$1,850 1/2 PAGE \$330 \$1,100 1/4 PAGE \$220 \$ 675	Black & 1 Color with your negatives 1 TIME 4 TIMES PAGE \$900 \$3,100 1/2 PAGE \$550 \$1,900 Black & 2 Colors PAGE \$1200 \$4,300	4 Colors with your negatives 1 TIME 4 TIMES PAGE \$1,550 \$5,500 1/2 PAGE \$1,200 \$4,000 Bl. Cover \$1,750 \$6,250

150 line screen preferred-right reading negatives, emulsion side down

For information and insertion orders, please contact:
National Second Mortgage Association
(800) 342-1121 • (909) 941-2080 • FAX (909) 941-8248
Advertising is subject to approval by the President of NSMA.

AD SIZES
PAGE 7 1/2" x 10"
PAGE with bleed 8 3/4" x 11 1/4"
1/2 PG. horizontal 5" x 7 1/2"
1/2 PG. vertical 5" x 7 1/2"
1/4 PG. horizontal 3 1/2" x 5"
1/4 PG. vertical 3 1/2" x 5"