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Representing the Mortgagor: Can the Mortgage be Saved?

PART I

Here is an article for practicing lawyers dealing with the down-to-earth subject of defending a mortgage foreclosure. Not only does the author discuss the law involved, but he examines the ethical problems as well.

Introduction and Caveats

The title of this article is a question clients are asking lawyers with increasing frequency in recent years. Although most often the answer is in the negative, there are as many fact patterns as there are mortgages so that could never be an answer which covers every mortgage situation. In addition, there is much more to defensive strategy in foreclosure than just being aware of what defenses may be available.

Institutional lenders handling large portfolios usually do not foreclose until they absolutely must, and when they do, their procedures are well honed enough so that defects are the exception. The smaller lender, or the holder of the purchase money mortgage, may be somewhat less sophisticated and more prone to err, so there may be more room for salvation with the latter two.

But even if a foreclosure cannot be defeated, what counsel advises can have a most serious effect indeed on possible settlement or his client's financial position when a settlement *is* reached or the foreclosure is concluded.

When faced with the client whose residence or business property is either in foreclosure, or is in imminent danger of going into foreclosure, the attorney well versed in the nuances of foreclosure law and practice will have a good idea of the rights and remedies available. But there are so many recondite aspects to analyze, even counsel proficient in this area may not have all the answers. On the other hand, the practitioner whose experience with foreclosures is only fleeting, stands a significant chance of offering advice which may be incorrect, incomplete or inadequate.

The consequences of such possible misinformation are exceptionally severe. The most obvious result is the loss of the client's home with all the emotional trauma added to the financial disaster. Perhaps equally devastating is the loss of the person's business property, if that is the subject of the foreclosure.

But suppose the situation appears to be hopeless no matter what defenses might be interposed - as is often the case. Putting in a defense to possibly constrain a settlement could pose an apparently reasonable alternative, and oftentimes a spurious or questionable defense does emerge in an effort to slow down the action and force a settlement. This too, however, can have deleterious consequences for the mortgagor due to factors unbeknownst to many attorneys.

For example, if a mortgage contains a provision that the foreclosing mortgagor is entitled to reasonable legal fees (or some percentage of the loan) in the event of foreclosure, the litigation engendered by the answer causes the mortgagor to incur increased

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legal fees. These in turn *increase* the size of the foreclosure judgment and *increase* a possible deficiency, which could be a personal obligation of the client. Or, if there might be a *surplus* which the client could obtain after the foreclosure sale, that will be *decreased* with the increase in the judgment amount.

Hence the client is exposed to two additional areas of harm by less than expert advice. Therefore, the burdens on attorneys to be especially meticulous when counselling in the foreclosure situation are elevated still further.

To appreciate these little known aspects, and to weigh some of the areas where defenses may legitimately be available, requires an examination of the law and practice of mortgage foreclosure.

Authority for Legal Fees in Foreclosure

We know that in most suits, except where punitive damages are sought or statute specifically so provides, counsel fees are not recoverable. How then do they become a factor in foreclosures?

As will be reviewed in detail, *infra.*, if the mortgage itself provides that counsel fees are to be paid in a foreclosure, the clause will be upheld to the extent of reasonableness. When the mortgage has no such provision, legal fees are *not* recoverable in the judgment. This, however, leads to the concept of acceleration.

The standard form of mortgage in New York contains a provision that upon the happening of certain events, such as mortgagor's failure to pay principal and interest, the holder of the mortgage has the option to declare the *entire* principal balance due and payable. Once this election is made - whether by letter or instituting the foreclosure - there is no obligation upon the mortgagee to accept the arrears and reinstate the mortgage. If the mortgagee is free to reject the mortgagor's tender of past due amounts, it is also at liberty to impose any conditions it chooses as a prerequisite to reinstatement. One of those is reimbursement for legal fees and disbursements - even if the mortgage contained no such provision. The mortgagor who takes umbrage at this demand is free to decline to pay, but then he won't have his mortgage reinstated. (Incidentally, another typical condition of reinstatement is a mortgage modification agreement raising the interest rate to the prevailing maximum.)

To the extent that the mortgagor contests the foreclosure, he may be increasing the legal expenses for which he may be liable. When the mortgage does not specifically authorize legal fees in the foreclosure, the defaulting mortgagor will still be liable for such costs, disbursements and extra allowances as allowed in CPLR Sec. 8302, subds (a), (b), (c) and (d). (See also CPLR § 8301 and Article 81)

It is also usual that a discretionary allowance not exceeding $300 will be awarded pursuant to CPLR §8303 (a) 1.

Another possible, but not likely, source of additional sums to the foreclosing plaintiff in the absence of a legal fee provision is found at CPLR § 8303 (a) 2, as follows:

> "to any party to a difficult or extraordinary case, where a defense has been interposed, a sum not exceeding five per cent of the sum recovered or claimed, or of the value of the subject matter involved, and not exceeding the sum of three thousand dollars;"

This would appear to be fertile ground for plaintiff to be compensated where recompense for legal fees was not otherwise available. However, the cases reveal that the Courts are not inclined to make such awards. *Lacks* v. *Lacks*, 420 N.Y.S.2d 387; *Gross* v. *Lichtman*, 55 A.D.2d 670, 390 NYS 2d 182; *Delisio*

v. *Clyde Milling Corporations*, 24 A.D.2d 823 264 N.Y.S.2d 146.

Does the mortgage actually provide for legal fees in the foreclosure? The only language in the standard title company form of mortgage - which most private mortgagees use - specifically excepts legal fees in foreclosure.

The clause is number 12 in the standard form and provides:

> "That if any action or proceeding be commenced (Except an action to foreclose this mortgage or to collect the debt secured thereby), to which action or proceeding the mortgagee is made a party, or in which it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by the mortgagee for the expense of any litigation to prosecute or defend the rights and lien created by this mortgage (including reasonable counsel fees), shall be paid by the mortgagor, together with interest thereon at the rate of six per cent per annum, and any sum and the interest thereon shall be a lien on said premises, prior to any right, or title to, interest in or claim upon said premises attaching or accruing subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage. In any action or proceeding to forecluse this mortgage or to recover or collect the debt secured thereby, the provisions of law respecting recovering of costs, disbursements and allowances shall prevail unaffected by this covenant."

If this terminology is encountered, legal fees are not the responsibility of the mortgagor in foreclosure except, as noted, if made a condition of reinstatement.

The astute lender's attorney, however, will most often have inserted appropriate language into the mortgage document which will cover legal fees.[1]

Clauses of this type can almost invariably be expected in mortgages employed by institutional lenders. As a general proposition, a provision in the mortgage and/or the note, for payment of legal fees is enforceable.[2] *Inter-City Investor Corp.* v. *Kessler*, 56 A.D.2d 645, 391 N.Y.S.2d 894; *General Lumber Corp.* v. *Landa*, 13 A.D.2d 804, 216 N.Y.S.2d 33; *National Commercial Bank* v. *Bart Boat Co.*, 41 A.D.2d 159; *Marine Midland Bank* v. *Roberts*, 424 N.Y.S.2d 671.

The request for legal fees is always subject to the test of reasonableness. *National Bank of North America* v. *Arthur R. Smith Mechanical Corp.*, 424 N.Y.S.2d 412; *Federal Deposit Ins. Corp.* v. *Kassel*, 421 N.Y.S.2d 609; *Tuttle* v. *Juanis*, 54 A.D.2d 589, 387 N.Y.S.2d 167; *Scheible* v. *Leinen*, 324 N.Y.S.2d 197; *Fairfield Lease Corp.* v. *Marsi Dress Corp.*, 60 Misc. 2d 363, 303 N.Y.S.2d 179; *Franklin National Bank* v. *Wall Street Commercial Corp.*, 40 Misc. 2d 1003, 244 N.Y.S.2d 491.

Where the documents call for legal fees as some percentage of the mortgage amount due, the provision is still enforceable. *Marine Midland Bank* v. *Roberts, supra; National Bank of North America* v. *Arthur R. Smith Mechanical Corp., supra.*

What particular percentage will be found reasonable in a given case will, of course, vary. In *Juriaco* v. *119 Holding Corp.*, a slip opinion under index number 5260/81 of Justice Dunkin sitting in Supreme Queens, 5% of the principal balance as legal fee was deemed reasonable.

A legal fee of 15% was found valid without a hearing in *Stream* v. *CBK Agronomics, Inc.*, 79 Misc. 2d 607, 361 N.Y.S.2d 110. This same percentage was found to be a *cap* on the fee in *First National Bank of East Islip* v. *Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875.

For the general proposition that 15% is acceptable, see *Messina* v. *Resnick*, 37 A.D.2d 1041. Even 20% has been found to be reasonable. *General Lumber Corp.* v. *Landa, supra.; Tarro Building Industries Corp. v. Schwartz*, 54 Misc. 2d 13, 281 N.Y.S.2d 420.

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[1] Two typical alternate clauses which do impose such fees are:

> "It is agreed by the mortgagor that on the foreclosure of this mortgage there shall be included in the computation of the amount due the amount of a fee for attorney's services in the foreclosure proceedings as well as all disbursements, allowances, additional allowances, and costs provided by law."
>
> or
>
> "In the event of the foreclosure of this mortgage an amount of . . . . Dollars shall be added to the principal debt as attorney's fees. This shall be in addition to the right of the mortgagee to assess, tax and recover all disbursements, allowances, additional allowance and costs provided by law."

[2] There is one case, *Lincoln First Bank* v. *Thayer*, 423 N.Y.S.2d 795 (1979), a ruling in Supreme Court, Onondaga County, which found that legal fees in foreclosure should not be allowed unless the legislature authorizes it. The holding was based in great measure upon the disproportionate relationship of the legal fees sought to the amount of the mortgage, and the judge's view that secretaries did all the "legal work." The case is clearly against the overwhelming weight of authority and must be viewed as an aberration. That the courts treat it as such is obvious from notices sent by the Deputy City Administrative Judge for the Civil Division of the Supreme and Civil Courts and the Administrative Judge of Suffolk County to their staffs outlining procedures for assessing legal fees in foreclosures.

The Relationship of Legal Fees to Defensive Posture

To comprehend the possible liabilities attendant to the imposition of legal costs in foreclosures, it is necessary to understand how foreclosing attorneys normally develop their fees. Although counsel for the mortgagor could bill the case on a lump sum basis, or on straight time, for residential or small commercial foreclosures, the fee is usually pegged to each stage of the case.

The typical identifiable steps in a foreclosure, with a general approximation of associated fees, is as follows (disbursements ar additional):

PROCEDURE	APPROXIMATE FEE
Collection) Acceleration)	$350
Summons and Complaint	600
Answer) Motion for summary judgment (or trial))	Time Billing
Appointment of Referee to Compute) Referee's Computation)	875
Judgment of Foreclosure) Publication of Notice of Sale)	1250
Sale) Closing)	1500

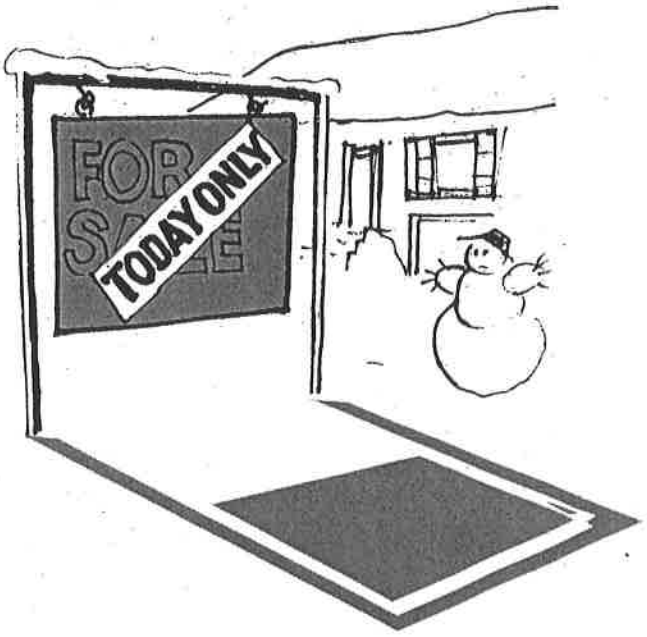
If a file has been turned over to lender's counsel to analyze and order a foreclosure search, but before preparation of the summons and complaint, the attorney for the defaulting mortgagor can expect a demand that in order to reinstate the mortgage, a legal fee of $350 must be paid, plus disbursements, such as the cost of a foreclosure search, approximately $100. So, if the case can somehow be settled at this juncture, the additional liability to the mortgagor is not too great.

Once the summons and complaint has been prepared, the lender's attorney will expect a fee of approximately $600 with disbursements now increased by the cost of process service, possibly on multiple defendants, together with the court filing fee.

As the foreclosure progresses, the fees and disbursements get higher, probably a heavy burden for the mortgagor who didn't have the money to pay his mortgage in the first place. Critical here is that the astute attorney for the foreclosing party will often not reinstate the mortgage until full payment (of whatever amount has been agreed upon) is actually *in hand.*

Experience dictates that the defaulting mortgagor is in such dire straits that he is likely to promise to pay even if he is unable or unwilling to actually meet his obligation. Thus, the lender may move through the foreclosure step by step, the mortgagor's "promises" notwithstanding. This then keeps the legal fees rising until a conclusion is reached.

The lesson then for the mortgagor's attorney is clear. Whatever defenses you may have, unless you are reasonably certain of success - which is the exception - resolve the matter as early as possible. In most situations, time is not likely to be on your side.



Redemption and the Mechanics of Foreclosure

Whether or not any defenses are available in the foreclosure, clients cannot be expected to understand their personal legal status in the case. Until there is an actual foreclosure sale, the defaulting mortgagor owns his house (or commercial parcel) just as he always did, except that his title may be divested at some future date. And, unless a receiver of the rents and profits is appointed, which is rare in residential foreclosures, the mortgagor retains generally all the rights to his property he always had.

So when the client asks, can I sell my house, the answer is yes, so long as title closes prior to the actual foreclosure sale. Recalling our list of steps in the foreclosure action, it is only the referee's sale, in turn followed by delivery of a referee's deed to the purchaser at the foreclosure sale, which effectively destroys the right of alienability. (*Belsid Holding Corp.* v. *Dahm* 12 A.D.2d 499, 207 N.Y.S.2d 91)

If prior to the referee's sale, the mortgagor can enter into a contract to sell the house for an amount above the existing mortgage, he has a good chance to salvage some money for himself. This, however, presupposes the existance of either of two additional factors.

One is that upon signing the contract of sale, the lender will agree to hold foreclosure in abeyance. If the comtemplated transaction is not subject to the new buyers obtaining their own mortgage commitment and if the closing date is not too distant, most, but not all, lenders will be pleased to await the sale. Where the contract contains some significant contingency, such as a mortgage or a zoning variance, the lender may not halt until the condition is fulfilled.

In the alternative, if the lender's cooperation cannot be obtained, a closing would have to be consummated before the foreclosure sale.

Refinancing is another option. Although, obviously, refinancing during a foreclosure is difficult, if perhaps some friend, business associate or family member will advance a sum sufficient to satisfy the mortgage being foreclosed, there is no reason why a new mortgage cannot be placed.

All this leads to the readily apparent, but sometimes overlooked, conclusion that of course the defaulting mortgagor always has the right to redeem - that is the right to pay and discharge the mortgage debt, so long as the foreclosure sale has not yet been held. (*Mann* v. *Sterling Holding Corp.*, 14 Misc. 2d 818; *Kortright* v. *Cady*, 21 N.Y. 343; *Nelson* v. *Loder*, 132 N.Y. 288; *Cass* v. *Hingenbotam*, 100 N.Y. 248.)

Stated in corollary fashion in other decisions, the propositions include:

- The right to redeem or "equity of redemption" in an incident of every every mortgage and the legal right of the owner to redeem is a "favorite equity." (*Goodell* v. *Silver Creek National Bank*, 48 N.Y.S.2d 572, aff'd without opinion, 288 App. Div. 1021, 53 N.Y.S.2d 529.)
- "The only right of a mortgagee is to be paid in full, and of a mortgagor, the right of redemption . . ." (*Application of Fleetwood Acres*, 186 Misc. 299, 62 N.Y.S.2d 669.)
- "The mortgagor, upon the money becoming due, has a right to come into a court of equity to have the amount of the lien determined, and discharged of record upon payment . . ." (*Miner* v. *Beekman*, 50 N.Y. 337.)
- If the mortgagee refuses to accept a valid tender, the mortgagor may avail himself of the procedures in RPAPL §1921 and compel issuance of a satisfaction or assignment.
- When the mortgagee has indicated unequivaocally that a tender would not be accepted, there is no necessity for a formal tender since the law will not require performance of an idle gesture or useless act. *Mahnk* v. *Blanchard*, 233 App. Div. 555, 253 N.Y.Supp. 307; *Rosenfeld* v. *Savings Bank of Utica*, 173 Misc. 667, 17 N.Y.S.2d 652; *Mandelberg* v. *Lampert*, 246 App. Div. 763, 283 N.Y. supp. 937) Similarly, where the mortgagee requires a payment of some other obligation which is invalid, tender may be dispensed with. (*Michaels* v. *Single*, 138 Misc. 446, 246 N.Y.Supp. 17, aff'd., 233 App. Div. 890, 251 N.Y.S.upp. 889)
- Where a foreclosure has been begun, or has even been completed, and the defaulting mortgagor has not been excluded from his interest - that is, not properly served with process-he has a cause of action for redemption. (*Campbell* v. *Jackson*, 111 N.Y.S.2d 446; *Mackenna* v. *Fidelity Trust Co.*, 184 N.Y. 411)
- Where the mortgagee has assigned the mortgage, the action to redeem may be brought against the assignee. *Halpin* v. *(Phenix Insurance Co.*, 118 N.Y. 165)
- As to the statute of limitations applicable to an action to redeem see CPLR § 212 (c), which provides:

"§ 212. Actions to be commenced within ten years

* * *

(c) To redeem from a mortgage. An action to redeem real property from a mortgage with or without an account of and profits may be commenced by the mortgagor or his successors in interest, against the mortgagee in possession, or against the purchaser of the mortgaged premises at a foreclosure sale in an action in which the mortgagor or his successors in interest were not excluded from their interest in the mortgaged premises, or against a successor in interest of either, unless the mortgagee, purchaser or successor was continuously possessed of the premises for ten years after the breach or non-fulfillment of a condition or covenant of the mortgage, or the date of recording of the deed of the premises to the purchaser."

This limitation, however, applies to redemption only where the mortgagee, foreclosure purchaser or someone claiming under them is in possesson of the premises. (*Sumner* v. *Sumner*, 217 App. Div. 216 N.Y.Supp, 389) Where redemption is sought from one not in possession, the applicable period of limitation is six years, pursuant to CPLLR § 213 (1).

None of this should be confused with the right, or lack thereof, to tender *arrears*. As noted, prior to acceleration, the mortgagor may always pay past due amounts, if payment of arrears is in full and submitted unconditionally. After acceleration, it is too late to tender mere arrears since the entire balance has been declared due.

Another possible source of confusion is RPAPL §1341[3] which would apparently be available only in the rare and unusual situation when some *part* - but not all - of the principal is due. When the full balance due has been accelerated, a tender of anything less than full payment would be unavailing.

The actual mechanics of redemption may be a function of the circumstances of the particular case. Once a foreclosure has been instituted, and if a valid tender of the principal, interest and all applicable costs is rejected, a counterclaim to redeem is appropriate on the theory that a tender is a bar to foreclosure. (*Kortright* v. *Cady, supra.)*

After acceleration, but before foreclosure has begun, or after the foreclosure sale if the mortgagor was not excluded from his interest, an action to redeem would lie. (*Chase* v. *Peck*, 21 N.Y. 581; See also: *Campbell* v. *Jackson, supra; Mackenna* v. *Fidelity Trust Co., supra.)*

The redemption situation is most often encountered by counsel when a foreclosure is in progress and his mortgagor client desires to pay whatever balance is due. Pursuant to RPAPL § 1921, a mortgagee upon tender is required to give a satisfaction and application to the court to compel issuance thereof is authorized. The most pragmatic approach then, is simply to move in the foreclosure action for an order directing the plaintiff to accept a tender and upon receipt thereof by plaintiff, an assignment or satisfaction. This is precisely how the desired end was accomplished in *Mann* v. *Sterling Holding Corp., supra.*

In addition, to avoid the accrual of interest as well as to make the mortgagor's position stronger, an amount believed sufficient to satisfy the claim should be deposited with the clerk of the court pursuant to CPLR Rule 3219. As is succintly noted in Weinstein-Korn-Miller, New York Civil Practice, par. 3219.06:

> "A tender under CPLR 3219 may be made at anytime not later than ten days before trial. While this provision is somewhat obscure as to the order of the various steps to be taken the following procedure is suggested:
>
> (1) Serve claimant with a written tender.
>
> (2) File copy of the written tender and proof of service with the clerk and deposit money with him."

Since an action to redeem is equitable in nature, it is susceptible to the equitable defenses of laches and estoppel. (*Zivotsky* v. *Max*, 190 Misc. 1004, 75 N.Y.S.2d 553, aff'd., 276 App. Div. 792, 92 N.Y.S.2d 631; *60 Columbia St.* v. *Leofreed Realty Corp.*, 110 N.Y.S.2d 417) Hence, to the extent counsel has any control, prompt attention to redemption is recommended.

With all the foregoing in mind, counsel for the defaulting mortgagor should have a much better idea how to approach the mechanics of payments at various stages of the foreclosure process and protect the available rights of his client even though a foreclosure is imminent, in process or completed.[4]

Defensive Posture and the Deficiency Judgment

In counselling the client whose property is in foreclosure, the attorney must always be aware of the possibility of a deficiency judgment. Clause number 1 of the standard form of mortgage in New York contains the recital:

> "That the mortgagor will pay the indebtedness as hereinbefore provided."

Both the words themselves and the specific statutory interpretation pursuant to RPL § 254 subd. 3 mean in essence that the mortgage debt is a personal obligation of the mortgagor. This is true, by the way, even if the mortgagor never signed a mortgage note or bond or if the note or bond was lost. (See *Goldman* v. *Rhoades*, 122 Misc. 567, 203 N.Y.S. 548; Marks, Maloney & Paperno, *Mortgages and Mortgage Foreclosure in New York*, section 298)

To graphically observe this concept, suppose a judgment of foreclosure and sale is entered on January 1 in the sum of $55,000, that being the amount of principal, interest, costs and legal fees as computed by the referee and confirmed in the judgment. By the time of the actual foreclosure sale on February 20, the sum due the lender has been increased by additional interest, referee's fees, advertising costs

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[3] "§ 1341. Payment into court of amount due.

> Where an action is brought to foreclose a mortgage upon real property upon which any *part* of the principal or interest is due, and another portion of either is to become due, and the defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, the court shall:
>
> 1. Dismiss the complaint without costs against plaintiff, if the payment is made before the judgment directing sale; or
>
> 2. Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale; but, upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due. (emphasis supplied)

[4] Also of importance, but not directly related to the usual questions raised, are the somewhat arcane provision of Article 15 of the Real Property Actions and Proceedings Law, § 1352 of which is commonly referred to as "strict foreclosure." Under Article 15 are provisions to quiet title to real property and correct errors which may have been made in a title action, including foreclosures. So, where some party having a right to redeem, such as the property owner (mortgagor) or judgment creditor, has not been served in the action, they will have another opportunity to redeem.

and prospective tax stamps on the deed so that the total owing is now $56,041.95.

No outsider bids at the sale, so the lender bids in a nominal $500. Subtracting the nominal bid from the total due shows a loss to the lender of $55,541.95.

When the lender first took back its mortgage, it is likely that the mortgage amount was less than the value of the property. (This, of course, may not have been so in the case of an unsophisticated private lender or in the purchase money mortgage situation.) But, as sometimes happens, where the physical condition of the house has severely deteriorated, or where a drastic change has occured in the neighborhood, the house is now "worth" $30,000. This presupposes that a valid appraisal would show the market value of the house at this sum and that presumbably the lender could now sell the house and realize that sum. If the mortgage security only protected the lender in the amount of $30,000, its loss is the difference between $55,541.95 and $30,000, or $25,541.95. That is the deficiency for which the defaulting mortgagor may be personally liable.

Authority for obtaining a deficiency judgment is found in RPAPL § 1371 and attorneys for mortgagors are well advised to review those provisions. To be sure, getting a deviciency judgment is not easy. There are a number of hurdles the lender must overcome.

- The party liable for the deficiency, who could be a guarantor as well as the mortgagor, must have either appeared in the action or been personally served. (Both CPLR § 308 subds. 1 and 2 confer personal service.)
- The judgment of foreclosure and sale must have made provision that the whole of residue be paid. Not every judgment so provides.
- The plaintiff must move for a deficiency judgment within ninety days after the foreclosure sale. This ninety day period is a statute of limitations rather than a jurisdictional requirement (*Mortgage Affiliates Corp.* v. *Jerder Realty Services*, 62 A.D.2d 591, 406 N.Y.S.2d 326; *Tompkins County Trust Co.* v. *Herrick*, 171 Misc. 929, 13 N.Y.S.2d 825; *Jamaica Savings Bank* v. *Risian Realty Corp.*, 165 Misc. 372, 300 N.Y.Supp. 553; *Heritage Savings Bank* v. *Grabowski*, 70 A.D.2d 989, 417 N.Y.S.2d 802). As such, the objection must be specifically raised by defendant or it is waived. (*Mortgage Affiliates, Inc.* v. *Jerder Realty Corp., supra; Jamaica Savings Bank* v. *Risian Realty Corp., supra.*
- The plaintiff has the burden of proving the fair market value of the premises as of the date of the foreclosure sale. (*National Bank of North America* v. *Systems Home Improvement, Inc.*, 69 A.D.2d 557, 419 N.Y.S.2d 606; *Mastramtoni* v. *Jones*, unreported slip opinion of Justice Durante, Supreme Court, Queens County, 10/11/79, index number 4848/78.)

Based upon the assumption that since the mortgagor was unable to pay the mortgage he would hardly have the wherewithal to satisfy a deficiency judgment, the prevailing wisdom is that deficient judgments should not be pursued. Although not common, these judgments *are* obtained and collected upon. If there is any likelihood that your client's property could yield a deficiency, he should be so advised. Then, if there may be any chance to settle the case, to avoid the liability for a deficiency judgment, a mortgage modification agreement might be less painful than a deficiency judgment. This is particularly true if your client has other assets which are reachable by a judgment creditor.

Finally, in defending a foreclosure, be aware that where the mortgage provides for legal fees to plaintiff in a foreclosure action, every dollar of legal fees reasonably incurred as a result of the mortgagor's defense increases the quantum of the deficiency judgment. This it not to say that ligitimate defenses should not be interposed, only that highly questionable defenses may only have the deleterious effect upon the mortgagor of elevating the possibility of a deficiency.

[End, Part I]