BERGMAN ON MORTGAGE FORECLOSURES . . .

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That Obscure Object of Foreclosure — The Estoppel Certificate**

If it were commonplace and easy, it wouldn't merit contemplation in these pages. That is why the point we tender here is the judicial declaration that failure to execute an estoppel certificate *is* a basis to foreclose. This seemingly arcane observation merits some discussion — especially because for the lender who meets the situation it could be quite consequential.

Overwhelmingly, lenders see defaults for failure to pay — the borrower neglects to remit installments. But for good reason, mortgages, of course, delineate many **other** events of default. Among these are breach of the due on sale provision, failure to insure, neglect to pay real estate taxes, inadequate repair, alterations without consent, demolition without permission and suffering building violations. This recitation does not intend to be all encompassing. Commercial mortgages, for example, will have many additional provisions and those will vary with the circumstances.

The point though, remains: failure to pay, while the most common default, is not the only potential breach.

How important these other defalcations are will depend upon more factors than would hold our interest here, but they **can** be significant. If real property taxes are not paid, for example, the owner/borrower will ultimately be divested of title **and** the mortgage will be extinguished. In a case where the lender may not be escrowing for taxes, such a result is certainly meaningful.

Where most of the value is in the improvements, as is usually the case, demolition of the structure certainly suggests genuine jeopardy to the mortgage. Somewhat less dramatic, but of similar effect, is lack of repair, perhaps at a level where a mansion is reduced to a shack.

Because a mortgage is a contract, some lenders might assume that where any default is encountered, the ability to enforce the mortgage is a virtual certainty. In common parlance, a promise ought to be a promise. The conclusion is logical enough, but in New York at least, inaccurate.(For a full, detailed analysis, of these concepts, see 1 *Bergman on New York Mortgage Foreclosures*, Chap. 4.)

Some mortgage defaults are enforced with strictness — failure to pay, breach of the due on sale provision (in part because of federal pre-emption) and neglect to maintain hazard insurance. Enforcement for other transgressions, however, is uneven, often uncertain and highly dependent upon the facts. Consider lack of repair as an example. Using the mansion to shack analogy, mortgage enforcement would be likely (but not certain) and courts would carefully scrutinize the specific wording of the mortgage document. A broken window, even if neglected for years, would obviously not be a basis to foreclose; nor would a shaky bannister. So when **does** lack of repair rise to a certifiably actionable level? It is not especially clear.

Armed with such a preface, approach the newly illuminated estoppel arena. The estoppel certificate is a critical element of mortgage commerce. There would rightly be hesitation to take a mortgage by assignment absent an estoppel certificate in the package. That is one reason why most mortgages require a borrower to issue an estoppel certificate upon demand.

Can a lender foreclose if a borrower refuses to execute an estoppel certificate? Until the decision in *FGH Contracting Co. v. Weiss*, 185 A.D.2d 969, 587 N.Y.S.2d 415 (2d Dept. 1992), the response was an imponderable. The few cases which addressed the issue had waffled at best and there was no reported case ruling that declination to furnish the estoppel certificate was grounds to foreclose.

The Appellate Division has now provided explicit clarification and lenders should derive some comfort from the new view. If a borrower refuses to execute an estoppel certificate, foreclosure can be the lender's remedy.

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