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EXPERT OPINION

Judgment Rate Lowered to 2%—Not Applicable to Foreclosures

In his Foreclosure Litigation column, Bruce Bergman discusses a new law which becomes effective on April 30 "labelled as an amendment to the civil practice law and rules regarding the interest rate applicable to money judgments arising from consumer debt," but "conspicuously, never once mentions mortgages, mortgage foreclosure or judgments of foreclosure and sale."

By Bruce J. Bergman

Labelled as an amendment to the civil practice law and rules regarding the interest rate applicable to *money judgments* arising from consumer debt (emphasis supplied), a new law was signed by the Governor on Dec. 31, 2021 and becomes effective April 30, 2022. It amends CPLR §5004 (rate of interest) which had recited, and which remains:

> Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

In addition to amending §3215(f) and (l), CPLR §3218(1)(a), CPLR §5231(a), (d), (J) and (k) and CPLR §5222 (a) and (c)—none of which relate to mortgage foreclosures—the new legislation adds a subsection (a):

> ; provided the annual rate of interest to be paid in an action arising out of a consumer debt where a natural person is a defendant shall be two per centum per annum...

Subsection (b), also an addition, defines consumer debt:

> ...'consumer debt' means any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services, which are the subject of the transaction are primarily for personal, family or household purposes...including but not limited to, a consumer credit transaction... (as defined in CPLR §105). (parenthetical material reduced.)

A cursory reading of the new edict might lead to the assumption, and some scuttlebutt making the rounds would suggest that the statute could apply to foreclosures, that is, to the judgment of foreclosure and sale. That court clerks may indeed adopt this position may be predicated upon a mailing of the new law's text to foreclosure firms by a high official in the Office of the Court Administration.

For compelling reasons, the view here is that *judgments of foreclosure and sale are not affected by the new provisions.* Certainly by the statute's own definitional language there can be no application under any circumstances to commercial foreclosures.

Not a Money Judgment

The preamble to the statute itself declares that the amendment relates to the rate of interest applicable to money judgments (arising out of consumer debt). Although patent on its face, this is reinforced by the New York State Senate Introducer's Memorandum In Support which repeats the bill's title as applicable to money judgments, for consumer debt.

Conspicuously, it never once mentions mortgages, mortgage foreclosure or judgments of foreclosure and sale, just as the statute itself is barren of any such recitation—even though both could have easily provided clear verbiage if such was the focus. Contrast that with the plethora of borrower protective legislation of the last 15 years which has been transparent in reciting and honing in on foreclosures when that was the direction.

The dispositive, overarching concept of the analysis is that a judgment of foreclosure and sale is not a money judgment and is therefore perforce removed from coverage by the new legislation.

A basic purpose of the judgment of foreclosure and sale is to divest the mortgagor of title and make the proceeds of the sale of the property available to the mortgagee as recompense for its claim. [*DaCosta* v. *Hamilton Republican Club of Fifteenth Assembly Dist.*, 187 Misc. 865, 65 N.Y.S.2d 500 (Sup. Ct. 1946)]. It should be understood though, that this objective is achieved only when the foreclosure sale is conducted. Divestiture of title does not occur upon issuance of the judgment, but rather upon conduct of the sale authorized and empowered *by* the judgment. [*Koch* v. *Drayer Marine Corporation*, 118 A.D.3d 1300, 988 N.Y.S.2d 333 (4th Dept. 2014)].

Yet, because CPLR article 52 relating to money judgment enforcement and RPAPL article 13 controlling mortgage foreclosure are distinct legislative enactments, the judgment emerging from the equitable action of mortgage foreclosures is as a matter of law not a money judgment. [*Citibank* v. *Cambel*, 119 A.D.2d 720, 501 N.Y.S.2d 133 (2d Dept. 1986)].

Mortgage foreclosure is not an action to recover the sums due from the mortgagor personally. Rather, it is designed to collect the monies from the land through enforcement of the lien of the mortgage. [*Jamaica Sav. Bank* v. *M.S. Inc. Co.*, 274 N.Y. 215, 8 N.E.2d 493 (1937)]. Accordingly, the foreclosed premises do not benefit from, nor is the judgment in favor of the lender diminished by, the homestead exemption. [*Citibank* v. *Cambel*, 119 A.D.2d 720, 501 N.Y.S.2d 133 (2d Dept. 1986); *First Nat'l Bank of Glens Falls* v. *G.F. Clear, Inc.*, 103 A.D.2d 951, 479 N.Y.S.2d 802 (3d Dept. 1984)].

Such is also to say that the homestead exemption cannot be used to defeat the action of a party foreclosing a mortgage. [*In re Onyan*, 163 B.R. 21 (N.D.N.Y. 1993)].

Yet another distinction between a money judgment and a foreclosure judgment arises from observing that unlike a contractual debt which merges with a judgment [*In re Kumari*, 2019 Bankr. LEXIS 932 *citing Westinghouse Credit Corp.* v. *D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004)], the rule as to a foreclosure judgment is that the mortgage does not merge into a judgment until the foreclosure sale is conducted. [*In re Kumari*, 2019 Bankr. LEXIS 932 *citing In re Galasso,* 249 B.R. 54, 55 (S.D.N.Y. 2000)].

The "Other" Provisions

As noted earlier, the new legislation also amends other CPLR provisions, to harmonize reduction of the judgment interest rate in consumer debt cases. Most of these, however, address procedures for sheriff's executions and restraining notices—hallmarks of the money judgment execution process, but wholly unrelated to mortgage foreclosure.

Somewhat more arcane is the change to CPLR §3215 which is a statute mandating application for judgment on default within one year, here imposing that, if applicable, the application should include a statement that the consumer debt rate applies. In foreclosure litigation/procedure however, notation that any defendants are in default is inherent in the *preliminary* stage of pursuing a judgment of foreclosure and sale which is the appointment of a referee to compute. Understanding this aspect dismisses any issue about diminished judgment interest finding a role in foreclosures. For an in-depth review of this esoteric aspect, see 2 *Bergman On New York Mortgage Foreclosures* §20.02 [1][a], LexisNexis, Matthew Bender (rev. 2022).

NYS Senate Introducer's Memorandum In Support

That the judgment of foreclosure and sale is not the subject of the new legislation is underscored yet further here. No mention whatsoever is made of mortgage in any context. Instead, it makes clear what the statute is designed to remedy: "debt collection lawsuits." And when offering examples, it delineates rent, medical bills and car loans. It also assertively mentions protection from bank levies and wage garnishments, but never touches upon foreclosures. A careful reading of each line of the memo offers considerably more evidence that foreclosure judgments are not encompassed by the new requirements.

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