Bergman on Mortgage Foreclosures

By Bruce J. Bergman

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Foreclosure Judgment Bars Borrowers From Later Suing for Fraud

Lenders and their attorneys have seen this type of case before, but they keep on coming. So, the principles—comforting to lenders—are worthy of reciting anew when encountered, as is so in a recent case.[1]

This started out as a garden variety bank foreclosure which proceeded to judgment of foreclosure and sale—which happened to be on default—then to actual sale. Sometime thereafter, the former borrower, claiming to be aggrieved, brought a quiet title (or bar claim) action against the lender and its various attorneys for damages for fraud, and violation of Judiciary Law § 487 (this aspect against the attorneys) arising out of the prior foreclosure action.

Could this possibility succeed? If it could, lenders would be in almost eternal danger of disgruntled borrowers who had every opportunity to litigate through appeals of the foreclosure action, later suing lenders who were merely enforcing their rights under the mortgage. It is not quite an upside-down world, so the answer is "no," the borrowers' actions would not succeed.

Three critical related principles support the banishment of borrower assaults such as these.

One is the doctrine of res judicata, which holds that a final adjudication of a claim on the merits (as in the underlying mortgage foreclosure) precludes relitigating that claim—and all claims arising out of the same transaction or series of transactions.[2]

Next, and specifically applicable to the foreclosure case, a judgment of foreclosure and sale is final as to all questions at issue between the parties and concludes all matters of defense which were or could have been litigated in the foreclosure action.[3]

Finally, even a judgment obtained on default (as was so in this case), which has not been vacated, is conclusive for res judicata purposes and encompasses issues that were or could have been raised in the prior action[4]—for our purposes here, the earlier foreclosure.

To restate it all in the vernacular, the borrower had his chance in the foreclosure to make his arguments. Had he done so and lost, the judgment would have served to take away any power to sue the lender later in another action. Even where the borrower defaults in the foreclosure, the judgment is effective as to any arguments the borrower might have raised had he chosen to do so. He elected not to and cannot later be given the proverbial second bite of the apple.

Will we see these cases yet again? Undoubtedly. But mortgage holders can rely on the maxims recited here to confidently fend off attacks.

Endnotes

1. *Eaddy v. U.S. Bank, N.A.*, 180 A.D.3d 756, 119 N.Y.S.3d 756 (2d Dept. 2019).
2. *Eaddy*, 180 A.D.3d at 756 (*citing Ciraldo v. JP Morgan Chase Bank, N.A.*, 140 A.D.3d 912, 913 (2016)); *see Djoganopoulos v. Polkes*, 67 A.D.3d 726, 727 (2009); *see also Sclafani v. Story Book Homes*, 294 A.D.2d 559, 559 (2002).
3. *Eaddy*, 180 A.D.3d at 756 (*citing Ciraldo, N.A.*, 140 A.D.3d at 913; *see SSJ Dev. of Sheepshead Bay I, LLC v. Amalgamated Bank*, 128 A.D.3d 674, 675 (2015); *see also Dupps v. Betancourt*, 121 A.D.3d 746, 747 (2014).
4. *Eaddy*, 180 A.D.3d at 756 (*citing Richter v. Sportsmans Props., Inc.*, 82 A.D.3d 733, 734 (2011); *83-17 Broadway Corp. v. Debcon Fin. Servs., Inc.*, 39 A.D.3d 583, 585 (2007); *Rosendale v. Citibank*, 262 A.D.2d 628 (1999).

Statute of Limitations: Some Clarity on the 'Savings Provision'

Lenders, servicers and their counsel need not be reminded of the continuing threat that the expiration of the statute of limitations presents to the successful prosecution of a mortgage foreclosure action. That is why the rescue provision afforded by CPLR 205(a) is so meaningful.[1] As readers will know from earlier articles, a plaintiff (in our context a mortgage holder) is permitted to bring a new action on the transaction within six months of termination of a prior action, where that action is terminated in any manner other than

a.) Voluntary discontinuance;

b.) Failure to obtain personal jurisdiction;

c.) Dismissal of the complaint for neglect to prosecute the action; or

d.) Final judgment upon the merits.

The practicalities of what underlies the importance of this statute is the problem that when a foreclosure may be dismissed, by then, the six year statute of limitations since the acceleration of the mortgage may have passed. That would then bar the initiation of a new foreclosure action – except that the statute does indeed allow a new action to be brought if the dismissal of the first action did not fall into one of the delineated categories.

But then the question becomes, precisely when after the dismissal of the first action must the mortgage holder begin the new action—understanding of course that the statute says it must be within six months of termination of the prior action? But what is that exact moment?

A new case offers some clarification and confirms that minutia of this type always remains meaningful in the legal arena.[2]

Here, the mortgage holder argued that the six-month period should be calculated from the date the dismissal order is served with notice of entry (and service of such an order in that fashion is typical and commonplace).[3] Citing previous authority, the court ruled, however, that service of the order with notice of entry was not the measuring point.[4] Rather, for the purposes of this statute, an action from which no appeal has been taken is considered terminated 30 days after mere entry of the court's dismissal order, this date representing the expiration of the party's right to appeal.

In a sense, it is fairly simple, but counsel needs to understand the point. When a foreclosure is dismissed, if a new action can be initiated, it must begin within six months of entry of that order of dismissal. Nothing else is involved. Thinking about or relying upon other events could lead to what is in essence a disaster. The beginning of a new action is something to be considered with dispatch in any event, but if it starts approaching the last minute, this rule offers needed clarification.

Endnotes

1. *See* N.Y. CPLR 205(a).
2. *Specialized Loan Servicing Inc. v. Nimec*, 183 A.D.3d 962, 123 N.Y.S.3d 713 (3d Dep't 2020).
3. *Id.* at 965.
4. *Id.* (citing *Pi Ju Tang v. St. Francis Hosp.*, 37 A.D.3d 690, 691 [2d Dep't 2007]).