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EXPERT OPINION

The Odd Remedy of Strict Foreclosure —To the Rescue

In foreclosure cases, the consequences of a mistake can be critical. One misstep is failing to name and serve a party with a junior interest, a "necessary party." The strict foreclosure action is a way of solving what could otherwise be a "very thorny dilemma."

6 minute read

By Bruce J. Bergman

Foreclosure can be a convoluted nerve-wracking pursuit, particularly in judicial foreclosure states. New York, for example, tends to be near the top in time-consuming litigation.

One additional problem beyond time generally is that the consequences of a mistake can be so critical. If, for example, a foreclosure might consume two years (or much longer), an initially unnoticed error at the inception could condemn the foreclosing party right back to a beginning stage of the action—certainly a bungle of some dismaying significance.

So it is apparent that avoidance of miscues is always a worthy goal for mortgage lenders and servicers. But some oversights are just inevitable.

A Major Misstep

Among the most upsetting missteps is failing to name and serve a party with a junior interest. Such a person or entity is typically denominated as a "necessary party."

The underlying goal of a mortgage foreclosure is to cause the secured property to be sold in the same legal condition it was when the mortgage was given. That is why lenders and servicers are not especially concerned about interests which later attach to the property, such as judgments or junior mortgages. If those are made defendants in the foreclosure case, as routinely they would be, their interests will be cut off and the property is then presumably attractive for purchase at the foreclosure sale.

And if those encumbrances or interests arose subsequent to the filing of the lis pendens in the action they are extinguished when the property is struck down at the foreclosure sale. [For further discussion and for citation on this maxim see 2 *Bergman On New York Mortgage Foreclosures* §15.02, Lexis Nexis, Matthew Bender (rev. 2022)].

But if a party who could (and should) have been named and included in the case was omitted, that is, no jurisdiction was obtained, an obvious problem, at a minimum an issue, survives. The property is now burdened by an interest (for example a mortgage, judgment, mechanic's lien or tenancy) which should not be there. At least it could have been terminated had that been desired. A $25 parking ticket judgment won't mean much, but a $300,000 mortgage might, so—depending upon the circumstances—this can be a genuinely troublesome incident.

How this can happen is not so difficult to imagine. Lender's counsel could misread a search and neglected to include a necessary party. Perhaps a staff member had inadvertently omitted a name which had properly been included by the drafter. Or, the process server might not observe the presence of a tenant who could have been named.

Then too, the fault could lie with the foreclosure search where an interest of record was overlooked. Possible blame aside, the dilemma must be addressed in some fashion.

Help Is Available

Suppose for a simple, elemental example that the missed party was a judgment creditor for $12,000. Assume too that the sum due upon the foreclosed mortgage was $200,000. If the duration of a strict foreclosure case, traditionally about six months (discussed in a moment), because the

mortgage interest accuring during that time (at 10%) would aggregate $10,000, offering the judgment creditor perhaps $5,000 to release the lien could be a reasonable accommodation for both parties. Even less could be appropriate because the missed party will lose in the end.

Should settlement be unavailable, pursuit of the strict foreclosure will extinguish the judgment against the property, thereby banishing the judgment creditor solely to chasing the defaulting mortgagor. Since the latter was unable to pay the mortgage, ability to satisfy the judgment is likely to be remote. All this will be highly dependent upon the circumstances—who holds the interest and how much it is, among others—but the concept should be clear. Settlement in this fashion is something to consider if conditions allow.

A Strict Foreclosure

If the purely practical route is unavailable, then the remedy of strict foreclosure can be considered.

For purposes here, the analysis will refrain from exploring the highly technical nuances of the process and observe instead that the essence of a strict foreclosure (in New York) is a short version of a foreclosure action. It is designed not to have the property sold anew, but rather to wipe out the interests of a party who could have been named in the action, but was not.

In essence, that omitted party is given by the court a right to redeem the mortgage; that is, pay all that was due upon the mortgage together with interest and any improvements made to the property in good faith. A narrow time frame in which to manifest that redemption is given, usually 30 days, but it can be up to 60 or even 90 days.

Upon such redemption the previously excluded party becomes the assignee of the mortgage as if it had not been foreclosed. The redeeming party, however, does not receive title. This pronouncement immediately and understandably presents confusion. For a further explanation of this aspect with case citation, see 4 *Bergman On New York Mortgage Foreclosures* §32.01[1][a], Lexis Nexis, Matthew Bender (rev.2022).

If the redemption is not accomplished, then the judgment which issues forever forecloses the right of redemption of the party who had previously been omitted. The result then is the same as if the party had been included in the original foreclosure action: the interest is extinguished.

A Safety Net

None of this is to suggest that the strict foreclosure action is an off-handed or casual calling. It necessitates a summons and complaint, service of process, and, if an answer is received, a motion for summary judgment, among other things, all with knowledge of the esoteric underlying legal principles.

There is accordingly some finesse required in preparing the pleadings properly and it does require a familiarity of the concepts and procedures. Nevertheless, it is an uncommonly sure way of solving what could otherwise be a very thorny dilemma.

Knowing that the solution exists can and should be a source of considerable comfort. It is there if needed.

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