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EXPERT OPINION

Those Sometimes Elusive Legal Fees in Foreclosure

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Real Estate

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While lenders would like to believe that the subject of awarding legal fees in a mortgage foreclosure (or condominium lien foreclosure) action is reasonably consistent and predictable, that turns out not to be quite so. To their chagrin, lenders find that legal fees requests are often reduced by courts, sometimes substantially, but without explanation.

Obviously, if a lender has legitimately expended legal fees of a certain amount, but only some portion is declared recoverable, it represents a loss. We are reminded of this issue by a recent case which very neatly tied up the elements and would—it could perhaps be hoped—serve as a future guide. [*McCormick 110, LLC* v. *Gordon*, 200 A.D.3d 672 (2d Dept. 2021)].

To best understand the subject, a review of the basic elements, followed by the holding in the noted recent case may be helpful.

Entitlement

Is a foreclosing plaintiff entitled to an award of legal fees? The sometimes not so simple answer is "yes," if the mortgage so provides. The general rule in litigation is that each party is responsible for its own legal fees—*unless* statute provides otherwise or there is a contractual provision providing for the award. As to statute, no law in New York compels legal fees to be given to a foreclosing plaintiff (although the opposite is true for defendants in the case, an issue that need not be explored here, see RPAPL §282 applying to residential mortgages).

As to the contract, it is essentially effortless for a mortgage provision to be written providing legal fee recompense to the plaintiff in the event that a foreclosure action is pursued. Easy though this appears, the oft-used title company form of mortgage does *not* provide for that legal fee payment. It does support the payment of legal fees for any action *except* foreclosure of the mortgage. The uninitiated could miss this distinction and therefore, without a rider, that standard form fails to underwrite the collection of legal fees in a foreclosure action.

Institutional lenders, on the other hand, will have had forms for decades which do provide for the award of legal fees and law firms which represent such lenders will be familiar with the concept. Nonetheless, from an overall point of view, mistakes can be made in the drafting of legal fee clauses and render them ineffective, although this aspect is somewhat beyond the goal here. 3 *Bergman On New York Mortgage Foreclosures*, Chapter 26 (rev. 2022) discusses the drafting of the legal fee clause and offers multiple examples of those that are up to the task and those that come to naught. Proceeding here assumes that a legal fee clause is properly crafted so that the foreclosing plaintiff would otherwise be entitled to be repaid the legal fees it expended.

Hearing Required?

The assessment of legal fees by the court is addressed at the stage of judgment of foreclosure and sale. Carefully prepared papers in support of the application for the legal fees (an issue in the recent mentioned case as well) typically is sufficient for the court to make an award. To the contrary, New York County more often does require a hearing, although that can vary from judge to judge and is perhaps less of a mandate in these post COVID times.

Elements to Support an Award

First, reasonableness of the fees is the overarching standard, that is, *quantum meruit*. Although sometimes referred to in different verbiage, the elements to be presented by the party seeking legal fees are essentially uniform for any variety of litigation:

- Time spent by counsel
- Difficulties involved
- Nature of services
- Amount involved
- Professional standing of counsel
- Result obtained
- Importance of work performed
- Lawyer's Integrity
- Questions involved
- Necessity of time
- Customary fee

(Other names for the various categories, with case law support for all, is found at 3 *Bergman On New York Mortgage Foreclosures*, §26.03[2] (rev. 2022))

While not specifically recited as an element, it would be both appropriate and wise for plaintiffs to attach copies of all the attorney's billing to show precisely the work done, when performed and the hourly rate. That such is what the attorney charged is not in and of itself a complete demonstration —it still has to be fair and be accompanied by the other factors.

The Problem and Clarity of the New Case

Although observed anecdotally, lenders can likely confirm that what happens too often is that the application for legal fees, even if unopposed, is reduced by the court without explanation. In the residential case, just one of an infinite number of examples could be a request for $8,000 in legal fees with the court striking that down to $5,000 or $3,000. Assuming counsel presented the bills and backup for most or all of the factors, reducing the fees would most often seem to be questionable, certainly when there is no opposition. When the matter is litigated, the court would consider the legitimacy of any objections and reach a conclusion.

The real issue, though, is when there is no opposition but the court nonetheless makes the reduction. (In the more substantial commercial case with much larger fees and with contests as to those sums more commonplace a different situation is faced.)

Here is how the recent case is helpful. First, it confirms the accepted principle that a plaintiff in a foreclosure action may indeed be entitled to attorney fees pursuant to the terms of the mortgage. It then offers the accepted standard that the award of attorney's fees pursuant to the contractual provision is enforceable only to the extent that the amount is reasonable and warranted by the services actually rendered.

It goes on to say that to determine such reasonableness, the court is to consider such factors as the time, effort and skill required; the difficulty of the questions presented; counsel's experience, ability and reputation; the fee customarily charges in the locality; and the contingency or certainly of compensation. If that is done, the case advises a hearing may not be required because the court will possess sufficient information upon which to make and informed assessment of the reasonable value of the legal services rendered.

The holding then arrives at the conclusion which ties all this together. In the mentioned case, counsel for the plaintiff submitted an affidavit from its attorney stating that the plaintiff was entitled to $71,451.11 in attorney fees. In the affidavit, the attorney described his experience and presented a discounted billing rate (although how much of an element the latter was remained unclear). The plaintiff in addition meaningfully submitted the attorney's billing statements as evidence. There being no opposition, the Second Department ruled that the plaintiff should have been awarded the requested attorney fees.

That is just the point. Where the plaintiff fulfills all the requirements and presents with clarity the required evidence and explanation, in the absence of opposition effectively assailing the request, the court should make the award. This case is therefore worthy of serving as a guide when this issue arises, as it does so often.

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