



Bruce J. Bergman

EXPERT OPINION

The Importance of the Voluntary Payment Doctrine in Foreclosures

In his Mortgage Foreclosure column, Bruce Bergman offers some basics on the subject of the voluntary payment doctrine which provides in short that when a sum is paid with full knowledge of the facts, and without protest, it is deemed voluntary and no later attack on the payment can succeed.

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It should be apparent that when a mortgage default is encountered, particularly when that leads to a mortgage foreclosure action, the borrower is rarely cheerful about satisfying the debt. This is particularly so where additional charges beyond principal and interest accrue—especially legal fees, although default interest, late charges and sundry protective advances can be prickly points of contention.

This can lead from time to time to the discordant, even hostile situation of a borrower paying off a mortgage, receiving a satisfaction, but later demanding return of, for example, legal fees paid. This particular scenario may be unique to the mortgage foreclosure construct; certainly it is more common in this arena.

A typical situation might be encountered when the borrower has the opportunity to refinance, the timeframe is limited and so even though aggrieved, the full sum due is paid with the borrower only *later* attacking that payment. It is here that the voluntary payment doctrine may be invoked which can afford some stability of outcome.

The doctrine provides in short that when a sum is paid with full knowledge of the facts, and without protest, it is deemed voluntary and no later attack on the payment can succeed. It is apparent that such a legal underpinning is essential—otherwise no mortgage payoff would ever be final. It would always be open to a clawback by the borrower claiming that the sums were incorrect. Some basics to enlighten the subject follow.

Assuming for review purposes that the legal fee component of a mortgage payoff will be a fertile subject of dissent, as a practical matter, legal fees are paid under one of three circumstances: Upon the borrower's reinstatement of the mortgage; upon the borrower's satisfaction of the mortgage or upon a foreclosure sale with a third party as a successful bidder and to the extent of legal fee award in the judgment. In the first two instances, a borrower might be chagrined by the obligation to pay legal fees, but once remitted, the matter can be deemed concluded.

Attorney fees paid without objection in response to a payoff letter are pursuant to contractual obligation—the mortgage—and are deemed voluntary, not under duress even when remitted to facilitate a closing. [*Overbay, LLC v. Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.*, 185 A.D.3d 707, 128 N.Y.S.3d 56 (2d Dept. 2020).]

As a general proposition in this regard, the voluntary payment doctrine prohibits recovery of payments voluntarily made with full knowledge of the facts, so long as in the absence of fraud or mistake of material fact or law. [*Beltway 7 & Props., Ltd. v. Blackrock Realty Advisors, Inc.*, 167 A.D.3d 100, 90 N.Y.S.3d 3 (1st Dept. 2018).] In any event, because a tender under protest would appropriately be considered conditional, mortgage holders would most often decline to accept a payment under protest. Given that not uncommon circumstance, consideration of the voluntary payment doctrine does not arise.

Two other legal concepts may be a part of this payoff contemplation. One is estoppel which will bar the claim of the party pursuing return of the payment where the foreclosing party detrimentally relied upon receipt of the satisfaction of payment when in exchange it issues the mortgage satisfaction. The other is an instance where the party seeking return of the sums paid also sues the attorney for the foreclosing party. Then the controlling maxim is that an agent acting on behalf of a disclosed principal – and the law firm is an agent—will not be liable for a breach of contract in the absence of clear and explicit evidence of the agent’s intention to be bound.

If, however, the legal fee portion of a payment in satisfaction of a mortgage is remitted under protest, it may be considered involuntary

and thereby subject to later court scrutiny. [*1300 Avenue P Realty Corp. v. Straigakis*, 186 Misc.2d 745, 720 N.Y.S.2d 725 (App. Term. 2d Dept. 2000).]

A recent case reminds that the protest route remains active in creating peril for lenders in the midst of this type of scuffle [*U.S. Bank, N.A. As Trustee for Truman 2013 SC4 Title Trust v. Cordero*, 191 A.D.3d 490, 142 N.Y.S.3d 488 (1st Dept. 2021)].

There, the defendant in the foreclosure action sold the property before the referee even computed the amount due. After the payoff, the court granted defendant's motion for an accounting of fees, charges and expenses and other payments related to the payoff of the mortgage and referred the matter to a referee. This occurred as the foreclosing plaintiff was unable to show application of the voluntary payment doctrine because the defendant had sent written protests to the plaintiff in correspondences on three different occasions.

The foreclosing plaintiff also failed to demonstrate that the defendant had full knowledge of the facts necessary to invoke the voluntary payment doctrine. Among other things, the payoff statement sent to the borrower had not reflected any itemization for legal fees.

In the end, the court found that given the borrower's written protests, it could not be concluded that the defendant voluntarily and intentionally abandoned his right to challenge the payoff amount.

Care thus remains in order when addressing this issue and the standards should be clear.

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