BERGMAN ON MORTGAGE FORECLOSURES

BY BRUCE J. BERGMAN

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Mortgage Note Need Not Be Inspected for Plaintiff To Prove Standing

Even had it not been a regular subject of these columns, lenders, servicers, and their counsel are well aware that a defense of standing is commonplace in mortgage foreclosure actions—likely the most often seen defense interposed by defaulting mortgagors. It is also recognized that this is a thorny arena and it can sometimes spell trouble for lenders.

In this regard, it is not often that New York's highest court comments upon foreclosure standing issues, but in a new case they *did*, making a particularly critical point worthy of attention.[1] Below are the meaningful points found in the Court of Appeals order.

For a foreclosing plaintiff to be entitled to summary judgment dismissing a defense of lack of standing, the burden is upon the plaintiff to demonstrate as a matter of law that it does indeed have standing to foreclose.[2] However, there is no "checklist" of required proof to establish standing. In the noted case, the plaintiff was found to satisfy that burden through evidence that it possessed the note when it commenced the action, including a *copy* of the original note endorsed in blank. There was other supporting material as well, inclusive of an affidavit of possession by an employee who reviewed the plaintiff's business records. In response to this, the borrower was unable to raise a factual issue as to plaintiff's standing.

Given the foregoing, the Court of Appeals found that it was proper to deny the borrower's request to inspect the original note. Rather, it held that there is no per se rule requiring the court to grant a request for inspection of the original note as a condition of awarding summary judgment to a plaintiff in a mortgage foreclosure action.

The court went further to rule that to the extent cases in the past have held or suggested otherwise, they can no longer be followed.

When arguing that the mortgage note may somehow not be in proper form to support standing (issues as to the endorsement and the affixation of the endorsement or allonge to the note for example), borrowers not infrequently demand to actually see the original note. Some courts may have been inclined to allow this and there have been rulings to that affect. No longer. The Court of Appeals has in this decision changed that and it is consequential for mortgage holders.

Endnotes

1. *JPMorgan Chase Bank, N.A. v. Caliguri*, 36 N.Y.3d 953, 136 N.Y.S.3d 225 (2020).
2. *Id.* at 954.