

# BERGMAN ON MORTGAGE FORECLOSURES

## The Anomaly of Foreclosure Legal Fee Award in New York County

By Bruce J. Bergman

The collection of the legal fee component of a mortgage foreclosure action can often be a meaningful pursuit. This is especially so in substantial commercial foreclosure actions, perhaps less compelling in residential cases, although the importance can be elevated if the latter are heavily litigated. The award of legal fees is made in the judgment of foreclosure and sale and is typically granted based upon the papers—except in New York County.<sup>1</sup>

But New York County is, of course, Manhattan, and that will be the situs of some of the most substantial commercial properties, thus foreclosures, concurrently the matters with the most significant incurrence of legal fees.

As an initial observation, legal fees are available to a plaintiff—in any action, foreclosure or otherwise—only where statute or the contract of the parties requires such an obligation. As mortgage lenders and servicers—and their counsel—will recognize, mortgages typically have such a legal fee provision. But the quantum of fees to be assessed is governed by the standard of “reasonableness” and there is a demonstration of any number of factors that the party pursuing the fees must offer.<sup>2</sup> These include:

1. Time spent by counsel
2. Difficulties involved
3. Nature of services
4. Amount involved
5. Professional standing of counsel
6. Result obtained

Bruce J. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures* (Lexis-Nexis Matthew Bender,) is a member of Berkman, Henschel, Peterson & Peddy, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.



7. Importance of work performed
8. Lawyers' integrity
9. Questions involved
10. Necessity of time
11. Customary fee

While not all of these need be presented, many or most of them will be required, although submission of all the bills for legal fees together with a delineation of counsel's ability, background and regular fees will be the essence of the material needed. Again, this can be expressed in an affidavit with exhibits and is overwhelmingly what the court will use to grant the award—except in Manhattan. There, the determination of legal fees is at least sometimes set down for a hearing.

The dilemma then presented to the foreclosing plaintiff is the time to be consumed in scheduling such a hearing and awaiting a decision. Usually, there is a very strong compulsion once a foreclosure judgment is entered to proceed to a sale. After all, interest is accruing and the larger the debt, or the greater the rate of interest, the greater is that accrual. Time also can translate into the need for the foreclosing party to advance further taxes and insurance premiums. In turn, growth of the debt will eventually eliminate any surplus, create a deficiency and portend loss to the plaintiff. It depends how the numbers compute, but the utility of

law would order the licensee to “reasonably compensate the adjoining owner for the use and occupancy of the adjoining premises.”<sup>13</sup> Since the amount of compensation (i.e., the license fee) could be a “sticking point” during negotiations, this provision may help bring both parties to the negotiation table, if necessary, through court-supervised mediation, which could reduce upfront fees and inordinate delay.

Of course, it remains to be seen whether this proposed legislation will become law, either as introduced or with amendments, and if it does, whether it will ameliorate the problems described in this article. Moreover, FISP inspections and repairs are just one situation in which access to neighboring properties is often necessary. Nonetheless, the Legislature should take action to encourage parties to negotiate in good faith to ensure that necessary FISP-related construction can be completed in a manner that respects the rights of neighboring owners, but also requires them to act reasonably in ensuring that their buildings are safe—thereby protecting the public at large and the residents of both the licensor and licensee buildings.

#### Endnotes

1. See 1998 N.Y.C. Local Law No. 11, N.Y.C. Admin. Code § 28.302.1 (New York City Buildings, Façade Inspection & Safety Program (FISP)); see also 1 Rules of the City of New York § 103-04 (RCNY).
2. *Id.*
3. William G. Blair, *Assessing the 10-Year-Old Façade Law*, NY Times (Jun. 10, 1990), <https://www.nytimes.com/1990/06/10/realestate/assessing-the-10-year-old-facade-law.html>.

4. See generally 1 RCNY § 103-04.
5. *Id.* at (c).
6. *Id.* at (d).
7. See 11 N.Y.C. Admin. Code § 3309.10 (“requiring roof protections to extend a distance of “at least 20 feet (508 mm) from the edge of the building being constructed”).
8. See, e.g., *DDG Warren LLC v. Assouline Ritz 1, LLC*, 138 A.D.3d 539, 539-40 (1st Dep’t 2016) (noting that a licensor is generally awarded a license fee when a licensee must use the licensor’s property); *Ponito Residence LLC v. 12th St. Apt. Corp.*, 38 Misc.3d 604, 613-614 (Sup. Ct. N.Y. Co. Oct. 23, 2012) (awarding license fee as a condition of a license under RPAPL § 881 to maintain a sidewalk shed that extended 20 feet in front of an adjoining property); *Matter of Rosma Dev., LLC v. South, 5 Misc.3d 1014[A]*, 2004 N.Y. Slip Op. 51369(U), \*14-15 (Sup. Ct. Kings Co. Oct. 19, 2004) (awarding license fee as a condition of a license under RPAPL § 881 for the limited purpose of erecting sidewalk bridging, abutting approximately 10 feet onto the sidewalk in front of adjoining owner’s property). But see 22 *Irving Place Corp. v. 30 Irving LLC*, 57 Misc.3d 253, 257 (Sup. Ct. N.Y. Co. June 26, 2017) (observing that no license fee would need to be awarded for the construction of a sidewalk shed under FISP, since the licensor experienced “no loss of enjoyment to its property”).
9. See generally N.Y. Real Property Actions & Proceedings Law § 881 (RPAPL).
10. 2023-2024 NY Senate-Assembly Bill S1305, A1321 (*available at* <https://legislation.nysenate.gov/pdf/bills/2023/S1305>).
11. *Id.* at p. 3 (proposed sub-provision 5(f)).
12. *Id.* at p. 2 (proposed sub-provision 3).
13. *Id.* at p. 3 (proposed sub-provision 4(e)).

## Contribute to the NYSBA Journal and reach the entire membership of the state bar association

The editors would like to see well-written and researched articles from practicing attorneys and legal scholars. They should focus on timely topics or provide historical context for New York State law and demonstrate a strong voice and a command of the subject. Please keep all submissions under 4,000 words.

All articles are also posted individually on the website for easy linking and sharing.

**Please review our submission guidelines at [www.nysba.org/JournalSubmission](http://www.nysba.org/JournalSubmission).**

