Bergman on Mortgage Foreclosures

Foreclosure Judgment Is Final—Again

By Bruce J. Bergman

Bruce J. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures* (LexisNexis Matthew Bender,) is a member of Berkman, Henoch, 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.*

That a judgment of foreclosure and sale is solidly final[1] is one of the few protections left for the foreclosing party as the New York Legislature continues to legislate help to borrowers.[2] It must be noted immediately that a defense of standing can resist the finality of the judgment.[3] That aside, the general rule remains, as pointedly restated in *Jones v. Flushing Bank*, a recent Second Department case.[4]

Lenders will recognize the almost otherworldly persistence of some borrowers to delay and impede the foreclosure process; this case is a good example of that. After the mortgage was given, the borrower sold the property to an entity, promptly defaulted and resisted the foreclosure by interposing an answer claiming, among other things, that although this was—it is asserted—a residential loan, the lender characterized it as a commercial loan.[5] Upon summary judgment the borrower cross moved, lost, took an appeal, ultimately filed a bankruptcy that confirmed the foreclosure sale and took an appeal of that as well.[6]

But all that is a sideshow. The topper to the obfuscation was the bringing of a post-foreclosure sale lawsuit by the borrower against the lender to recover damages for negligence, fraud, breach of contract and violation of General Business Law § 349.[7] Can a borrower do that? Well, they can do it, but they will not succeed, as this case underscores.

The controlling principles were discussed both in terms of *res judicata* and finality of judgment. Under the doctrine of *res judicata*, once a claim is brought to a final conclusion, all other claims arising out of the same transaction are barred even if they are based upon different theories and even if seeking a different remedy.[8] Thus, *res judicata* bars a party from re-litigating any claim that could have been or should have been litigated in a prior proceeding—precisely the situation here.[9]

Moreover, and to the very particular point of the foreclosure judgment, a judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense that were or might have been raised in that foreclosure action.[10] Because the judgment of foreclosure and sale encompassed all issues that were raised or could have been raised in that action, including whether the lender improperly failed to disclose that the mortgage loan was placed in a commercial loan rather than a residential loan, the borrower is precluded from asserting the causes of action raised in the post-foreclosure suit that are predicated on those same earlier issues.[11]

In short, the borrower's new action can be dismissed, and in this case it was. There really is finality to the judgment of foreclosure and sale.

Endnotes

1. *See, e.g., Long Island Sav. Bank, FSB v. Mihalios*, 269 A.D.2d 502, 503 N.Y.2d (2d Dep't, 2000).
2. *See, e.g.,* The Foreclosure Abuse Prevention Act (FAPA), codified at N.Y.RAPL §§ 1301(3), 1301(4), and CPLR §§ 203(h), 205-a.
3. 3 *Jones v. Flushing Bank*, 212 A.D.3d 791, 183 N.Y.S.3d 458 (2d Dep't,. 2023). *See also*, N.Y. Real Property Actions & Proceedings Law § 1302-a.
4. 212 A.D.3d 791, 183 N.Y.S.3d 458 (2d Dep't, 2023).
5. *Jones*, 212 A.D.3d at 792.
6. *Id.*
7. *Id.*
8. *Id.* at 793.
9. *Id.*
10. *Id.*
11. *Id.*