Foreclosure: Judicial Estoppel and a Grand Irony

The decision in 'Cruz v. Bank of New York Mellon' calls attention to the subject of judicial estoppel and raises, as the title recites, a grand, perhaps exquisite irony.

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By Bruce J. Bergman

While in the world generally one plus one equals two, in this case it equaled zero—and in a quite rational way. A borrower employed two defenses which so often pummel foreclosing plaintiffs but nonetheless emerged the loser.

Judicial estoppel is one of those sundry doctrines lawyers (and ultimately their client lenders and borrowers) need to know, even though it seems to be invoked only from time to time. The exceptional zeal and emotion that anecdotal observation suggests prevail in mortgage foreclosure actions seems to more often engender application of judicial estoppel in such cases.

A recent decision calls attention to the subject and raises, as the title recites a grand, perhaps exquisite irony (*Cruz v. Bank of New York Mellon*, 218 A.D.3d 638, 192 N.Y.S.3d 634 (2d Dept. 2023).

First, a quick refresher on the doctrine to afford proper context. Also referred to as the doctrine of estoppel against inconsistent positions, judicial estoppel in a general sense is applied to preclude a party from asserting a position directly contrary to or inconsistent with a posture earlier assumed in the same proceeding or in a prior proceeding.

Similarly, the doctrine finds use to bar one who has assumed a certain position in a prior action and thereby secured a favorable judgment from adopting a contrary position in another action merely because the party's interests have changed.

Emphasis is meaningful upon the controlling factor of a party subject to preclusion having earlier obtained relief upon what is now a contrary stance. That is, there had to be a judgment or order in favor of the party now assuming a different position merely because of the change in interests. (So where the party did not earlier actually prevail, the doctrine does not apply.)

With that primer in mind, and before examining the new case, note that two of the most common defenses relied upon by defaulting mortgagors are lack of standing and expiration of the statute of limitations. Although sometimes expressed together in a single action, they may more often be employed separately, but with enough frequency to observe how oft-used they are.

In the recent case under consideration, the borrower responded to a foreclosure initiated in 2010 asserting lack of standing upon the part of the foreclosing mortgage holder, nothing unusual there. Upon summary judgment the court adopted that very stance and dismissed the foreclosure for lack of standing on the plaintiff's part, this too not uncommon.That order issued in 2014.

In 2019 the borrowers commenced a bar claim action [RPAPL §1501(4)] to discharge the mortgage on the ground that the statute of limitations—which commenced presumably upon initiation of the 2010 action—had now expired. (That expiration would have seemingly occurred in 2016, six years after the acceleration created by commencement of the 2010 action.)

Use of judicial estoppel here was manifest and the Second Department so ruled.In the 2010 foreclosure the borrower argued that the action was invalid because the plaintiff had no standing to initiate it.

Years later, and for its convenience, the borrower reversed its stance claiming that the 2010 foreclosure action (even though brought by a party with no standing to commence it) had served to begin the statute of limitations; therefore when six years passed the mortgage should have been discharged.

The paradox is obvious: the incompatible confluence of the defenses of lack of standing and statute of limitations ironically hoisted the borrower on its proverbial own petard. Too much of a good thing—combined of course with the patent inconsistency—banished the overzealous borrower: a clear and interesting use of the doctrine of judicial estoppel.

Bruce J. Bergman *is a partner with Berkman, Henoch, Peterson & Peddy, P.C. in Garden City. He is the author of "Bergman on New York Mortgage Foreclosures" (four vols., LexisNexis Matthew Bender, rev. 2024).*