

PURSUING THE DEFICIENCY JUDGMENT: RECENT ENLIGHTENMENT

*By Bruce J. Bergman

Perhaps because in part (anecdotally observed here) deficiency judgments were not so often pursued, the legal minutiae attendant to the process have always seemed a bit obscure. Questions from lenders to counsel on those occasions where deficiencies have been sought confirm the perhaps elusive nature of knowledge attendant to the deficiency judgment process. In particular, two specific areas have always been of major concern: the time in which to move for the deficiency, and the method to prove the essential aspect of the property's value.

A recent case helpfully elucidates on these two points: *First Commerce, LLC v. Jerath*, 229 A.D.3d 926, 216 N.Y.S.3d 69 (3d Dept. 2024). [Deficiency judgments are addressed by statute in RPAPL § 1371. For an expansive review of the subject, with citations, see 4 *Bergman On New York Mortgage Foreclosures*, Chap. 34, LexisNexis Matthew Bender (rev. 2024).]

Context

Properly appreciating the relevance of the principles explored in the cited case suggests a condensed overview of deficiency judgment methodology.

The deficiency is sought in a motion made after the foreclosure sale has been consummated by delivery of the referee's deed. The borrower is given credit for the *greater* of the value of the property *on the date of sale* or the amount bid at the foreclosure

*Bruce J. Bergman is a member of 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)

sale. This sum (a higher of the two) is then subtracted from the amount due to the foreclosing plaintiff pursuant to the calculation in the judgment of foreclosure and sale. If employing this formula results in a shortfall, then the plaintiff must move within ninety days of delivery of the deed for that deficiency. It should be readily apparent that there may be room to argue about the timeliness of the necessary motion (discussed in the recent case) as well as the measure of proof of the value of the property (also discussed in the recent case).

The Current Clarification

A foreclosure sale was held and the deed delivered, followed by the defendant moving to vacate the sale on the claimed ground that she did not receive notice of that sale, although it appears that the court granted that motion primarily because the borrower promised to redeem – that is to pay all sums due to the plaintiff. The result was that the defendant was given a constrained period of time to pay, failing in which the order opening up the sale would be vacated and the plaintiff would be given thirty days to move for the deficiency. The defendant then neglected to pay.

By the time all this ran its course, the statutory ninety days had passed and the defendant seized upon that by attacking the deficiency motion on the ground that it was untimely. Citing the rule that a defendant may be estopped to plead a timeliness defense where the plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action, the court ruled that the defendant waived any timeliness objection because it was she who obtained the order to show cause vacating the judgment. In short then, if it is the party liable for the deficiency who impedes the ability to move within ninety days of delivery of the deed, timeliness will not be a defense.

Likely even more compelling, plaintiffs typically inquire as to how the value of the property is to be demonstrated in the deficiency proceeding. Recall, as noted, that the deficiency is the difference between the sum due the plaintiff pursuant to the judgment less the greater of the value of the property on the date of sale or the amount bid at the sale. Hence, the role of value is essential.

The benchmark for demonstrating value is an appraisal by a licensed appraiser. But as a practical matter in some or many instances (certainly in smaller cases) the plaintiff will obtain a less expensive and usually more quickly available report from a real estate broker, what is sometimes called a BPO, that is, a broker's price opinion.

The standard in this regard to assess pursuant to case law is that the court shall determine upon affidavit or otherwise the fair and reasonable market value of the premises. While that offers some leeway to the plaintiff seeking the deficiency, value is still something which must be proven with certainty. A subsequent inquiry then is whether there needs to be a hearing to assess value. That depends upon whether the motion papers and the opposition demonstrate value with sufficient certainty to avoid the need for a hearing.

The important holding in the recent case was that the plaintiff demonstrated value via report from two real estate brokers who had examined the property. The defendant, however, while arguing with the quantification of value, did not submit any expert proof to rebut that valuation. Therefore, an evidentiary hearing was not required because there were no factual issues to resolve. The plaintiff proved the value and was awarded a deficiency judgment.