(WHO CARES ABOUT) ENTERING THE FORECLOSURE JUDGMENT

By: Bruce J. Bergman*

Minutiae you say; technical dross just a part of the continuing morass that the mortgage foreclosure action has become in these enlightened modern times. In this regard, it may be hard to tell if foreclosures are games of inches or miles. We opt for the view that a multiplicity of small things still add up to big things in the end, very meaningful for the parties to foreclosure actions.

So as a practical matter here, the subject issue can impact upon the progress of a foreclosure case or the legitimacy of a foreclosure sale. *Then* it certainly matters to all. To the extent the cases are not unanimous on the subject only adds to the depth of the issue.

As most attorneys in this arena will recognize, in New York, the judgment of foreclosure and sale (let's just call it the judgment) is the last paper which issues from the court in the course of a foreclosure and it is the document which finally authorizes that a foreclosure sale can be conducted. Sometimes it takes many months to obtain (as in New York City) but once the judge signs it, the case is *almost* on its way. First, though, the clerk of the court must enter it, which means officially log it in and file it. Although that act is

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itself simple and ministerial, not infrequently it consumes days, weeks or more to be accomplished. On occasion the court even loses the judgment and then the problem is much worse than just wondering when it will be entered.

In any event, a copy of the judgment is not always available to counsel until *after* it is entered and a sale cannot be scheduled until at least a copy of the judgment is received. (The judgment contains information needed to set the sale, i.e., the name of the referee and the newspaper designated for the legal advertising.) In much of upstate New York, though, the court makes the judgment available to the attorney with responsibility then upon counsel to convey it to the clerk for entry. So, mundane, yes, unimportant, no.

It is conceivable that an unentered judgment can be obtained (counsel vigorously pursues that which pleases foreclosure plaintiffs) and the foreclosure action could proceed even though there was no entry. While moving the case along is desirable, the lack of entry might in theory still be a defect. Could borrowers -- especially those crafty ones bent on delay as a lifetime ambition -- pounce on that as a fatal error?

One case says yes, two others say no, not an issue.

This leads ultimately to the realm of excusing errors which do not visit prejudice upon any party – an ever more important theme on the foreclosure battlefield because the aggregation of minutiae is becoming, or more accurately has become,

crushing.

But first, the focused decisional law. The two helpful cases are: *Chase Home Mort. Corporation v. Marti*, 279 A.D.2d 270, 719 N.Y.S.2d 14 (1st Dept. 2001); *Matrix Capital Bank v. Maniar*, 2A.D.3d 182, 769 N.Y.S.2d 516 (1st Dept. 2003)]. In the first, under what the court referred to as "unique circumstances" (although it wasn't clear what those were) failure to enter the judgment was ruled a correctable defect because the borrower suffered no cognizable prejudice. This really is heartening to the foreclosing parties. Ministerial glitches like this are inevitable from time to time. And it is difficult to imagine that a defendant could be damaged by failure to perform this mechanical task. That being so, the courts should not seek to vacate a foreclosure for what in the end is a mistake without consequence.

Three years later in the second cited case, the ruling was that failure to enter the judgment was correctable dating back to its signing because the only infirmity was the ministerial act of having the clerk stamp it.

The unfortunate case –later in time to the two Appellate Division Rulings -- was one which vacated a foreclosure sale for the very reason that the judgment was not entered. [*Korakis v. Carlton Boiler Repair*, N.Y.L.J., June 23, 2004, at 18, col. 1, (Sup. Ct., N.Y. Co., Goodman, J.]. The theory was that prejudice did result because the sale then extinguished the borrower's right to redeem. Yes, but all foreclosure sales do just that[1],

and there are a number of other procedural reasons why it can be asserted that the court erred here. Moreover, it seems pointedly contrary to the noted Appellate Division rulings[2] which is likely the primary quarrel with its efficacy.

That a foreclosure judgment may not have been entered seems a benign event, prejudicing no one, as the Appellate Division has opined. And there is more than ample authority[3] – applying specifically to mortgage foreclosure actions – that a non-prejudicial error is an irregularity which permits a court to uphold a foreclosure. That is to say, a controlling maxim is that minor irregularities which do not create prejudice are not a basis for reversal.[4]

In the end here is the possible dilemma faced by attorneys and their foreclosing plaintiff clients. If a judgment is obtained before it is entered, must the plaintiff wait to set a sale? Days and weeks count, so there is a compelling impetus to go forward and not wait for entry. If that understandable path is chosen, and in the unlikely event the sale is attacked if the judgment was not entered by the time of the sale, will the sale survive? Analysis of the cases suggests that the answer is “yes”. The one case to the contrary was at the trial court level and did not mention that the higher Appellate Division had previously ruled that neglect to enter the judgment was not fatal. And later another department of the Appellate Division confirmed that neglect to enter a judgment did not effect the validity of a foreclosure sale.

Have we set up a straw man in presenting this analysis? Perhaps. After all, the Appellate Division has twice spoken on the subject. The lone naysayer is from a lower court and appears to be an aberrant ruling. But it is submitted that practitioners can confirm prevailing wisdom as the posture requiring a judgment to be entered before a foreclosure sale is scheduled. The thrust of this presentation is to suggest that there ought not to be temerity on this point.

None of this is to say that some disgruntled party might not attack a sale for want of entry of the judgment, but case law seems to advise that they would be wrong.

1. See, *inter alia, Nutt v. Cuming,* 155 N.Y. 309, 49 N.E. 880 (1898) *Chase Manhattan Mtge. Corporation v. Harper,* 54 A.D.3d 987, 865 N.Y.S.2d 127 (2d Dept. 2008); *Option One Mtge. Corp. v. Corman,* 39 A.D.3d 724, 835 N.Y.S.2d 608 (2d Dept. 2007); *Norwest Mortgage, Inc. v. Brown*, 35 A.D.3d 682, 830 N.Y.S.2d 158 (2d Dept. 2006); *Banque Arafe Et International D'Investissement v. One Times Square Limited Partnership*, 223 A.D.2d 384, 636 N.Y.S.2d 299 (1st Dept. 1996), and more extensive discussion, with case citation, at 1 *Bergman on New York Mortgage Foreclosures* §2.21[3], LexisNexis Matthew Bender (rev. 2012).

2. *Chase Home Mort. Corporation v. Marti,* 279 A.D.2d 270, 719 N.Y.S.2d 14 (1st Dept. 2001); *Matrix Capital Bank v. Maniar,* 2 A.D.3d 182, 769 N.Y.S.2d 516 (1st Dept. 2003*).*

3. See *Bergman on New York Mortgage Foreclosures* §2.06A[2], LexisNexis Matthew Bender (rev. 2012) for an expansive review of this subject with examples of mistakes in foreclosure actions held insufficient to upset the case.

4. *Vincent v. Gazella*, 59 A.D.3d 775, 875 N.Y.S.2d 275 (3d Dept. 2009), *citing Citibank v. Schimkus*, 231 A.D.2d 486, 487, 647 N.Y.S.2d 252 (1996), *appeal dismissed*, 89 N.Y.2d 981, 656 N.Y.S.2d 739, 678 N.E.2d 1355 (1997); *Reconstruction Fin. Corp. v. Finch*, 8 A.D.2d 869, 870, 186 N.Y.S.2d 956 (1959).