THE BUGABOO OF FIDUCIARY DUTY

By: Bruce J. Bergman

Included in the omnipresent efforts of borrowers – and others – to stave off mortgage foreclosure is the charge of fiduciary duty breached; in the vernacular: "the lender owed me a special duty and so had no right to (you fill in the variety of protest). But overwhelmingly it is not so. The general rule is that the legal relationship between a lender and borrower is one of debtor and creditor, not a fiduciary relationship.[1] This applies as well to the role of lender and guarantor.[2]

As always, there can be nuance to the formulation and any number of fact patterns illuminate the point. For an expanded review, attention is invited to 1 *Bergman on New York Mortgage Foreclosures*

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§1.01[1][a], LexisNexis Matthew Bender (rev. 2011). What particularly catches our interest, though, is a recent case[3] which arises out of the turmoil of a home equity theft scenario and tried to ensnare an innocent lender. The desperation of these times suggests that the issue may not be as obscure as a quick glance might indicate.

There, the plaintiff (an 82 year old widow no less) said she was scammed in 2005 by her granddaughter Smith who obtained a deed to her house by fraud and forgery. Of course as soon as Smith grabbed the title she secured a $175,000 mortgage from Eastern. It will be no surprise that Smith defaulted on that mortgage (naturally $175,000 richer in the process) which precipitated a mortgage foreclosure action by Eastern. But Smith was not yet done. In 2007 she obtained a $270,000 mortgage from Zoumas to satisfy the Eastern mortgage (and apparently supply additional funds).

Although Eastern quietly went on its way (the foreclosure was concluded and it was paid) its exposure was not over. The plaintiff sued Smith, Eastern and Zoumas to quiet title (she wanted her title

back) and for actual and punitive damages. As to Eastern in particular – our focus as the lender – Smith alleged that in 2006 Eastern was notified of the fraud but nonetheless allowed its loan to be satisfied in 2007. Zoumas joined the fray and charged fraud and negligence upon Eastern's part, pursuing indemnification and contribution.

Eastern the lender escapes liability. (It beat plaintiff Smith for lack of service within 120 days, but that was an accident of the case and not the point of this exploration.)

Regarding the claim of Zoumas, the new lender who satisfied the mortgage with its loan, indemnification and contribution which might have been available was barred because no breach of duty from Eastern to them could be shown[4] – precisely the important principle.

Buttressing that holding was the conclusion that Eastern owed no duty of care to the new lenders – and there was no evidence of affirmative misrepresentations[5]. The final relevant conclusion was

that Eastern had no fiduciary duty or confidential relationship with the new lender and had no duty to disclose material information.

So the no fiduciary relationship between lender and borrower does indeed extend to others.

Endnotes

1. See, *inter alia*, *Debroshi v. Bank of America,* 65 A.D.3d 882, 886 N.Y.S.2d 106 (1st Dept. 2009).

2. *Niazi v. JP Morgan Chase Bank*, 66 A.D.3d 438, 886 N.Y.S.2d 404 (1st Dept. 2009).

3. *Seldin v. Smith*, 76 A.D.3d 623, 907 N.Y.S. 2d 36 (2d Dept. 2010).

4. *Selden v. Smith*, *supra* at note 3, citing *Raquet v. Braun*, 90 N.Y.2d 177, 659 N.Y.S.2d 237, 681 N.E.2d 404; *Ruddy v. Lexington Ins. Co*., 40 A.D.3d 733, 734, 835 N.Y.S.2d 440

5. *Selden v. Smith*, *supra* at note 3, citing, *inter alia, Industrial Risk Insurers v. Ernst*, 224 A.D.2d 389, 390, 638 N.Y.S.2d 109.

6. *Selden v. Smith*, *supra* at note 3, citing *inter alia*, *Dembeck v. 220 Cent Park S., LLC,* 33 A.D.3d 491, 823 N.Y.S.2d 45.