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“EMC’ Clear on Right to Redeem After Sale”

By Joel David Sharrow

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Bruce Bergman’s article, “Redemption,” (NYLJ, Sept. 24, page 5), among other things, postulated the possibility that *Ameriquest Mtg. Co. v. Bellon*, 29 AD 3d 612 (2nd Dept. 2006), might conceivably be construable as implying that a court may extend a redemption date beyond the foreclosure sale; and, *EMC Mortgage Corp. v. Bobb*, 296 AD2d 476 (2d Dept. 2002), either misstates the law as to the timing of the cut-off of a mortgagor’s redemption rights or “represents imprecise definitions or interpretation of procedure, ...merely an oddity and not an assault on precedent.” I respectfully disagree.

Insofar as *Ameriquest* is concerned; Mr. Bergman’s article correctly notes that “the redemption actually occurred prior to the sale.” That fact, in my view, is dispositive. Upon redemption, there no longer was a mortgage lien on the realty so that the foreclosure action was rendered moot and academic. The referee, albeit not yet aware of the redemption, lacked authority to do anything. Consequently, the by-then unauthorized sale was void ab initio and no rights to the property, the mortgage or the redeemer’s rights, could be affected by such void sale.

The *EMC* case, where the mortgagor filed several bankruptcy petitions to repeatedly stay scheduled sales, expressly recognizes that the sale cuts off redemption rights. There, a post-sale CPLR 2104 agreement between the parties, which only recognized that the parties contractually limitedly extended the date for redemption, was a voluntary bestowal by the lender of an “indulgence” to a late redemption; and such a contract legally could not be over-ridden by a court, under the guise of contract interpretation, so as to further extend the redemption period. *EMC* does not hold expressly or otherwise that a court may extend redemption rights after the sale.

More importantly, numerous cases have cited *EMC* for the well-settled rule that redemption rights are cut off upon the referee’s sale and a court may not thereafter revive such rights. For example, *Norwest Mortgage Inc. v. Brown*, 35 AD3d 682, 684 (2nd Dep’t 2006), one of the cases discussed in the Redemption article; and more recently, *NYCTL 1996-1 Trust v. Jellerette*, 48 AD3d 769, 770 (2nd Dept. 2008). I submit that the plethora of later Second Department cases have clarified any perceived ambiguity in *EMC*. Those cases recognize that *EMC* stands for the correct legal proposition, to wit: once the referee says “sold” at the auction, the right to redeem permanently has expired.

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