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FORECLOSURE

Attorney's Letter Can Stall Foreclosure

Notices of appearance from a borrower's attorney can hold up the foreclosure process.

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It never gets easier for lenders and servicers. There always seems to be some new roadblock to stretch out the foreclosure case in a judicial state like New York. While the topic of when a borrower's attorney introduces a letter into a foreclosure case may appear to be rather mundane, it is actually a pointedly important subject - certainly in judicial foreclosure jurisdictions.

A nuance of the mortgage foreclosure case in New York, for example, is that if no defendant asks for copies of the papers at each stage of the case, then the necessary plateaus which must be achieved (such as appointment of the referee and the obtaining of the judgment of foreclosure and sale) can be pursued *without* notice to anyone. Pleasingly, that means instead of a motion (each requiring an additional two weeks of notice time) the various orders can be sought without imposing the extra time.

Mechanically, each order is simply submitted to the court with the invitation to sign it as soon as possible. The court only seldom responds that soon, but it tends to be quicker than the notice of motion route.

An unwelcome paper

It should be apparent, then, that if a party interposes a paper which *does* require notice — some variety of appearance — then a measure of delay is added to the foreclosure case and that is typically unwelcome. A defendant can choose to appear in an action either by serving an answer, or at a

lesser level of detainment, a document called a notice of appearance, which is the focus here.

What happens, though, when confused defendants lurch from their own contacts with foreclosing counsel to various lawyers, hoping to find someone who will offer a rescue? That can frequently bring forth various correspondences from the attorneys as they are either considering being engaged or are already engaged by the borrower. Might these sometimes meandering letters be considered as appearance, thereby imposing unwanted (and unexpected) notice obligations?

Well, although an attorney could send a letter and use the words of a notice of appearance in it, it's almost never done that way. Therefore, can it be assumed that there shouldn't be any problem in this situation? Making such an assumption would be wrong!

Room for errors

A new case in New York tells us that there may indeed be room for difficulty, confusion, or as we would put it, error on the part of the courts. In the offending case [*Leader Federal Bank for Savings v. Van Tienhoven*, __A.D.2d__, 692 N.Y.S.2d 258 (4th Dep. 1999)] an attorney just engaged by a borrower after the summons and complaint was served wrote to inform the servicer's counsel of this situation. The letter stated the attorney's request and appreciation for obtaining a copy of the summons and complaint.

The attorney most assuredly did not ask for demanded notice of any other or further proceedings in the foreclosure action. Plaintiff's counsel accordingly did not provide such notice and therefore the judgment of foreclosure and sale was obtained on default and no notice of sale was given to the borrower or his attorney.

When after the sale the borrower refused to leave the premises (what else is new?), an eviction was begun. It was only then that the borrower came forward through his counsel and said that he was entitled to notice of all earlier proceedings in the case, that the attorney's letter was the equivalent of a notice of appearance and that the whole foreclosure was simply no good.

The court didn't agree with the last part and left the judgment intact, but *did* rule that the rather casual letter was the equivalent of a notice of appearance and that the borrower was entitled to notice of sale. Therefore, the remedy was that the sale was vacated.

What all this suggests for the future (in New York and potentially other judicial foreclosure states) is the possibility that foreclosing servicers might need to consider some - or even many - letters from borrowers' attorneys as notices of appearance. Consequently, this will add a number of months to every foreclosure case in which this is encountered - a sobering thought indeed.

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