BERGMAN ON MORTGAGE FORECLOSURES: More Strictness on the 90-Day Notice

By Bruce J. Bergman

From the proverbial time immemorial, there was no requirement of statute or case law that acceleration of the mortgage balance required any notice or warning from the mortgage holder. The widely employed FannieMae/FreddieMac uniform instruments necessitate a 30-day notice to cure as a condition precedent, but that was a matter of contract. By now, lenders, servicers and their counsel are familiar with the mandate of RPAPL §1304 that a 90-day notice must be sent by the lender or servicer as a prerequisite to foreclosure of a home loan. This began in 2008 applying solely to subprime, non-traditional or high-cost home loans. As of February, 2010, this was extended to all home loans.

A recent case joins others and underscores yet again the dismaying strictness in court interpretations of the 90-day notice requirement for New York home loan foreclosures. [*GMAC Mortgage LLC v. Munoz*, 28 Misc.3d 1235 (A), 2010 WL 3583992 (N.Y. Sup.)] (We observe dismay from the viewpoint of lenders; borrowers will be heartened.)

Regarding the action in question, the borrower had defaulted in the spring of 2006 and there was apparently no issue whatsoever about that. The foreclosure was begun in January of 2010, and the mandated settlement conference was held in April, 2010. (So the borrower knew full well that he was in default.) Nothing came of the conference and no issues were raised which might have impeded the progress of the foreclosure. Then the plaintiff applied to have a referee appointed (to thereafter compute and then seek judgment of foreclosure and sale).

But the court denied the application for the referee's appointment and that is the heart of the matter. The plaintiff had identified the loan as non-traditional, thereby requiring the 90-day notice. The complaint appropriately pleaded that the notice had been sent and the time had expired. The court, however, viewed that statement (in a complaint verified by the attorney) as insufficient demonstration that the notice was sent. What the court ruled to be required was evidentiary proof, including an affidavit from one with personal knowledge of compliance as to the type size and content requirements of the notice, together with an affidavit of proper service of the notice by registered or certified mail and by first class mail to the last known address of the borrower. Such proof not having accompanied the application for the order of reference, it was denied.

That the 90-day notice is of any genuine help to a borrower or leads to reinstatements of mortgages, or generally aids the foreclosure process, has never been demonstrated. Because the law requires it, however, then removes debate as to the utility of such notice, it needs to be sent. Here, though, the borrower made no objection about the notice—there was no claim that it was not sent or not received. That the borrower was in default was also manifest. The court nonetheless required as a new prerequisite for the action to proceed absolute proof of compliance with the statutory requirements. A statement in the complaint that it was accomplished was found wanting.

While there is no suggestion here that this court's punctilious demand is irrational, it is another example of the unrelenting burdens of paper work imposed as prerequisites to the progress of a mortgage foreclosure action. Lenders will be bogged down. Defaulting borrowers will be afforded yet more time. Were the borrower here to have denied receipt of the notice, then of course the foreclosing plaintiff would have been compelled to prove compliance. In the absence of that, however, one can question the need for all the extra tasks (which leads to delay and expense).

While this becomes philosophical, that these burdens continue remains a fact, and that this sort of thing would emerge was predictable upon passage of the statute requiring the notice. Lenders have apparently accepted it with equanimity, although this is another sign that mortgage foreclosures in New York—already the lengthiest in the nation—will become ever more difficult and ever more time consuming.

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