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New Foreclosure Statutes In New York Threaten The Process

It is one thing to provide a default notice to a borrower but quite another to provide a path to abuse the system.

by Bruce J. Bergman

Mortgage servicing in New York has always been a challenge. Now it will be worse - all as a result of a new omnibus foreclosure law effective as of Dec. 20. First, we will discuss some perspective to assess the coming perils, and then, a specific pinpointing of the dangers will follow.

The mortgage crisis spawned considerable borrower-friendly legislation throughout the country, and New York was certainly in the forefront of offering protection. Legislation in 2010 imposed major requirements regarding foreclosure notices, settlement conferences and lender maintenance obligations. These were serious, extensive and laden with unintended consequences and contributed mightily to slowing down the already protracted foreclosure process in the Empire State.

Now come further extensive requirements, a line-by-line review of which would be dry, dismaying for servicers and far too lengthy a recitation for these pages. To the extent, however, that the new statutes are particularly dangerous or anomalous, attention to these aspects will be the focus.

Judgment and sale

Amendment regarding the foreclosure sale seeks to accelerate the foreclosure process by requiring that the sale be held within 90 days of the date of the judgment. Aside from this presupposing that it is lenders that are volitionally delaying scheduling sales (a point strongly disputed and simply not so), this fails to take into account the realities of the foreclosure process. First, a judgment is not available to a foreclosing plaintiff until it is entered. Depending upon the venue, this can be weeks or months after the date of the judgment. This immediately can render the 90-day sale date requirement unachievable. With or without a delay, there are any number of common circumstances that can intercept the ability to promptly set a foreclosure sale (which requires at the outset 28 days' worth of advertising).

The referee's schedule may prohibit a rapid sale; he could be on trial or on vacation and he might not schedule the date for months after it is preferred. Or, the referee may become ill or die, be appointed or elected judge, or take some other public office that precludes his service as a referee. This then requires a motion to amend the judgment to appoint a different referee.

Finally, a borrower's order to show cause or bankruptcy filing can readily stay any ability to schedule a sale.

In sum, although speeding to a sale is welcome, and is overwhelmingly already the desire of plaintiffs, imposing a requirement to hold the sale within 90 days of the date of the judgment will create confusion and foment assaults on sales, which would not have a reasonable or legitimate basis.

Conveyance restraint

Addition to the conveyance provision requires the plaintiff, if the successful bidder at the sale, to list the property for sale within 180 days of execution of the deed or within 90 days of completion of construction or renovation. That it is constitutional for a law to tell prop-

erty owners that they are bound to sell property, and within a certain period, is perplexing. Although application to a court for an extension for a good cause shown is available, it still imposes more litigation and does not ensure a favorable result.

If the borrower or tenant is holding over, the property is typically not salable until an eviction has been completed. Eviction proceedings can be delayed interminably and render compliance with the 180-day requirement impossible in many instances.

90-day notice requirements: impending notice issuance

The former language requiring a 90-day notice - strong enough, it would seem - provided that "if this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you." This certainly was clear enough; the default had to be resolved. The new language, however, allows commencement of legal action only "if you have not taken any actions to resolve this matter within 90 days." But "any action to resolve the matter" is not defined. Why couldn't a borrower assert that action to resolve is fulfilled by an application for a new mortgage with some other lender, or by seeking a mortgage modification with the current lender, or by sending a letter stating that a resolution is sought, or by a correspondence seeking to make partial payments of the arrears for a while, or any number of other undefinable actions? Any of these might be deemed as "seeking resolution," and if they were, the ability to begin a foreclosure would not exist. How many of these borrower attempts serving as a bar to mortgage enforcement could be invoked - and their duration - is an imponderable. It is easy to conclude, though, that an impediment to foreclosure has just emerged.

On the 89th day, the borrower could cure the default - and then immediately redefault two or three days later.

Directing borrowers to remain

Fulsome though the 90-day notice has always been, a further warning has been added by the new legislation. The key portion reads as follows:

"You have the right to remain in your home until you receive a court order telling you to leave the property. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave."

It is apparent that the solons feared that borrowers assumed that initiation of a foreclosure action was perceived by them as meaning immediate departure from the premises was required. But the language is likely to be interpreted by a layperson as an invitation - a direction, really - to continue to remain at the home until an actual order of eviction is served. This will surely increase the number of holdovers and the resultant time and expense of post-foreclosure eviction proceedings - a patent burden and hardly welcome.

Repeated notices

The statute had always been affirmative in sagely providing that only one 90-day notice was required to be sent within a 12-month period - obviously to avoid the constant, repeated sending of notices. The new provision, however, adds the distinction that the one notice need only be sent for the "same delinquency." Where that was leading is underscored by the language immediately following the passage that states, "Should a borrower cure a delinquency but re-default in the same twelve month period, the lender shall provide a new notice pursuant to this section."

An obvious ploy of which wily borrowers will avail themselves is brought to light. If, for example, there is a default on Jan. 1, the 90-day notice (which probably would not be sent for a month or two, in any event) will be delivered. On the 89th day, the borrower could cure the default - and then immediately redefault two or three days later. With

the new mandate, the mortgage holder will be obliged to send a newly minted default notice. The borrower could respond, again, by awaiting the 89th day, when there would be a cure, followed seriatim by eternal defaults. This would ensure that the borrower could always remain at least three months in arrears on the mortgage obligation - all in contravention of the mortgage contract.

Dismayingly, that is what this surely will allow. It is one thing to provide a notice to a borrower about his or her default but quite another to provide a path to abuse the system. The foreclosing party would be paralyzed and stuck with a constant delinquency, powerless to pursue a remedy.

Notice in another language

Finally, there is this new provision to the 90-day notice that states the following: "For any borrower known to have limited English proficiency, the notice required by subdivision one of this section shall be in the borrower's native language (or a language in which the borrower is proficient), provided that the language is one of the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York, based on United States census data. The department of financial services shall post the notice required by subdivision one of this section on its website in the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York, based on the U.S. census data."

This may be seen as carrying political correctness beyond reasonable limits. The 90-day notice may have to be in some language other than English. How, though, is the mortgage holder to know whether any borrower has "limited English proficiency"? How limited does it have to be? How will that be determined? Who would determine it?

Presumably, this assessment would have to be made by someone present at the time of the closing (even though some closings proceed by mail). Who would have that ability and how accurate the contemplation might be are unclear. Assuming one can articulate how limited is limited, and determine what the native language is, such information would have to be preserved in the mortgage file. And if the mortgage were to be assigned (as is common, multiple times), the information would need to be preserved throughout the assignment process - something glaringly difficult as a practical matter.

For borrowers intent on gaming the system, massive new avenues are opened by the expanded version of the 90-day notice provision.

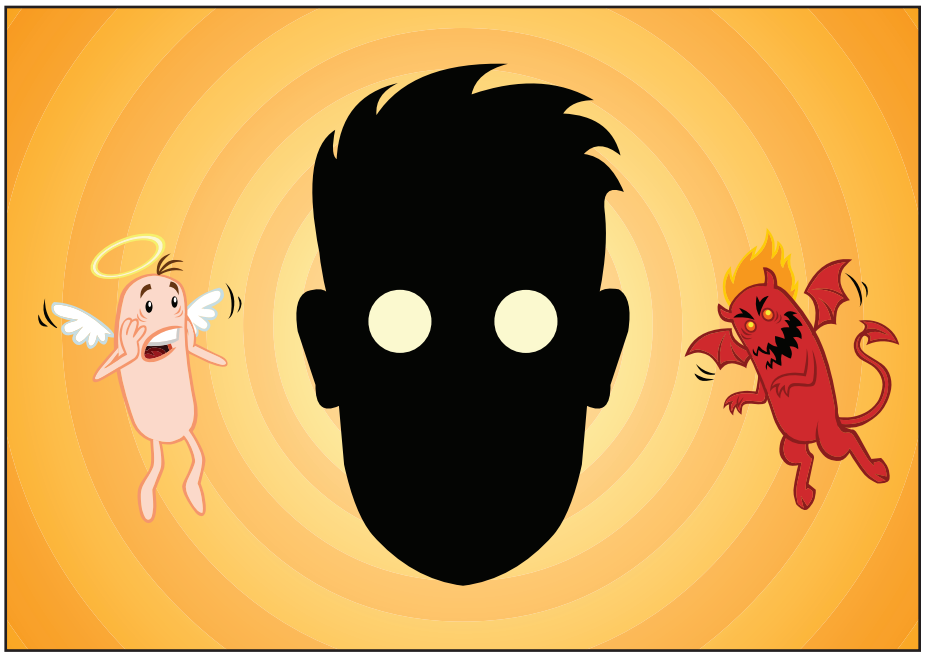
Settlement conferences

In this arduous process, the existing statute has been bereft of meaningful detail in defining good-faith bargaining, delineating the types of settlements contemplated, setting forth penalties for lack of good faith and some mechanical aspects of the procedure. These are remedied in part by the legislation adopting and refining case law interpretations of the categories. The result is that the procedures are burdensome and the penalties severe; lenders and servicers will need to be familiar with the lengthy minutiae.

Four particular areas, though, emerge for comment where peril or incongruities lurk.

If a lender denies a modification, the statute now requires that the document be presented explaining the reasons for the denial and the data input fields and values used in the net present evaluation. Further, if the modification was denied because of investor restriction, the plaintiff must bring the documentary evidence providing the basis for such a denial - for example, items such as pooling and servicing agreements. Although later on, the new provision codifies what the law requires (i.e., failure to make or accept an offer is not sufficient to negate good faith) as a practical matter, the need to explain a rejection of settlement is likely to lead to considerable pressure from hearing officers or judges upon plaintiffs to change their positions. This is not necessarily a flaw in the drafting of the statute but a reflection of the realities of the process.

The foreclosing plaintiff is now required to file a notice of discontinuance and vacatur of the lis pendens within 90 days after any settlement agreement or modification is fully executed. But if a settlement is in the form of a forbearance agreement, which will not be completed or fulfilled within 90 days,



then a plaintiff will be unable to comply with this provision. Again, as a practical matter, many settlements take the form of such forbearance agreements, and this then could result in having to force plaintiffs into violation.

Although there is no good reason why a defendant in a foreclosure action should be treated any differently than any other defendant in serving a timely answer, the new standard permits a defendant who appears at a settlement conference but who did not file an answer to be presumed to have a reasonable excuse for the default. That defendant is, therefore, permitted to serve and file an answer without waiving any substantive defenses within 30 days of initial appearance at the settlement conference. That answer, otherwise woefully late, vacates any default. This further delay imposed upon the process may be unfortunate.

During the settlement process, statute now specifically requires that any motion made by the plaintiff (or defendant) must be held in abeyance during the settlement process. The main problem here (aside from impeding plaintiffs from disposing of a borrower's answer) is the ill-advised prohibition against moving regarding other defendants. For example, if a junior mortgagee has interposed a defense but has ignored a discovery request, the plaintiff should be permitted to pursue preclusion against that defendant even though the settlement process is ongoing; other such defendants are, after all, not the borrower. Inhibiting actions against other defendants tends only to further prolong the foreclosure case, often substantially.

New maintenance obligation

Because a mortgage holder possesses only a lien on the mortgaged premises and, therefore, is not an owner, requiring this party to maintain the premises creates an unpredictable and unexpected expenditure beyond what any mortgage contract contemplates. Moreover, it imposes tort liability upon such a lender because it foists care, custody and control into its hands. Therefore, the existing requirement that a foreclosing party assumes maintenance of the premises if vacant and abandoned, or populated by tenants, as of the judgment stage is already offensive and parlous.

The new requirement now creates a maintenance obligation at the inception of an action. Applying to vacant and abandoned one-to-four family residential properties and to a first-lien mortgage holder (excluding state or federally chartered banks, savings banks, savings and loan associations, or credit unions), within 90 days of the borrower's delinquency, the lender or servicer is bound to complete an exterior inspection of the property to determine occupancy throughout the delinquency of the loan, conducting an exterior inspection every 25 to 35 days at different times of the day - all certainly a new, expensive and unexpected burden that a mortgage would not otherwise elicit.

When the lender or servicer has a reasonable basis to believe that the residential property is indeed vacant and abandoned, the servicer must secure and maintain the property. Within seven days of determining such a condition, the servicer must also post a notice on an easily accessible part of the property, reasonably visible to a borrower or occupant, and continue to monitor the property to ensure that the notice remains posted. This obligation to maintain continues until the property has been sold or transferred to a new owner. This later provision, however, is unclear because it is not apparent whether this means the obligation ends if the owner of the property conveys title (which would not necessarily change anything) or whether it means the moment when someone has bid at a foreclosure sale. Servicers will be confused, and the provision is well worthy of clarification.

Should a foreclosing party violate the maintenance requirement, a hearing officer or the court can adjudicate violations, and a civil penalty of up to $500.00 per day per property for each day the violation persists may be imposed. Still further, any municipality shall have a cause of action in any court against the lender or assignee of the mortgage loan servicer to recover costs incurred as a result of maintaining property that presumably the servicer was required to maintain.

A possible savings provision appears, but it, too, is ambiguous. The provision is that a servicer that peacefully enters a vacant and abandoned property so as to maintain it pursuant to this section "shall be immune from liability when such servicer is making reasonable efforts to comply with the statute." Whether that means that a servicer cannot be sued for trespass (a likely interpretation) or whether this is a blanket way to avoid tort liability devolving to a foreclosing party is too vague to render an opinion.

Although the new section appropriately requires that any local law inconsistent with these provisions cannot be imposed, precisely where there will

be such inconsistencies will not always be so obvious - and the fact is that local government entities do have such statutes.

If you try to square the requirements of the new provision as to determining vacant property and responsibility for that with the existing section, which kicks in at a different time and does not have the same standards, it is difficult to harmonize them.

Expedited procedure for vacant and abandoned property

Because, from a lender's viewpoint, imposition of property maintenance shortly after a borrower becomes delinquent is so draconian, it is welcome that the omnibus bill adds a new section offering an accelerated process to reach a judgment of foreclosure and sale when the property is vacant or abandoned. The essence of the accelerated procedure is good; an order to show cause is made after service is complete to demonstrate the vacancy (not as certain or effortless as the statute implies), asking the court to compute the sum due without necessity of appointing a referee and to issue the judgment of foreclosure and sale. But there are some infirmities or undue burdens in the procedure.

A registry of vacant or abandoned properties is created through the Department of Financial Services, and the foreclosing party, within 21 business days of learning or when it should have learned that the property was vacant and abandoned, must submit this information to the department - another bureaucratic millstone. Moreover, it can be an open question as to when a lender had determined that a property was vacant.

The application - the motion or order to show cause - cannot be made until the defendant's time to answer has expired. If "the Defendant's" means the borrower, it is one thing, but it is quite another if it means all of the other defendants in the action. This is unclear and needs remediation. Then, too, a defendant - particularly one who has abandoned the premises - may be very difficult to find, so the time consumed in serving such a defendant can be surprisingly lengthy, thereby diminishing the presumed rapidity of the alternative process.

Although a notice of motion or order to show cause inherently needs to be served, the procedure here is that the court must promptly send a notice to the defendant of the plaintiff's notice of motion or order to show cause. How quickly or accurately the court will do this might be an open question and could impede the process.

Although delineation of all of the proof a plaintiff must present upon the order to show cause is extensive, the court may still require the plaintiff to appear and provide testimony in support of the application. Although this is hardly irrational, it is apparent that such a procedure can cause delays, with hearing dates far in the future and the possible difficulty of producing witnesses.

Although the court is directed to make a written finding as soon as practicable as to whether the plaintiff has proved his or her case, court delays in any number of venues within the state are well recognized. In some places, then, rendering of the judgment of foreclosure and sale will be far less swift than the procedure might have intended.

Even though the property may be clearly and actually abandoned, provision is made that no judgment of foreclosure and sale can be entered if the mortgagor - or any other defendant - has filed an answer, appearance or other written objection that is not withdrawn. First, filing an appearance is not an objection. Next, this gives carte blanche to any defendant to interpose an answer and thereby torpedo the accelerated procedure.

In sum, regarding an abandoned or vacant property, the foreclosing party will be compelled to spend money and assume liability for a period of time greater than the statute would have predicted.

The new foreclosure dictates in the Empire State are extensive and warrant careful attention from servicers so they can comply. There are more than a few aspects that are unclear, so compliance, or an understanding of what the language means, will be elusive. In addition, some of the perceived protections for borrowers will contribute to further delays in the foreclosure process either by outright extension or by providing ammunition to borrowers bent on dilatory tactics. Assuredly too, pursuing a foreclosure in New York will become more expensive. SM

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