Bergman on Mortgage Foreclosures

Peril and Ambiguities in the New Foreclosure Statutes

By Bruce J. Bergman

While the new omnibus foreclosure law (L.2010, ch.73), effective December 20, 2016, can be presented as needed protection for borrowers and citizens generally, it can also be seen as dangerous for any foreclosing lender, adding expense, delay and confusion. Although very lengthy and detailed—any thorough analysis vastly exceeds space available here—some questionable aspects of the categories will be addressed.

Judgment and Sale

Amendment regarding the foreclosure sale [RPAPL § 1351(1)] seeks to accelerate the process, requiring the sale be held within 90 days of the *date* of the judgment. Aside from presupposing that it is lenders who volitionally delay sales (a point strongly disputed) this fails to account for realities of foreclosure process. First, a judgment is not even available to a foreclosing plaintiff until *entered*. Depending upon the venue, this can be weeks or months after the *date* of the judgment.

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Then, referees may not be readily available because they are on trial, on vacation, have become ill or died, or were appointed or elected a judge or to some public office that precludes service as a referee; some of these events require a motion to amend the judgment to appoint a different referee, increasing time.

Settlement discussions can postpone scheduling a sale, so a rapid sale date will tend to chill that effort. Finally, a borrower's order to show cause or bankruptcy filing can readily stay any ability to set a sale. Too often, 90 days just won't work.

Conveyance Restraint

Addition to the conveyance provision [RPAPL § 1353(1)] requires the plaintiff, if the successful bidder at the foreclosure sale, to list the property for resale within 180 days of execution of the deed or within 90 days of completion of construction or renovation. How it is constitutional for a law to tell property owners that they are they are bound to sell property, and within a certain period, is perplexing.

If the borrower or tenant is holding over, the property is typically not salable until an eviction has been completed, and such proceedings can be delayed interminably.

If sale prices are depressed, the plaintiff may wish to refrain from selling quickly to avoid suffering an even greater loss. Indeed, renting the property may be the better alternative for some period and denying that right is both inappropriate and potentially damaging.

90-Day Notice Requirements

The new language 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. A borrower could assert that action to resolve has been fulfilled, i.e., application for a new mortgage, seeking a mortgage modification, or sending a letter stating that a resolution is sought, or a correspondence seeking to make partial payments of the arrears. If any of these might be deemed as "seeking resolution," the ability to begin a foreclosure would not exist. How many of these borrower attempts deemed a bar to mortgage enforcement could be invoked—and their duration—are imponderables. It is easy to conclude, though, that a challenging impediment to foreclosure has just emerged.

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Repeated notices will now be a problem. The new provision adds the distinction that the one notice need only be sent for the "same delinquency" and provides that:

> Should a borrower cure a delinquency but redefault in the same twelve month period, the lender shall provide a new notice pursuant to this section....

An obvious ploy of wily borrowers is manifest. They could default, cure on the 89th day, be entitled to a new

notice and do this eternally. This would assure that the borrower could always remain at least three months in arrears on the mortgage obligation, all in contravention of the mortgage contract.

"That defendant is therefore permitted to serve and file an answer, without waiving any substantive defenses within thirty days of initial appearance at the settlement conference."

The obligation to provide the notice in some other language if the borrower had limited English proficiency is also deeply troubling. How is the mortgage holder to know whether any borrower has "limited English proficiency"? How limited would it have to be, how would that be determined and who would determine it are problematic. Presumably this assessment would have to be made by someone present at the time of the closing (even though some closings proceed by mail). Assuming one can articulate how limited is limited, and determine what the native language is, such information would have to be preserved eternally in the mortgage file, to be used at some future date if a default eventuated necessitating a 90-day notice. 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. One can readily assess how borrowers could game the system here.

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Settlement Conferences

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 yet further delay imposed upon the process may be unfortunate.

During the settlement process, the statute now specifically requires that any motion made by plaintiff (or defendant) must be held in abeyance during the settlement process. The main problem here (aside from impeding plaintiffs in disposing of a borrower's answer) is the ill-advised prohibition against moving regarding *other* defendants. There are multitudinous examples of time-consuming procedures plaintiffs need to pursue when other defendants may answer or assail the action. Prohibiting efficient efforts against those others only further delays the foreclosure.

New Maintenance Obligation

Because a mortgage holder possesses only a *lien* on the mortgaged premises, and therefore is not an owner, requiring such 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 at the judgment stage if vacant and abandoned, or populated by tenants, already is offensive and parlous.

"Finally, it remains imprecise as to the relationship between this new statute and the existing section which imposes maintenance liability as of the foreclosure judgment stage."

The new requirement creates a maintenance obligation at the *inception* of an action, even earlier if the vacancy or abandonment is or could have been determined. 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.

A possible savings provision appears, but it too is ambiguous. The provision is that a servicer who 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.

While 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 governments do have such statutes.

"And, a defendant—particularly one who has abandoned the premises—may be very difficult to find so that the time consumed in serving such a defendant can be surprisingly lengthy."

Finally, it remains imprecise as to the relationship between this new statute and the existing section which imposes maintenance liability as of the foreclosure judgment stage.

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 RPAPL § 1309 and § 1310 offering an accelerated process to reach a judgment of foreclosure and sale where 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 the necessity of appointing a referee, and to issue the judgment of foreclosure and sale. But there are some perhaps unrecognized infirmities or undue burdens in the procedure:

- It can be an open question as to when a lender can have determined that a property was vacant. This is sometimes not so precise.

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- The application cannot be made until the defendant's time to answer shall have expired. If "the Defendant's" means the borrower it is one thing, quite another if it means all the other defendants in the action. This is unclear and needs remediation. And, a defendant—particularly one who has abandoned the premises—may be very difficult to find so that the time consumed in serving such a defendant can be surprisingly lengthy.
- A property cannot be deemed vacant for, among other reasons, that an "action to quiet title" exists. While on its face this seems reasonable, an action to quiet title can take many forms; for example, a junior lender might be trying to direct recordation of a copy of a mortgage when an original was lost. This should have nothing to do with prohibiting a foreclosure on a vacant property and yet the blanket term "action to quiet title" will have such an effect regardless of the actual nature of that action.
- Although delineation of all 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. While this is hardly irrational, it is apparent that such a procedure can cause delays with hearing dates far in the future, together with the possible difficulty of producing witnesses.
- While the court is directed to make a written finding as soon as practicable as to whether the plaintiff has proved its case, court delays in many venues within the state are well recognized. In some counties, rendering of the judgment of foreclosure and sale will be far less swift than the procedure might have intended.

"In sum as to 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."

- 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 torpedo the accelerated procedure merely by serving an answer.

In sum as to 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.

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