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Peril and Ambiguities in the New Foreclosure Statutes

By Bruce J. Bergman

While the new omnibus foreclosure law (L.2010, ch.73), effective Dec. 20, 2016, can be presented as needed protection for borrowers and citizens generally, it adds expense, delay and confusion for any foreclosing lender. The analysis below highlights some of the questionable aspects of the new statute.

JUDGMENT AND SALE

The statute amends RPAPL § 1351(1) to require that foreclosure 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, even when the plaintiff has diligently sought entry of the judgment.

90-DAY NOTICE REQUIREMENTS

The new language amends the language in the notice a lender must send to the borrower at least 90 days before commencing an action against the borrower. As amended, RPAPL 1304 requires the notice to inform the borrower that the lender may commencef legal action only "if you [the borrower] 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 have 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 statute has introduced a challenging impediment to foreclosure.

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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 re-default in the same twelve month period, the lender shall provide a new notice pursuant to this section … .

An obvious ploy for wily borrowers is manifest. They could default, cure on the 89th day and 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.

The statute also requires the lender to provide notice to the borrower in the borrower's native language if the borrower is "known to have limited English proficiency." The statute does not indicate whether the mortgage holder must have actual knowledge of limited English proficiency, or how limited the proficiency must be. Moreover, even if the statute is read to require "actual knowledge," would actual knowledge by an original mortgagee be imputed to assignees? If so, information about the borrower's proficiency would need to be preserved throughout the assignment process, something glaringly difficult as a practical matter.

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 statute amends CPLR 3408 to permit 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. This yet further delay imposed upon the process may be unfortunate.

During the settlement process, CPLR 3408 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

RPAPL 1308, added by the new bill, requires most first-mortgage servicers to secure and maintain residential real property when the servicer has reason to believe that the property is "vacant and abandoned." 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.

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 latter provision, however, is unclear because it is not apparent whether this means the obligation ends if the mortgagor conveys title, or whether it means the moment when someone has bid at a foreclosure sale.

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

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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 or whether this is a blanket way to avoid tort liability devolving to a foreclosing party is too vague to render an opinion.

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 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.

First, 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.

Next, 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.

Third, 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.

Finally, 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.

Conclusion

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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DEVELOPMENT

Landowner May Not Convert Conforming Use Into Nonconforming Use

7-Eleven v. Town of Huntington
NYLJ 6/10/16, p. 32, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In landowner's hybrid article 78 proceeding/declaratory judgment action challenging denial of a site plan application, landowner appealed from Supreme Court's denial of the petition. The Appellate Division affirmed, holding that landowner's prior use was a conforming use, landowner was not entitled to convert the property to a non-conforming use.

Landowner sought to demolish an existing restaurant and to build a convenience store on the premises. The town's zoning code authorizes a landowner to change an existing nonconforming use to a use that the zoning board of appeals (ZBA) determines is less intensive and more in character with uses permitted in the district. Landowner invoked that provision to seek approval for its site plan because the existing restaurant did not conform to various dimensional zoning regulations in the district. The ZBA, however, contended that the code provision was inapplicable because restaurant use was permitted in the district, and therefore the restaurant use was not a nonconforming use within the meaning of the code. Supreme Court agreed.

In affirming, the Appellate Division emphasized that landowner's proposed construction of the code provision was inconsistent with the aim of restricting and eventually eliminating nonconforming uses. The court emphasized that landowner's construction would permit conversion of conforming uses into nonconforming uses, which would appear to generate unreasonable or absurd consequences.

Commercial Campground Conformed to Zoning Ordinance

Cooney v. Town of Wilmington
2016 WL 3190065, 6/9/16
AppDiv, Third Dept.
(Opinion by Aarons, J.)

In neighbors' article 78 proceeding to review a determination by the zoning board of appeals (ZBA) that landowner was not in violation of the zoning code, neighbors appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that landowner's use was a valid nonconforming use and that, in any event, landowner had complied with the zoning code.

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