Some Not So Desultory Observations on Extra Notice Requirements in Real Estate Litigation*

Bruce J. Bergman, Esq.**
East Meadow, New York

Editor's Note: Although submitted independently of Robert Abraham's article, appearing elsewhere in this issue, Bruce Bergman's article points up some of the problems with which attorneys handling foreclosures under New York's statutory framework must deal.

Somehow, the practice of law is becoming more arduous. To be sure, most attorneys very much respect and probably welcome the demanding nature of our professional calling. But it seems that some measure of the gentility, civility and congeniality is ever so inexorably fading into fond memory. Parties are more litigious and strident. Court delays and backlogs are an increasingly unforgiving plague on efficiency. Litigation and transactions are burdened by still more mandates, more forms, more fees, more taxes and in general, veteran practitioners might opine that former times were indeed the proverbial good old days.

Although emotions of this type are not so easily measured empirically, the seemingly minor impositions of CPLR §3215 are an example of, if not so much the legislature running amuck, the lawmakers groping to extend protection where its reverse consequences are perhaps unfortunate. To not so immediately state the point, the accumulation of ostensibly innocuous extra steps can, in the aggregate, have a deleterious effect upon the efficacy of the legal process.

First, some words about more particular perspectives. In a real estate litigation practice, specifically including mortgage foreclosure, there is a likelihood that counsel will be pursuing actions in some volume. Large institutional clients can, of course, generate a substantial number of cases. Whatever detainment a statutory or judicial imposition may create for one or a few cases may hardly be worthy of comment. Across a broad spectrum of matters, though, what otherwise might be minor can readily become major. That is the problem.

It is submitted for consideration that there are two offending provisions of CPLR § 3215, each involving default judgments. Addressing them in perhaps inverse order of annoyance, but the order in which they appear in the statute, the first is the requirement of CPLR § 3215(f) providing that if more than one year has elapsed since the default of any defendant, that defendant is entitled to notice of application for judgment.

It should not be a non sequitur to suggest that a default is a default. A defendant is no more or less in default one year after the fact than ten or eleven months after the occurrence. Rhetorically, what precisely is the utility of this mandate? Indeed, it will be no surprise to mortgage foreclosure and other real estate litigators that the actions often do not proceed to judgment until more than a year after defaults have ensued. The filing of a bankruptcy, protracted settlement negotiations, contentious litigation and the inevitable court delays are but a few of the reasons why more than a few cases move at a glacial pace.

The practical result of the cited requirement is that a judgment that might have been obtained *ex parte* must now suffer the delay of proceeding by notice of motion. Even if the judgment would have been sought on notice in any event, searching the file to identify defendants whose defaults have crossed the magical one year line presents still another task. Concededly, again, in a handful of cases this objection is of little magnitude — although still arguably unnecessary. But over scores or hundreds of cases, it does have meaning which translates into increasing the already burdensome cost of litigation.

What may even be worse, there are some judges, and some downstate counties, that demand that every judgment in a mortgage foreclosure case be on notice to **all** defendants, inclusive of those whose defaults are of less than a year's duration! Any practitioner unaware of which counties and which individual judges outside those venues entreat the "notice to all" proviso will find a judgment otherwise in full compliance with the CPLR nevertheless rejected. Then, more cost and more delay emerges.

Moving on through § 3215, (3)(i) provides the next point of contention:

(Continued on Page 33)

(Continued from Page 32)

> "When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation, an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend 'personal and confidential' and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt.
>
> * * *"

Not satisfied with protecting only a natural person, effective January 1, 1991, this extra notice obligation was extended by CPLR § 3215(4)(i) to a domestic or authorized foreign corporation when served pursuant to BCL § 306(b). A careful examination of this addition is even more perplexing. BCL § 306(2) provides that:

> "An additional service of the summons *may* be made pursuant to paragraph four of subdivision (f) of section thirty-two hundred fifteen of the Civil Practice Law and Rules." (emphasis supplied)

This extra notice imperative, clearly a costly one in the aggregate, is nonetheless understandable in the arena of consumer transactions. In actuality, the legislation was designed to shield the hapless from what was viewed as all too prevalent sewer service. And an examination of the bill jacket underscores the intent to insulate individuals from the unscrupulous in debt collection cases.[1]

Should the otherwise well-founded statute have application to mortgage foreclosure cases? Not only does the bill jacket **suggest** to the contrary, the statute itself **provides** to the contrary. CPLR § 3215(3)(iii) states in relevant part:

> "This requirement shall not apply to. . .any summary proceeding to recover possession of real property or to actions affecting title to real property."[2]

Such language should banish the extra notice obligation in most real property litigation. It **does**, of course, except that once again, some counties and some judges simply refuse to adhere to it. They want the extra notice demonstrated by submitted affidavit as a prerequisite to issuance of a judgment, even though title to real property is indeed at issue.

Some judges and clerks insist upon this without identifying a reason. Others, albeit an apparent minority, found the requirement upon the possibility that a deficiency judgment may be sought after the foreclosure sale is completed. A foreclosure, however, assuredly remains an action affecting title to real property, notwithstanding that deficiency liability **may** exist and **may** be pursued. Some mortgage transactions have deficiency liability, while others do not. In any event, liability for the deficiency has always been an inherent, integral part of the mortgage foreclosure equation, and it can be presumed that the Legislature understood that when it promulgated the lucid exception of CPLR § 3215(3)(iii). There are no modifiers in the statutory language removing the exception where a deficiency judgment motion may be authorized.

Thus, we encounter another arena where what some might categorize as chimeras of clerks or various judges — although well intended — create cost and detainment in the litigation process. Commerce and law — inextricably intertwined — too often suffer the slings and arrows of outrageous fortune. Never was that more true than in today's deeply troubled economy.

Ridding the entire system of every aberration and impediment is a worthy, but surely unachievable goal. Nevertheless, might anyone deign to begin with CPLR § 3215?

Endnotes

1. Office of Court Administration letter of June 17, 1977, to the Governor's Counsel; Letter of The Association of the Bar of the City of New York on June 21, 1977, disapproving amendment; Report of the Special Committee on Consumer Affairs (date unavailable); Memorandum by the Executive Director of the Law Revision Commission relating to Assembly Bill No. 5394 (undated; received in bill jacket June 13, 1977); Letter of Federal Trade Commission, New York Regional Office of June 13, 1977, to Governor's Counsel, supplemented by letter of June 20, 1977; Commercial Lawyers Conference letter of May 3, 1977, to Senate and Assembly Codes Committee.
2. CPLR §3215(4)(iii) mirrors this provision verbatim as to corporate defendants.

****Bruce J. Bergman, Esq. is a partner in the law firm of Certilman Balin Adler & Hyman in East Meadow and an adjunct associate professor of real estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is a member of the American College of Real Estate Lawyers, past chair of the Real Property Law Committee of the Nassau County Bar Association and is the author of *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (1990).**