90-Day Notice For Suit On Note Revisited: Court Of Appeals Needed

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By **Bruce J. Bergman** | May 29, 2018 at 01:10 PM

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Contemplating practicalities first, there can assuredly be compelling reasons to pursue the note, among them that the mortgaged premises have already been lost, for example via senior mortgage foreclosure [*Stein* v. *Blatte*, 118 Misc. 2d 633, 461 N.Y.S.2d 189 (Sup. Ct. 1983)] or through tax lien foreclosure [*Lehman* v. *Roseanne* Investors Corp., 106 A.D.2d 617, 483 N.Y.S.2d 106 (2d Dept. 1984)]; expected defenses will unduly delay the foreclosure, less so the action on the debt; the obligor or guarantor has readily reachable assets and is not in a position to file a bankruptcy; the secured property is worth substantially less than the debt. [For further review of this aspect, see *1 Bergman on New York Mortgage Foreclosures* §7.13[1], LexisNexis Matthew Bender (rev. 2017).]

By this time, mortgage lenders and their counsel will be very familiar with the obligation to send a 90-day notice in any home loan mortgage foreclosure action. (This is pursuant to RPAPL §1304, but applies only in the case of a defined "home loan" -which means it does not apply in commercial cases.) In any event, it is overwhelmingly common in the pursuit of most foreclosures and is clearly a prerequisite to the action; it cannot be skipped. For those mortgage lenders and servicers who simply send these automatically—and haven't looked at the notice lately—the heading reads: "YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY." Furthermore, it specifically refers to the mortgage as a "home loan" and states again that there is a "risk of losing your home." This actuality is buttressed by the glaring exception to the 90-day requirement if the borrower no longer occupies the residence as a principal dwelling. [RPAPL §1304(3)].

The statute provides in relevant part (again, RPAPL §1304[1]) that "...with regard to a home loan, at least ninety days before a lender...commences legal action against the borrower, including mortgage foreclosure...", going on to say that the 90-day notice must be sent. So the language requires the notice for "legal action against the borrower" which would appear to include mortgage foreclosure. But does it encompass a suit on a *note*? That is the nub of the dilemma.

This additionally contributes to questioning applicability of the notice mandate to an action on the note when the statute seems so directed to preserving ownership of the principal residence.

Election of Remedies

Although upon examination it might seem obvious, a suit on the mortgage note is a monetary action, at law, which pursues a money judgment. Mortgage foreclosure is an action at equity and the resultant judgment is not a money judgment. These actions are separate and generally (with exceptions) cannot even be pursued at the same time lest that path run afoul of the election of remedies statute—RPAPL §1301. (In some states this is referred to as the one action rule.) The compelling point is that the actions are distinct and one can certainly wonder whether the drafters of the notice provision were familiar with the arcane aspects of the election of remedies.

"Any" Action?

So, did the statute really mean that *any* legal action against a borrower where a home loan existed required a 90-day notice? We think not. We believe that this never occurred to the Legislature and that the language is just imprecise. Indeed, the notice—as highlighted earlier—focuses upon losing one's home. When a judgment ensues after a suit on the note, the one asset the lender can *not* execute against is the home because when a judgment is obtained in an action at law, the judgment creditor may not then levy on the mortgaged premises. [CPLR §5330(a); *Wyoming County Bank & Trust Co.* v. *Kiley*, 75 A.D.2d 477, 430 N.Y.S.2d 900 (4th Dept. 1980)]. Under the CPLR the right to execute the judgment is limited to other real and personal property of the judgment debtor.

Further regarding the relationship between a money judgment and the mortgaged property, CPLR 5236(b) directs that mortgaged real property shall not be sold by execution founded upon a judgment for all or part of the mortgaged debt. In sum, in an action on a note, the home is immune from attack. Therefore, a major disconnect exists between what the 90-day notice says and a requirement to employ it when there is a suit on the note.

But then, this is a borrower-friendly statute and it was easy to predict that when the issue would first be addressed a court would lean towards protecting borrowers given the imprecise language. That is exactly what happened in the initial trial court review of the subject. [See *Cadlerock Joint Venture, L.P. v. Callendar,* 41 Misc.3d 903, 973 N.Y.S.2d 539 (Sup. Ct. Kings Co. 2014)]

When the point arose in the Second Department (*Deutsche Bank Natl. Trust Co. v. Webster,* supra.) the theme continued: "any litigation" must have included a suit on the note. The Fourth Department got it right, however (*M&T Bank v. Benjamin,* supra): an action on a note is not an action for the foreclosure of a mortgage, thereby not capable of invoking RPAPL §1304's 90-day notice edict. This implied, but

did not explicitly state, that the "any action" reference simply could have no application to suit on the note which did not place ownership of the mortgaged home in jeopardy.

Conclusion

So it is now up to the Court of Appeals. Whether a conundrum such as this will ever be pursued that far is problematic. The proverbial path of least resistance might typically induce lenders to send the notice, believing loss of the 90-days is less onerous then litigating the issue all the way to New York's highest court. But until it is decided there, cases in different departments will impose different standards—pointedly confusing and unfortunate.

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