NEW FORECLOSURE STATUTES IN NEW YORK – A REVIEW OF THE PERILS

*By Bruce J. Bergman

Unsatisfied with borrower and community protections afforded by the multiple statutory amendments of recent years, the legislature passed a new omnibus foreclosure law (L. 2010, ch 73), effective December 20, 2016. Our review of the changed 90-day notice mandates entitled "New 90-Day Notice Mandates A Perilous Morass Fore Lenders" appeared in these pages previously (N.Y.L.J., Sept. 4, 2016, at 5 col. 6). Now addressed are the multitudinous issues created by changes addressed to judgment and sale, conveyance impositions, settlement conferences, maintenance obligations and the expedited procedure for vacant and abandoned properties.

JUDGMENT AND SALE

Amendment regarding the foreclosure sale [RPAPL §1351(1)] seeks to accelerate the foreclosure process by requiring the sale be held within ninety days of the date of the judgment. Aside from this presupposing that it is lenders who are volitionally delay scheduling sales (a point strongly disputed, and simply not so) this fails to take into account the realities of 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 ninety day sale date requirement unachievable. With or without a delay, there are any number of quotidian circumstances which can intercept the ability to promptly set a foreclosure sale (which requires at the outset 28 days' worth of advertising).

*Bruce J. Bergman is a partner with Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is the author of "Bergman on New York Mortgage Foreclosures" (four vols., LexisNexis Matthew Bender, rev. 2016)

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, or may be appointed or elected a judge, or takes some other public office which precludes his service as a referee. This then requires a motion to amend the judgment to appoint a different referee.

The newspaper in which the advertisement is to be placed goes out of business; it happens, and then requires a motion to amend the judgment which consumes time. Then too, settlement discussions can postpone the setting of a sale so that a rapid sale date will tend to chill post-judgment settlement discussions. Finally, a borrower's order to show cause or bankruptcy filing can readily stay any ability to schedule a sale.

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

CONVEYANCE RESTRAINT

Addition to the conveyance provision [RPAPL §1353(1)] requires the plaintiff, if the successful bidder at the sale, to list the property for sale (or other occupancy) within 180 days of execution of the deed or within ninety 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, or rent it, and within a certain period, is perplexing. While application to a court for an extension for a good cause shown is available, it still imposes more litigation, does not assure a favorable result and still fails to erase the unconstitutional fiat to sell or rent the real estate. It also neglects to consider other compelling roadblocks to either a quick sale or lease.

If the borrower or tenant is holding over, the property is typically neither salable nor rentable until an eviction has been completed. Eviction proceedings can be delayed interminably and render compliance with the 180 day requirement impossible in many instances.

If sale prices in that area have been depressed, the plaintiff may wish to refrain from selling quickly to avoid suffering an even greater loss. They should be able to wait until the market improves. While renting the property is an available alternative, that path suffers similar infirmities to the goal of a rapid sale.

SETTLEMENT CONFERENCES

In this arduous process, the existing statute had 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, the penalties severe; lenders and servicers will need to be familiar with the lengthy minutia.

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. While 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 position. 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 ninety 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 ninety 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 portends forcing 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 thirty 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, 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. 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; such other defendants are, after all, not the borrower. Inhibiting actions against other defendants tends only to further protract the foreclosure case, often substantially. Why this might be helpful is elusive.

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, singularly 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 already is offensive and parlous.

The new requirement now creates a maintenance obligation at the *inception* of an action, actually even earlier. 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 ninety days of the borrower's delinquency the lender or servicer is bound to complete an exterior inspection of the property to determine occupancy, thereafter throughout the delinquency of the loan conducting an exterior inspection every 25-35 days at different times of the day – all certainly a new, expensive and unexpected burden that a mortgage would not otherwise elicit.

Where the lender or servicer then 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 assure 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 may be imposed of up to $500.00 per day per property for each day the violation persists. 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 which presumably the servicer was required to maintain.

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 government entities do have such statutes.

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 well intentioned; 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 and undue burdens in the procedure.

- A registry of vacant or abandoned properties is created through the Department of Financial Services and the foreclosing party must within

twenty-one business days of learning or when it should have learned that the property was vacant and abandoned, submit this information to the department – another bureaucratic millstone. Moreover, 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.

- The application – the motion or order to show cause – cannot be made until the defendant's time to answer shall have expired. If "the Defendant's" means the borrower it is one thing, but quite another if it means all 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 that the time consumed in serving such a defendant can be surprisingly lengthy, thereby diminishing the presumed rapidity of the alternative process.

- The order to show cause is required to state to the borrower that "you have the right to stay in your property until a court orders you to leave". It can be opined that this will encourage a borrower to remain not only until a foreclosure sale is held but until an eviction order is carried out. At the very least it will appear to laypeople that they are free to stay unless there is an

absolute *order* to depart. While this cavil is of little consequence if the property is in fact abandoned, it does become operative if a defendant answers (see *infra*.) or if someone re-occupies the property.

- While 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 (after all, where is the borrower?) might be an open question and could impede the process.

- 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 and 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 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 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.

CONCLUSION

The new foreclosure dictates in the Empire State are extensive and merit careful attention from servicers so they can comply. There are more than a few aspects which are unclear, so that 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.