RESOLVED AT LAST – NO 90-DAY NOTICE A YEAR LATER

*By Bruce J. Bergman

If a mortgage holder in a home loan case sends a statutorily mandated 90-day notice, but then refrains (volitionally or otherwise) from commencing the mortgage foreclosure action for more than a year thereafter, must it suffer the detainment of sending a new 90-day notice? A recent case in the Appellate Division finally banishes what had been a thorny and eventually time consuming lender dilemma by answering the question in the negative.[1]

It is no mystery that the sources of delay in New York mortgage foreclosure actions are legion. One meaningful aspect, though, may be rather obscure, albeit well known to mortgage lenders, servicers and their counsel.

This seeming arcane minutiae has been a significant reality since 2010 which foreclosing mortgagees were compelled to confront – with uncertainty. What all this means in the real world, and its relationship to amended statutes effective December 20, 2016 follows.

The Mandate and the Problem

RPAPL § 1304(1) requires that where the mortgage falls within the definition of a home loan,[2] a certain ninety-day notice must be sent to the borrower before (and per case law as a condition precedent to) the commencement of a mortgage foreclosure action.[3]

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The aspect of the ninety-day imperative which invites analysis is RPAPL § 1304(4), providing that:

> "The notice and the ninety day period required by subdivision one of this section need only be provided once in a twelve month period to the same borrower in connection with the same loan."

What this meant (under the statute prior to amendment effective December 20, 2016) was immediately apparent at the inception to experienced practitioners; it represented a welcome avoidance by the legislature of abusive borrower shell games. When the ninety-day notice is sent, should the borrower cure the default, as in remitting the sums in arrears for example, then of course the mortgage is reinstated. If, however, a month thereafter the borrower defaults again, the mortgage holder need not send a new ninety-day notice as a prerequisite to foreclosure. (Only one notice is required within a year.) This then averts the bizarre exercise of a default followed by a ninety-day hiatus, followed by cure, then another notice with concomitant three-month default, all repeated *ad nauseam*. Such a scenario would effectively change the payment requirements of the mortgage loan and permit borrowers bent on delay to constantly, indeed interminably, postpone payment obligations.

With this understanding and interpretation, any subsequent default within a year would not have elicited a notice obligation. If, however, the borrower has cured the default, and more than a year had then passed, then it is simply a new situation and a notice would be required, for the new default.

This is quite different, though, from saying that if a year has gone by and the borrower has ignored the notice, the mortgage holder is obliged to send the notice yet again in order to initiate a foreclosure. The statute does not say that, although it readily could have so provided had that been the intent of the legislature. In other words, therefore, a ninety-day notice never cured does not lose its efficacy merely with the passage of time.

Meanwhile, case law analysis of the sundry foreclosure statutory amendments of recent years have generally been interpreted broadly, leaning towards constructions helpful to borrowers; certainly lenders and servicers have perceived the result with that perspective. Accordingly, regarding concern about the one year portion of the notice, there has been a prevailing cautious view in the wind that if a foreclosure was not begun with one year of the notice a new action would be barred absent the sending and expiration of an additional 90-day notice letter. Indeed, the Department of Financial Services took this very position, stating the following:

> "RPAPL §1304(4) states that a 90-day pre-foreclosure notice must be given to the borrower only once in a 12-month period. Consequently, if the borrower *re-defaults within 12 months* of the mailing of the *first* 90-day pre-foreclosure notice, the lender or servicer may choose to, but is not required to, send another 90-day pre-foreclosure notice prior to filing a list pendens and commencing a foreclosure action *within that 12-month period. After the expiration of the 12-month period, a new 90-day pre-foreclosure notice must be mailed to the borrower prior to filing a lis pendens and commencing a foreclosure action even if the re-default occurs within the 12-month period..."*

While it might be surmised that mortgage holders would surely institute their home loan foreclosures the moment the ninety days expired, there were any number of circumstances which impeded such punctuality, a few among them: (a) difficulties in obtaining information to support the now cancelled attorney affirmation required by Administrative Order 548/10, as amended by AO 431/11 or by the new certificate of merit obligation of CPLR § 3012-b; (b) governmental imposition of rules or suits as to the foreclosure process; (c) compelling pressures, political, public relations and others to settle or compromise mortgage defaults.

There resulted then the not uncommon confluence of a mortgage holder addressing initiation of a foreclosure action more than a year after having sent the ninety-day notice with a timorous approach to the 90-day issue. Were later court rulings (it had not yet been decided) to insist upon a second notice, any action in the netherworld until the issue might be clarified were exposed to dismissal no matter how much time the case had consumed, banished to start from the beginning. This was an untenable possible result.

Lenders opted for caution and suffered loss of yet another ninety days.

No more. In the new case, the ninety day notice was dated April 15, 2011. The foreclosure was not begun until January 2014, obviously far more than a year later. The borrower argued, based on the statute, that the notice had expired one year after it was sent. Here is where the Second Department confronted the issue and, as noted,

resolved it. It found that the language concerning providing a notice once in a twelve month period stood for the proposition that where there were multiple defaults during that time, only one notice was required. In addition, however, it ruled that

> "The statutory language does not state that the action must be commenced within 12 months for the RPAPL § 1304 notice. Thus, contrary to the defendant's contention the plaintiff did not fail to comply with the statute by sending RPAPL § 1304 notice within 12 months prior to the commencement of the action."

Issue solved.

Relationship To New Statute

Readers aware of the new amended foreclosure statutes in New York may wonder if this resolution still applies. The answer is yes. As of December 20, 2016, the first part of RPAPL § 1304(4) survives – that is the need for but one 90-day notice within a twelve month period to the same borrower on the same loan, to which is added only the words "and same delinquency". But the new language *does* empower the offending borrower to employ a delay tactic in providing 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."

Thus, a borrower will be free to default, receive a 90-day notice, cure the default just before expiration of the 90 day period, default anew, receive a new notice and default again, all in perpetuity, thereby always remaining three months behind on the mortgage. Why the legislature saw the wisdom in this is perplexing indeed, but it does not affect the instance of a 90-day notice sent followed by no cure, followed by initiation

of the action more than a year later. That aspect remains, and, as construed by the Second Department, precludes a need for a second notice after a year – for an uncured default.

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[1] *Deutsche Bank Natl. Trust Co. v. Webster,* 142 A.D.3d 636, 37 N.Y.S.3d 283 (2d Dept. 2016).
[2] Defined in RPAPL § 1304(5).
[3] The type of litigation requiring the notice is somewhat broader but is not relevant to this review.