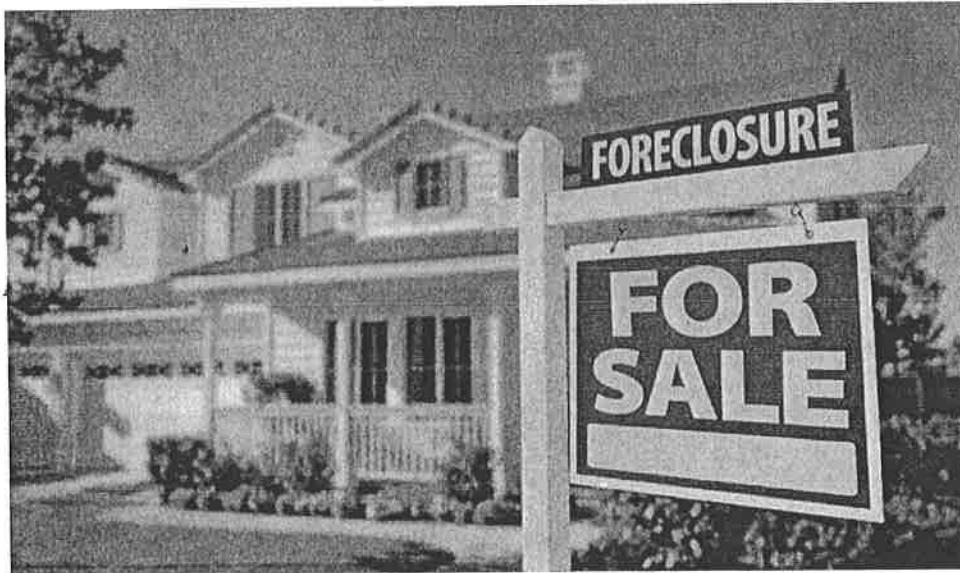


# Sale on Older Foreclosure Judgment To Be Held Within 90 Days?

In his Foreclosure Litigation column, Bruce Bergman discusses the timing issue surrounding a foreclosing plaintiff proceeding to sale and concludes: "It appears that a pre-amendment foreclosure judgment does not require a foreclosure sale within 90 days. While an uncertain or timorous plaintiff might err on the side of caution and seek s an order to avoid any chance of contention, such appears to be unnecessary and wasteful of time and expense."

By **Bruce J. Bergman** | May 28, 2019 at 01:45 PM



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Although surprising to many, unlike money judgments, a judgment of foreclosure and sale (which is not a money judgment [FN1]) always had an eternal life. (For a more complete explanation, see "The Consequences of Sitting on a Foreclosure Judgment," NYLJ, May 13, 2015, at 5, col. 2.) While there are reasons why a foreclosing plaintiff would usually wish to proceed to sale with some dispatch after obtaining the judgment of foreclosure and sale, there are any number of circumstances (pursuit of settlement being one of them) under which the plaintiff

would refrain. And for the very reason that the efficacy of the judgment had no termination date, there was historically no obligation to set the sale at any precise moment (other than applicable publication requirements).

That one might be incredulous at the apparently endless life of a foreclosure judgment is confirmed by a decision where a foreclosure judgment, vintage 2002, was being assaulted in 2015 with the argument that it was inefficacious for want of renewal. On this point, the court ruled that its research revealed no applicable law limiting the period within which a foreclosing plaintiff may sell the mortgaged property after entry of the judgment of foreclosure and sale. (*Bank of New York as Trustee Under the Pooling and Servicing Agreement Series 1999-Fv. Odzer*, 2996/02, NYLJ 1202715494627, at 1 (Sup., Na., Decided Jan. 5, 2015.))

And this is a meaningful point: the foreclosure judgment goes on and on, except as it might be affected by legislation circa 2016.

### **New Statute and Issues**

Effective as of Dec. 20, 2016, however, RPAPL §1351 was amended to mandate that

The judgment shall direct that the mortgaged premises...be sold...*within ninety days of the date of the judgment.* (emphasis supplied)

This created immediate burdens.

Aside from this presupposing that it is lenders who volitionally delay scheduling sales (a point strongly disputed, and typically not so), this fails to take into account the realities of the 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 90-day sale date requirement unachievable regardless of the plaintiff's dedication to proceeding apace. With or without 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).

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 services as a referee. This then requires a motion—the attendant time—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 settling 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 (with a stay) or bankruptcy filing can readily stay any ability to schedule a sale.

In sum, while speeding to a sale may be welcome, and overwhelmingly already the desire of plaintiffs, imposing a requirement to hold a sale within 90 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.

### **What About Pre-Amendment Judgments?**

Experience suggests prevailing wisdom accepts that whenever a judgment becomes stale—some time 90 days after signing or entry—court permission in some form is needed to efficaciously conduct a foreclosure sale. Indeed, court clerks (where involved) in some venues will not accept the sale without further court blessing. Recalling the language of the statute as amended, however, the first part of the mandate is that the judgment must direct the sale within 90 days. Therefore, there is no doubt where a post Dec. 20, 2016 judgment so recites, it would have to be honored. So where the sale pursuant to such judgment was delayed beyond 90 days, a motion to the court to authorize a sale anew pursuant to that judgment would be necessary.

Even for pre-amendment judgments, though, some practitioners had been seeking that same court authority. But the statute does not command that the sale for any foreclosure judgment must be conducted within 90 days. Rather, it decrees that a judgment of foreclosure and sale (as of the effective date of the amendment) must *require* that the sale be held within that constrained period. A judgment *prior* to the amended date, however, was not obliged to contain that recitation and undoubtedly would not have. (Always consult local rules for new or different strictures which may apply.[FN2])

Accordingly, this statute does not by its terms provide that these older judgments necessitate a sale within 90 days. In this regard, the general rule for retroactive application of a statute is that statutes are construed only as prospective, unless the language of the statute expressly or by necessary implication requires that it be given a retroactive construction. [*Coffman v. Coffman*, 68 A.D.2d 181, 400 N.Y.S.2d 833 (2d Dept. 1977)]. While remedial statutes will constitute an exception to the general rule about retroactivity, that would apply only if the statute does not impair vested rights. Rendering a judgment ineffectual would seem to do that very thing. In any event, remedial statutes are defined as those “designed to correct imperfections in prior law, by generally giving relief to the aggrieved party.” [*Coffman v. Coffman*, *id.*].

Consulting the statute with care, and authority regarding retroactivity, it appears that a pre-amendment foreclosure judgment does not require a foreclosure sale within 90 days. While an uncertain or timorous plaintiff might err on the side of caution and seek such an order to avoid any chance of contention, such appears to be unnecessary and wasteful of time and expense.

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#### ENDNOTES:

1. *Citibank v. Cambel*, 119 A.D.2d 720, 501 N.Y.S.2d 133 (2d Dept. 1986); *Wyoming County Bank & Trust Co. v. Kiley*, 75 A.D.2d 477, 430 N.Y.S.2d 900 (4<sup>th</sup> Dept. 1980); *In Re Ellerstein*, 105 B.R. 214 (W.D.N.Y. 1989). For further detail see 3 *Bergman on New York Mortgage Foreclosures*, §27.01[2], LexisNexis Matthew Bender (rev. 2018).

2. For example, there is a practical exception contained in a local rule confined to Kings County—Kings County Uniform Civil Term Rules, Part F, Rule 12, which provides: “Notices of Sale may be filed with the Clerk within one year of entry of the Judgment of Foreclosure and Sale. Permission of the court must be obtained for any filings thereafter.” This does not actually mean that a foreclosure judgment expires, just that a sale will not be countenanced in Kings County without further application. In a 2014 case, permission was granted where the delay in conducting the sale was elicited by borrower bankruptcy filings; See, *Rossrock Fund II LP v. Toledo*, 44329/07, NYLJ 1202715494163 at 1 (Sup. Ki., Decided Dec. 23, 2014).