Bergman on Mortgage Foreclosures:

Renewal Motions and Tenant Notices

By Bruce J. Bergman

Renewal Motions – Not So Easy

Underlying the whole mortgage foreclosure process is the invariable actuality that a borrower defaulted in making payments that were due, either installments or the full balance on maturity. (Payment default is, of course, the most common). Yes, sometimes the case is the result of some other variety of default, and on rare occasions there is a genuine issue about whether there was a default at all. But overwhelmingly, the borrower *did* default in remitting payments, so that lender's view of the action is pemeated with the thought that the foreclosure ought to be able to proceed without serious issue or undue delay.

Putting aside for this discussion the reality that foreclosures have so many technical and procedural aspects that proceeding with dispatch is often not so readily available, lenders will typically be dismayed when they are defeated, for example, upon a motion for summary judgment. Recall that this is the stage where the foreclosing party endeavors to dispose of the answer (which the lender will deem baseless); in the meantime, the process is in hiatus until that answer can be banished.

What then is the lender to do? Simply making a successive motion for summary judgment is typically not available (although there are exceptions to that, not especially relevant to this discussion). The other alternatives are either to re-argue or renew.

Re-argument is the posture that the court has misapprehended the law or the facts of the case and, therefore, issued an erroneous decision. This certainly can happen and whether a re-argument motion is worth the effort is something for the lender to review with its counsel.

The other alternative—the focus of this excursion—is the motion to renew. This is certainly one way to bring the issue anew to the court's attention. This, though, leads to the critical thought that it behooves the lender to supply to its counsel at the outset all the relevant information needed for the motion, and counsel should be aware of precisely what that information is so it can be requested, if not initially offered. As a recent case advises yet again in this arena [see *HSBC Bank USA N.A. v. Nemorin*, 167 A.D.3d 855, 90 N.Y.S. 3d 270 (2d Dep't. 2018)], a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the initial determination. In addition, the motion to renew must contain reasonable justification for the failure to present such facts on the prior motion.

Thus, a motion for leave to renew cannot be considered as a second chance readily provided to a party who has not exercised due diligence in the first instance in making the initial factual presentation.

In fact, the trial court lacks discretion to grant renewal where the moving party has omitted reasonable justification for failing to present the new facts on the original motion.

So the message here should be clear. If there was something important that the court needed to grant summary judgment in favor of a foreclosing lender, it needed to be presented upon the motion for summary judgment. Coming forward after having lost the motion with new information that was previously available, will not be a successful path.

Another Issue with the Tenant Notice Requirement in Foreclosures

Among the borrower-friendly legislative acts of the last decade and beyond in New York is a requirement that the foreclosing plaintiff give certain notice information to tenants— even if they are not named in the action and even when their tenancy will not be affected by the foreclosure. It was always recognizable that this would create problems for foreclosing lenders and, of course, it has.

Overview of Requirements

Pursuant to RPAPL § 1303, the foreclosing party in a foreclosure action upon residential real property must provide certain notice as to the tenants' rights to any tenant of a dwelling unit. While the similar notice to a mortgagor is to be served *with* the summons and complaint, notice to the tenant must be delivered within ten days of service of the summons and complaint.

The notice is required to be on its own page in bold, 14-point type, to be printed on colored paper other than the color of the summons and complaint. The title of the notice must be larger, in bold 20-point type.

If the building has less than five units, delivery is to be by certified mail, return receipt requested,and by first class mail to the tenant at the property, if the tenant's identity is known. If the identity is not revealed, the mailing is to be by first class mail addressed to "occupant." Should the building consist of five or more units, the notice must be posted "on the outside of each entrance and exit..."

There is, not surprisingly, more to the statute, but the purpose here is to highlight the essence of the requirements.

Problems for Lenders and New Case Confirmation

A careful examination of the entire statute in detail exposes both ambiguities and myriad problems for lenders to successfully comply. Because the purpose of this excursion is not to delineate all of those, readers who want to have more on this subject are referred to 1 *Bergman on New York Mortgage Foreclosures* § 2.01(3)(a) (Lexis Nexis Matthew Bender, rev. 2019)— a subsection entitled "Practice Tips Regarding Notice to Tenants."

In that section we predicted some years ago that it would be easy for the defaulting owner, or tenants, to remove the posted announcements, then claim that they had never been present. Whether that happened in the recent case to be mentioned or not, the end result was that the lender lost—see *938 St. Nicholas Avenue Lender, LLC v. 936-938 Cliffcrest Housing Development Fund Corporation*, 178 A.D.3d 623, 98 N.Y.S.3d 53 (1st Dep't. 2019). In this case (the foreclosure of an underlying co-op mortgage), various unit owners swore that they had never seen foreclosure notices posted at the building. It is apparent that the plaintiff's process service had submitted an affidavit that the notices *were* posted. Nonetheless, the court found that the denials by the unit owners were sufficient to rebut the process server's affidavit, in turn warranting a traverse hearing—the determination of whether the service (in this case posting) was valid or not.

Here, the finding was that there had not been a posting and that led to *dismissal of the entire complaint* because the plaintiff had failed to establish compliance with the subject statute, RPAPL § 1303. This is certainly a draconian result, setting the whole case back to its very beginning with all the consequential cost and interest accrual. Was the notice actually posted? Well, that is a philosophical question. The court found that it was not. But this exposes one of the problems with the tenant notice requirement. There is always room for denial of compliance by defaulting borrowers or their tenants, which can lead to a battle on that peripheral point alone, which in turn can threaten the integrity of the foreclosure.

This is yet another burden that foreclosing lenders must cope with in New York and whatever value being aware of such requirements affords, they are presented here.

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