# Bergman on Mortgage Foreclosures: A Series on Procedural Defenses

By Bruce J. Bergman

## The Thorny Problem of Proving the Home Loan 90-Day Notice Was Sent

Bruce J. Bergman

Where it is a home loan[1] in default, it is widely recognized that a 90-day notice will be required as a condition of acceleration and foreclosure.

Two recent cases confirm that sending the 90-day notice is a condition precedent to initiate a home loan mortgage foreclosure action and that failure to do so will defeat summary judgment and effectively defeat the case. [See *Citibank, N.A. v. Wood*, 150 A.D.3d 813, 55 N.Y.S.3d 109 (2d Dep't 2017); *Wells Fargo Bank, N.A. v. Trupia*, 150 A.D.3d 1049, 55 N.Y.S.3d 134 (2d Dep't 2017)].

While this is hardly welcome for lenders, it is not new. What is perhaps portentous is the more obscure issue of how to *prove* that the 90-day notice was sent. Each lender failed on that point in the cited cases, and yet another case as well.[2]

In the *Citibank* case the court held that the plaintiff had failed to submit an affidavit of service or any other proof of mailing by the post office showing that it properly served the borrower according to the statute.[3] Rather, the affidavit of an officer referenced supposed tracking numbers stamped on the notice, which was held insufficient to show that the notice was sent in the manner required by the statute because the loan servicer did not provide proof of a standard office mailing procedure and offered no independent proof of the actual mailing.[4]

In the *Wells Fargo* case, the plaintiff submitted an affidavit of an officer stating that she had reviewed the 90-day notice sent to the borrower on a certain date to the last known address by first class mail and certified mail. Annexed to that affidavit was a copy of that notice along with a copy of the certified mail receipt and the certified mail number, but the receipt contained no language indicating that it was issued by the United States Postal Service. The court held that although mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay, here the officer did not claim that she was familiar with the plaintiff's mailing practices and procedures and consequently did not establish proof of standard office practice and procedure designed to ensure that items are properly addressed and mailed.[5] In the end, the plaintiff was simply unable to support the officer's assertion that the notice was mailed to the borrower by first class mail.

In yet another case,[6] an officer averred that he had reviewed the business records maintained in plaintiff's regular course of business relating to the loan and based thereupon he concluded that the 90-day notice was sent in accordance with statute. But this was held unsubstantiated and conclusory, insufficient to establish that the RPAPL § 1304 notice was mailed to the borrower by registered or certified mail and also by first class mail.[7]

All of this readily suggests that foreclosing plaintiff's will need to have procedures in place to ensure that actual proof of a mailing according to the statute can be presented to a court when a borrower claims that the 90-day notice was not sent.

### Endnotes

1. Defined in RPAPL § 1304(6).
2. *Central Mortgage Company v. Abraham*, 150 A.D.3d 961, 55 N.Y.S.3d 336 (2d Dept. 2017).
3. Citing *Aurora Loan Serv., LLC v. Weisblum*, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609.
4. Citing *Citimortgage, Inc. v. Pappas*, 147 A.D.3d 900, 47 N.Y.S.3d 415; *JPMorgan Chase Bank, N.A. v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235; cf. *Flagstar Bank FSB v. Mendoza*, 139 A.D.3d 898, 900, 32 N.Y.S.2d 278.
5. *Citimortgage Inc. v. Pappas*, 147 A.D.3d 900, 901, 47 N.Y.S.3d 415.
6. *Central Mortgage Company v. Abraham*, *supra*, at note 2.
7. *Central Mortgage Company v. Abraham*, *supra*, at note 2, citing RPAPL § 1304(2); *JPMorgan Chase Bank, N.A. v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 285; *Cenlar, FSB v. Weisz*, 136 A.D.3d 855, 856, 25 N.Y.S.3d 308; *Citimortgage, Inc. v. Espinal*, 134 A.D.3d 876, 878-879, 23 N.Y.S.3d 251; *HSBC Mtge. Corp. (USA) v. Gerber*, 100 A.D.3d 966, 967, 955, N.Y.S.2d 131; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 106, 923 N.Y.S.2d 609.

# Failure of Preforeclosure Notice—Again—and What a Mess This All Is

Whether one believes that foreclosing lenders have some particular advantage in the foreclosure case, or whether legislation of recent years has especially empowered borrowers, or whether it is truly a level playing field, there can be no doubt that the path through a New York foreclosure (especially the residential case) is longer and more burdensome than it once was. In short, foreclosing lenders in home loan cases in New York are faced with more than a few roadblocks in the foreclosure process. Prominent among them is the obligation to send a certain 90-day notice (RPAPL § 1304) before acceleration can be declared or a mortgage foreclosure action can be initiated. No matter how egregious and obvious the borrower's default may be, there is no remedy until this notice is sent. Even then, once the commonplace defense of proper notice not having been received is interposed, the burden is then upon the plaintiff to make a showing of prima facie compliance.

*"The court conceded that the mailing of the notice could be proven by documents meeting the requirements of the business exception to the hearsay rule, but the person swearing would have to demonstrate familiarity with the plaintiff's mailing practices and procedures."*

A recent case tells us yet again how difficult it apparently is for the mortgage holder to meet this test. [*Bank of America, N.A.* v. *Wheatley*, 158 A.D.3d 736, 73 N.Y.S.3d 88 (2d Dep't 2018)].

First as to the comment about it all being such a mess (for foreclosing plaintiffs that is), in this case, as in so many, the omnipresent standing defense was raised—and the motion court found it to be a good defense. The plaintiff *did* have standing, however, and so this was reversed on appeal. But the lender had to suffer the time and expense of the initial defeat and the need to even appeal the case. Principles enunciated in the decision elucidating standing are meaningful, but the subject is a much larger one and strays from the main focus here.

Turning to the point actually under discussion, a foreclosing party can demonstrate service of the 1304 predicate notice rather simply by having an affidavit of service for each one. Seeing this reported with regularity, though, it becomes apparent that is not convenient or economical to do. There is an alternative, however, and that is testimony by someone with knowledge of the plaintiff's or servicer's procedures as to how such notices are mailed. Unfortunately, lenders and servicers often run afoul of glitches in presenting this proof. Such is precisely what happened in this case.

Here, having confirmed that service of a 1304 notice is a prerequisite to any foreclosure, and that the burden shifts to the plaintiff to prove the mailing once the borrower submits the defense, the court observed that the plaintiff failed to make the requisite showing. Plaintiff submitted an affidavit of an officer of its servicer together with two copies of the 90-day notice addressed to borrower defendant (as well as proof of filing of the financial statement with the New York State Banking Department—another issue). The court conceded that the mailing of the notice could be proven by documents meeting the requirements of the business exception to the hearsay rule, but the person swearing would have to demonstrate familiarity with the plaintiff's mailing practices and procedures. Having not shown that, the affidavit did not establish proof of standard practice and procedure designed to ensure that items were properly addressed and mailed. In addition, the plaintiff was unable to demonstrate that the notices included a list of five housing counseling agencies as required by the notice provision. Although the servicer's affidavit stated that such a list was included, the copies of the notices submitted merely contained information about contacting a hotline that would provide advice from counseling agencies—but not the list.

Reported cases readily confirm the consistent jousting on this issue: whether the foreclosing plaintiff can avail itself of the business records exception to hearsay. A number of further nuanced decisions can be found at 1 *Bergman on New York Mortgage Foreclosures* § 5.22, LexisNexis Matthew Bender, and if readers encounter the problem, reference there may be helpful.

In sum, the plaintiff somehow managed not to offer proof which meets the standards. The result was that the court found that the required notice was not proven; therefore, the denial of summary judgment by the trial court was affirmed.

At this point the hapless lender will either need to proceed to a trial to prove the mailing, or discontinue the action, serve the notice anew, being certain that its mailing can be proven, to then start the action all over again. To be sure, such a laborious, time-consuming path is most unwelcome to lenders.

# Condo Gets Bank Interest Reduced for Delay

A new case (New York County Supreme Court) relating to delay of a foreclosure action confirms two meaningful principles from the respective viewpoints of a foreclosing lender and a condominium holding a junior common charge lien. [*Citimortgage, Inc. v. Gueye*, 2016 Misc. LEXIS 2316].

Foreclosing parties always need to be aware that undue delay of a foreclosure action on the part of a plaintiff can result in a court reducing or eliminating the accrual of interest commensurate with the delay. This is an equitable judgment call on the part of a court and it typically does not arise unless delay has been considerable and the borrower pursues the issue. Conceptually, though, it is a matter of statute (CPLR 5001) and a substantial amount of case law that in an equity action (a foreclosure is such an action) the court has the authority to reduce or eliminate interest if the foreclosing party has been the source of delay.[1] It is worth emphasizing for the sake of clarity that if the court holds papers for long durations, or it is the borrower who employs dilatory tactics, such is not chargeable to the foreclosing party.

On the other side of this concept is the condominium holding a condominium common charge lien. The (incorrect) prevailing wisdom on the part of many condos is that because their liens are junior to foreclosing *first* mortgage holders, there is no point in prosecuting the condo lien; the bank will take care of it with their own foreclosure. But home loan foreclosure dictates impose considerable delays in the process, which means that a diligent condominium should be able to arrive at a foreclosure sale much faster than a foreclosing first mortgage—hence the suggestion that condos are well advised to indeed prosecute their condominium common charge liens. Further explanation as to why that is so need not be restated here, although those who could benefit from the discussion are invited to consult 4 *Bergman on New York Mortgage Foreclosures* § 36.11 [a], LexisNexis Matthew Bender (rev. 2016).

Whether or not the junior condominium is foreclosing, should the foreclosing bank be consuming undue time in the foreclosure, the condo is obviously suffering thereby. The form of damage is continuously accruing interest which creates a greater debt to the condominium and more money due to the foreclosing lender, which in turn consumes the equity. This leaves less, or no, surplus for the condominium. Accordingly, there is an incentive for the condominium to assault a foreclosing lender to seek reduction of interest where that foreclosing party caused the delay.

That is precisely what happened in the new case. Remarkably, the foreclosing plaintiff consumed *seven years* in prosecuting an unopposed mortgage foreclosure action. As part of that, the mortgage holder waited *three years* to even file an RJI. Faced with this undue protraction, and a cross motion by the condo to eliminate interest for the delay periods, the court did just what the condo asked. It examined each aspect of delay and attributed extinguishment of interest for the appropriate periods. From the foreclosing party's point of view this is unfortunate and unwelcome, although it has to be conceded that the lender brought the consequences upon itself.

From the position of the condominium, it buttresses the weapon that if they choose to allow the bank to bear the burden of foreclosing, but there is delay incurred, interest on that senior obligation can be subject to reduction or elimination.

### Endnote

1. *See* case law and discussion at 1 *Bergman on New York Mortgage Foreclosures* § 2.20[3], LexisNexis Matthew Bender (rev. 2016).

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# Release in Loan Mod Saves Lender—a Salutary Reminder

Here is a not uncommon scenario known to lenders. A once defaulting borrower (or one still in default) sues the lender for violation of the General Business Law Sections 349 and 350 alleging, as the court recited it, that the lender "employed relaxed underwriting standards, reduced documentation requirements, false appraisals, and forgery of borrower income levels for the purpose of consummating unaffordable or high-cost home loans that were destined to fail."

So while the money was indeed loaned to the borrower, the assertion was that the borrower should be entitled to keep the money because the lender never should have made the loan. The borrower lost this one, however, because the lender was sage enough to include in certain documentation a loan repayment agreement and a loan mod—and an effective release—and such is the lesson of this report. [The new case is *Warmhold v. Zagarino*, 2016 N.Y. App Div. LEXIS 7070].

Obviously, loan repayment plan agreements and loan modifications (there were both in this case) are oft-used avenues allowing borrowers to become current and pay off defaulted mortgages. Every lender and attorney has their own forms and there are any number of provisions they contain. But this case reminds that

a release from the borrower of any claims against the lender is both essential and enforceable.

The court confirmed that a release is a contract and its construction is governed by contract law. When there is such a release—again here from the borrower to the lender—this shifts the burden of going forward to the party making a claim to show that there has been fraud, duress or some other fact sufficient to void the release.

In this case, the loan repayment plan agreement and a loan modification agreement, both of which were executed by the borrower, contained releases which by their terms unambiguously barred the very action which this borrower brought. Unable to raise any issue as to invalidly of the releases, those releases controlled and the borrower's claim was dismissed. Chalk one up for a careful lender.

## Short Sale Not a Defense to Foreclosure

Certainly since the financial crisis, short sales have become commonplace, although perhaps a bit less intense of late. Where the property is apparently worth less than the sum due on the mortgage, the borrower might hope to sell for that diminished market value and the lender might be agreeable. But *must* a lender accept a short sale when tendered? Would a borrower even try to assert such a tender as a defense? The respective answers are, not surprisingly, "no" and "yes," as a recent case illustrates. [*U.S. Bank, N.A.* v. *Nava*, 2018 N.Y. Misc. LEXIS 155]. Speeding immediately to the conclusion, the court ruled that the borrowers' desire to proceed with a short sale is not a defense to a foreclosure action and the court cannot force an agreement upon a plaintiff.

This conclusion is not unexpected, although certainly helpful to have had a ruling like this since it is reasonable to expect that borrowers will raise such a defense from time to time. But then, the facts of the case were somewhat unusual and are worthy of recitation, particularly because they add other helpful elements.

Here, the judgment of foreclosure and sale had been obtained on January 30, 2017 but a bankruptcy filing by the borrower made it impossible to conduct the sale within 90 days of the judgment [as required by RPAPL § 1351(1)]. Nonetheless, the foreclosure sale was conducted, albeit beyond the 90 days, and thereafter the plaintiff sought the blessing of the court after the fact by way of an extension for the sale date. The borrowers opposed that motion and claimed that they wanted to complete a short sale. Prior to the foreclosure sale the borrowers had made an offer and a proof of funds but the plaintiff declined to consider it. The borrowers argued that the foreclosure sale was improper because it was late and further that the short sale application would have been considered if the improper sale had not been scheduled.

The court observed, however, that the borrower defendants had been in default in the action, had failed to vacate their default and therefore were not even qualified to seek affirmative relief in the case. As to the late sale, the court pointed out that a court is authorized to extend any time fixed by statute as may be just and upon good cause shown whether such an application for such an extension is made before or after expiration of the time fixed. Finding that the plaintiff had good cause for its delay in setting the sale (after all, the borrowers had filed bankruptcy) and that the borrowers did not demonstrate any prejudice as a result of the delay (indeed the defendants waited a year after entry of judgment of foreclosure and sale to proceed with a short sale) there was just no basis to upset the foreclosure sale.

While the circumstances of this case provided yet other support for the court to deny the short sale proposal as a defense, the basic concept should still apply: that a borrower's hopes to proceed with a short sale is not a defense to a foreclosure.

## Relationship Between Mandatory Conference and the One-Year Default Trap

This sounds too obscure, but hang in there. Have we mentioned before in these columns that nuance and minutiae in the New York foreclosure edits (especially for home loan cases) are a field of mines exploding in the path of foreclosing lenders? Of course we have, but it all continues to surprise nonetheless, although the case reported on here actually solves a problem in exposing one of the perilous areas. [*HSBC Bank, USA, N.A.* v. *Seidner*, 159 A.D.3d 1035, 74 N.Y.S.3d 282 (2d Dep't 2018)].

The issue arises out of the conflict between two major foreclosure mandates: One, to move for a default within one year [CPLR 3215(c)], the other to participate in the settlement process (CPLR 3048). If one dwells

upon the clash between these imperatives, both might not be able to be accommodated.

As to the one-year default obligation, after all defendants have been served in the foreclosure, and if any of them is in default, should a plaintiff fail to take proceedings for entry of a judgment within one year of default a judgment will not be entered. Rather the complaint shall be dismissed as abandoned. This dismissal is mandatory (although there is an exception if the failure to timely seek a default is supported by sufficient cause for the inaction), meaning in actuality both a reasonable excuse for delay and demonstration of meritorious cause of action.

Attorneys for mortgage lenders and servicers will immediately recognize the difficulty of moving for a judgment within one year, the settlement process aside. First there must be an application for an order of reference, then the computation, and only then the motion for judgment. The rescue here is that because application for appointment of a referee is a requirement in a foreclosure and is a prerequisite to a judgment, that is the same as having applied for a judgment so that is not an issue. This does not mean it is not litigated—it is—but lenders win on the point. Case law on this aspect can be worthy of consultation—see 2 *Bergman on New York Mortgage Foreclosures* § 20.02[c], LexisNexis Mathew Bender (rev. 2018).

We turn now, though, to the other mandate, which is that a settlement conference be conducted after process service is complete. This depends upon when the court schedules the conference. Even if that is done with dispatch, there can be reasons for the conferences to be postponed (such as the borrower not having counsel or not having appropriate papers) and lenders can request adjournments as well for various reasons. But then, that a conference is held does not mean repeated meetings will not be needed or directed by the court.

It is readily discernable that the conference process can consume many months, sometimes more than a year. So if the matter is released from the conference part after a year, but a default has not been pursued, the action may be subject to mandatory dismissal for want of a default judgment having been entered. Here is where new case law confirms that this really is not a problem. The ruling was that if a request for judicial intervention in a matter subject to mandatory settlement conference is filed within the one-year deadline needed for the default, the time thereafter to move for the default judgment is *tolled* while settlement conferences are pending.

If it didn't work this way, foreclosing plaintiffs would face an insurmountable imposition, so it probably had to be decided in any event. Happily it was, in a reasonable fashion and wisely taking realities into account.

Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.

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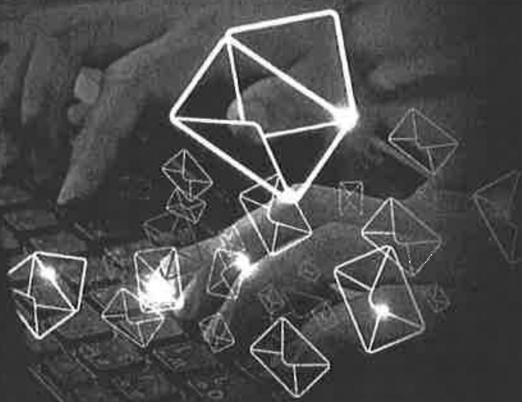

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