FORECLOSURE LITIGATION

Issue of Sua Sponte Dismissals In Foreclosure Actions

By **Bruce J. Bergman**

Mortgage holders are subjected to peril. A not so uncommon event in mortgage foreclosure actions is the dismissal of the case, or the compelling of some measure by the court, *sua sponte*, that is, on its own—without a motion having been made for that relief. Whether it is because emotions can run especially high in the foreclosure arena (typically more so in the residential rather than the commercial case) or because pursuit of a foreclosure is laden with plateaus and ever changing requirements as to those stages, or a combination of the two, the fact is that the volume of reported cases addressing *sua sponte* dismissals is extensive. (Courts also issue other mandates *sua sponte*, but dismissal of the foreclosure action is far more prevalent and for obvious reasons, the more disturbing, at least to plaintiffs.)

Basic Principles

These dismissals emerge at the trial court level and are often appealed where reversals are commonplace; simply reading all the cases tells us this is so. (Only a minority of the cases on the point are recited at the conclusion of this exploration.) In turn, these later holdings present the guiding principles to assess *sua sponte* orders. As a basic underpinning, the power of a court to dismiss a complaint *sua sponte* is to be used sparingly, and even then, only when extraordinary circumstances exist to warrant dismissal. [*Deutsche Bank National Trust Company v. Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 (2d Dept. 2020); *JP Morgan Chase Bank, N.A. v. Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 (2d Dept. 2019); *LaSalle Bank National Association v. Lopez*, 168 A.D.3d 697, 91 N.Y.S.3d 259 (2d Dept. 2019).]. Similarly presented, *sua sponte* dismissal must be restricted only to the most extraordinary circumstances and in the absence of those, *sua sponte* dismissal is not be employed. [*Midfirst Bank v. Bellinger*, 117 A.D.3d 1520, 986 N.Y.S. 294 (4th Dept. 2014).].

One definitional example of such extraordinary circumstances would be "a pattern of willful noncompliance with court ordered deadlines" [*Citimortgage, Inc. v. Carter*, 140 A.D.3d 1663, 32 N.Y.S.3d 786 (4th Dept. 2016).]. But extraordinary circumstances will not exist without an indication that plaintiff engaged in a pattern of willful noncompliance with court ordered deadlines. [*U.S. Bank National Association v. Polano*, 126 A.D.3d 883, 7 N.Y.S.3d 156 (2d Dept. 2015).]

A concurrent foundation to reject a *sua sponte* order is that it violates procedural due process where the mortgagee is not given notice or the opportunity to first be heard. [*Deutsche Bank National Trust Company v. Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 (2d Dept. 2020); *Chase Home Finance, LLC v. Plaut*, 171 A.D.3d 692, 9 N.Y.S.3d 731 (2d Dept. 2019); *U.S. National Bank Association v. Saraceno*, 147 A.D.3d 1005, 48 N.Y.S.3d 163 (2d Dept. 2017).].

Of like effect, in the absence of extraordinary circumstances warranting *sua sponte* dismissal of a complaint, it will be vacated when the plaintiff is not afforded fair warning that such a sanction was even being considered. [*Bank of New York v. Castillo*, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dept. 2014).]. It is also stated that a party must be placed on notice and be given a chance to be heard before the court can impose a sanction. [*Citimortgage, Inc. v. Lottridge*, 143 A.D.3d 1093, 40 N.Y.S.3d 573, 40 N.Y.S.3d 573 (3d Dept. 2016); *U.S. Bank National Association v. McCrory*, 137 A.D.3d 1517, 29 N.Y.D.3d 594 (3d Dept. 2016).]. Or where a defendant does not move to seek relief (e.g. from a judgment of foreclosure and sale or the order of reference) and the plaintiff has been given no notice, and is unaware of any threat, a *sua sponte* order is not to issue. [*Wells Fargo Bank* v. *Pabon*, 138 A.D.3d 1217, 31 N.Y.S.3d 221 (3d Dept. 2016).]

While the fact patterns addressing the need for notice are considerable (and many are mentioned, *infra.*), one example makes and introduces the point. [*Aurora Loan Services, LLC v. Moreno*, 166 A.D.3d 933, 89 N.Y.S.3d 222 (2d Dept. 2018).]. A foreclosure action recited X as the original obligor on the note but Y as the current record owner. Upon application for an order of reference, X moved to vacate on the ground that he was never served and that *he* was the record owner of the premises. After a hearing it was determined that X never resided at the premises where he was supposedly served and so the action was dismissed as to him. In addition, however, the court *sua sponte* directed dismissal of the complaint against the remaining defendants, finding it uncontested that X was the owner of the mortgaged property and therefore a necessary party in this action.

It was, however, one thing to find that a defendant was not served (which seemed correct here), but quite another to declare that X was the owner of the property when the plaintiff had no opportunity to introduce evidence that someone else was the property owner.

Given these circumstances, on appeal the court found that the lack of notice and opportunity to be heard denies fundamental fairness which is the basis of due process. It held that the record did not support the conclusion that X's ownership of the property was uncontested. In any event, the foreclosing plaintiff was never afforded the opportunity to present evidence, thus a basis to reject the trial court's *sua sponte* dismissal. [*Aurora Loan Services, LLC v. Moreno*, 166 A.D.3d 933, 89 N.Y.S.3d 222(2d Dept. 2018).]

For further examples of fact patterns leading to reversal of *sua sponte* dismissals, albeit more intertwined and less susceptible to categorization, see *U.S. Bank National Association v. Saracano*, 147 A.D.3d 1005, 48 N.Y.S.3d 163 (2d Dept. 2017); *Deutsche Bank National Trust Company v. Meah*, 120 A.D.3d 465, 911 N.Y.S.2d 92 (2014); *Midfirst Bank v. Bellinger*, 117 A.D.3d 1520, 986 N.Y.S.2d 294 (4th Dept. 2014).

The sheer reported volume of appellate division reversals of trial court sua sponte dismissals confirms on its face that such occurrences are, if not definable as a problem, certainly an issue.

Facts in Foreclosure Cases

Standing has been an oft-encountered reason for *sua sponte* dismissals. One immediate riposte to such instances is that even if a plaintiff did lack standing, such

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is not a jurisdictional defect and could not underwrite a *sua sponte* dismissal. [*FCDBF FF1 2008-1 Trust* v. *Videjus*, 131 A.D.3d 1004, 17 N.Y.S.3d 54 (2d Dept. 2015); *Citimortgage, Inc. v. Chow Ming Tung*, 126 A.D.3d 841, 7 N.Y.S.3d 147 (2d Dept. 2015).]. In the many cases where the trial court *sua sponte* dismissed a foreclosure for presumed lack of standing on the respective plaintiffs' part, reversal issued because the defendants had waived jurisdiction for neglect to raise the defense in a pre-answer motion or in an answer. [*FCDBF FF1 2008-1 Trust v. Videjus*, 131 A.D.3d 1004, 17 N.Y.S.3d 54 (2d Dept. 2015); *Mortgage Electronic Registration Systems, Inc. v. Holmes*, 131 A.D.3d 680, 17 N.Y.S.3d 31 (2d Dept. 2015); *Onewest Bank, FSB v. Prince*, 130 A.D.3d 700, 14 N.Y.S.3d 66 (2d Dept. 2015).]

Note, however that since the time those cases were adjudicated, effective December 23, 2019 RPAPL §1302-a was promulgated. That statute eliminates - applicable solely to a home loan foreclosure—the effect of CPLR §3211e which provides for the waiver of the standing defense. [There is nuance to RPAPL §1302-a worthy of exploration, found at §19.07[1][a1], *infra*.]

Another fertile stage for *sua sponte* dismissals is the order of reference. That a foreclosure judgment has not been obtained within a year of service is not violative of CPLR §3215(c). Because the order of reference is a preliminary step to judgment of foreclosure and sale, applying for that within one year suffices – and will not be grounds to dismiss *sua sponte*. [*Bank of New York Mellon v.* Shterenberg, 153 A.D.3d 1310, 61 N.Y.S.3d 304 (2d Dept. 2017); *Washington Mutual Bank v. Milford-Jean-Gille*, 153 A.D.3d 754, 59 N.Y.S.3d 781 (2d Dept. 2017); *John T. Walsh Enterprises v. Jordan*, 152 A.D.3d 755, 60 N.Y.S.3d 70 (2d Dept. 2017).]

Upon a motion for an order of reference, a court cannot, without an evidentiary hearing, decide that a plaintiff had not negotiated in good faith at the conference stage and thereby deny summary judgment. [*PHH Mortgage Corporation v. Herburn*, 128 A.D.3d 659, 10 N.Y.S.3d 102 (2d Dept. 2015).]. Also not a ground to deny an order of reference and dismiss the complaint, is where counsel discovers some irregularities with an affidavit required by an administrative order, or where plaintiff did not file the affidavit required by an administrative order [*JP Morgan Chase Bank v. Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 (2d Dept. 2019)] but where that order was not in existence when the reference was applied for. [*U.S. Bank, N.A. v. Ramjit*, 125 A.D.3d 641, 2 N.Y.S.3d 343 (2d Dept. 2019).]

Nor is a *sua sponte* dismissal proper when the plaintiff shows its entitlement to the order of reference and seeks to vacate an earlier order of reference because it could not independently verify information in prior counsel's statement required by an administrative order, but was able to verify the plaintiff's underlying business records. [*LaSalle Bank National Association v. Jagoo*, 147 A.D.3d 746, 46 N.Y.S.3d 216 (2d Dept. 2017); *Deutsche Bank National Trust Company v. Ramharrack*, 139 A.D.3d 787, 31 N.Y.S.3d 568 (2d Dept. 2016); *U.S. Bank National Association v. Ahmed*, 137 A.D.3d 1106, 29 N.Y.S.3d 33 (2d Dept. 2016).]. A like principle applies where the plaintiff seeks to vacate an earlier order of reference and judgment of foreclosure and sale to support new versions with a new affidavit of merit – there are no extraordinary circumstances supporting *sua sponte* dismissal of the action. [*LaSalle Bank National Association v. Lopez*, 168 A.D.3d 697, 91 N.Y.S.3d 259 (2d Dept. 2019); *Wells Fargo Bank v. Pabon*, 138 A.D.3d 1217, 31 N.Y.S.3d 221 (3d Dept. 2016).]

Neither absence of a thirty day pre-foreclosure notice [*Countrywide Home Loans, Inc. v. Campbell*, 1634 A.D.3d 646, 84 N.Y.S.3d 493 (2d Dept. 2018)], nor a single occasion of failing to appear at a conference [*Bank of New York v. Castillo*, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dept. 2014)], nor neglect to meet a single court ordered deadline to file a motion for a foreclosure judgment [*Citimortgage, Inc. v. Carter*, 140 A.D.3d 1663, 32 N.Y.S.3d 786 (4th Dept. 2016).] allow a *sua sponte* dismissal. And where a court launches an independent investigation consulting digital records and maps, asserting that certain discrepancies were found, it cannot base a *sua sponte* dismissal on that. [*First United Mortgage Banking Corp. v. Lawani*, 147 A.D.3d 912, 48 N.Y.S.3d 190 (2d Dept. 2017).]

While lack of jurisdiction can be a basis to dismiss a complaint (although not necessarily *sua sponte*) where a defendant has waived that defense by failing to move to dismiss the complaint within 60 days of answering [*Wells Fargo Bank, N.A. v. Cajas*, 159 A.D.3d 977, 73 N.Y.S.3d 223 (2d Dept. 2018)] it was error to *sua sponte* dismiss the complaint. [*Wells Fargo Bank, N.A. v. Cajas*, 159 A.D.3d 977, 73 N.Y.S.3d 223 (2d Dept. 2018).

Further, regarding process service, a court cannot *sua sponte* dismiss for supposed lack of jurisdiction when the process server's affidavit showed three visits to the premises on different days and different times, the process server also relating his unsuccessful effort to obtain an employment address for the defendant. [*U.S. Bank, N.A. v. Cepeda*, 155 A.D.3d 809, 64 N.Y.S.3d 104 (2d Dept. 2017).]

Such sua sponte dismissals are all the more unfortunate because they are so unnecessary. If a defendant does not pursue the relief, it cannot be granted—unless the plaintiff is given an opportunity to be heard on the subject.

Conclusion

The sheer reported volume of appellate division reversals of trial court *sua sponte* dismissals confirms on its face that such occurrences are, if not definable as a problem, certainly an issue. Of course for mortgagees assaulted with surprise baseless dismissals, it *is* a predicament and while rescue is typically available on appeal, the time that consumes (during which interest accrues) and the legal cost it endangers, is conspicuously unpalatable.

Such *sua sponte* dismissals are all the more unfortunate because they are so unnecessary. If a defendant does not pursue the relief, it cannot be granted—unless the plaintiff is given an opportunity to be heard on the subject. Even then, *sua sponte* dismissals are to be employed sparingly—and only in the presence of *extraordinary* circumstances. So the path to avoid *sua sponte* dismissals is lucidly presented, a clear guide, all suggesting that the abundance of such orders is ill-considered.