MORTGAGE LITIGATION

Legislative Assaults On Mortgage Holders

By **Bruce J. Bergman**

It comes as no surprise to mortgage lenders that elected officials are worried about mortgage borrowers and continue to promulgate borrower-friendly legislation. These sundry acts contribute to both extending the duration of the foreclosure process and making it more expensive for the foreclosing party. While a few of these do afford some comfort for limited borrowers in need, lenders and their counsel will opine that the post-mortgage crisis laws offer fertile ground for wily borrowers to interminably delay the foreclosure process.

It is apparent that proliferation of these new laws are continuing apace. An alert about two—of more than a few others—which need to be recognized follows.

Deposit for Vacant Parcels

A genuine jolt applies to mortgages in New York's Town of Hempstead because a new law "in relation to Foreclosures, Undertakings and Maintenance of Premises" was just passed in May, 2016.[1] (Code of the Town of Hempstead Chapter 128, subsection 128-61-1). How about a $25,000 advance for every action upon an abandoned parcel!

Note immediately that the town is no backwater—it is the largest town in the nation and has a population in excess of 760,000. So there are mortgages galore within its borders.

Despairing that vacant homes are an eyesore and a nuisance to neighborhoods, the town has shifted the burden of maintaining such premises from the owners of the property to any party which initiates a foreclosure on that property. And rather than wait for the moment that a foreclosure judgment may be entered (as RPAPL §1307 law inadvisedly already does[2]) it mandates that the foreclosing party shall deposit a $25,000 undertaking with the town within 45 days of commencement of any foreclosure against a residential property (single-family, two family or multiple family residence) that "has become vacant."

Definitionally, the party obliged to make the deposit is any person, business, organization, bank or lender. Residential property in turn is recited to be improved by a single-family, two-family or multiple family residence. The stated purpose is to secure the confirmed maintenance of the property free of violations (as in turn delineated in Section 128-61) for the duration of the vacancy—all as determined by the Commissioner of Sanitation. It is then declared to be unlawful for any such foreclosing party to fail to make the required deposit.

If the Commissioner of Sanitation determines that there is violation at the property, the deposited money can be used to remediate the condition (in addition to any other enforcement). When such monies are drawn down, the foreclosing party must restore the account to the full amount within 15 days after written demand down from the town. Failure to replenish the fund is likewise declared unlawful.

Should the initial deposit or the replenishment not be made, the town can serve a 10-day notice, pursuant to the process service requirements of CLPR Article 3, demanding the money. Failure to comply then elicits a fine up to triple the maximum in Section 128-65(A) of the chapter together with a minimum fine of $500 each day of noncompliance, or by imprisonment for not more than 15 days or by both fine and imprisonment. Increasing the scope of penalties, each calendar day of failure to comply constitutes a separate additional offense. .

Although the cited sections pointedly apply to residential properties, its own subsection G inexplicably states that "This section shall apply to all *non-residential* foreclosures commencing after the effective date..." (emphasis supplied). While editorially it can be suggested that the reference to non-residential is a typographical error, until corrected, the possibility exists that this encompasses any vacant property.

Problems With the Legislation

In addition to being tough—indeed oppressive and chilling—the statute is imprecisely written. In a nutshell, here are some of the major problems with this legislation:

- There is at least one critical definition unstated. The characterization of a single family or a two family residential property is understandable, but without the statute referring to a definition within its terms or elsewhere in the code, presumably a multiple family residence could be up to any number of units. Whether that means, for example, that the foreclosure of an apartment building incurs the requirements of this statute is unclear and presents an immediate issue.
- When property is vacant is an elusive contemplation. If an owner abandons property, it is a question of fact as to whether he has left with no intention of returning. It is not necessarily easy to determine. Did he take all of the furniture? Perhaps not. If some of the furniture is still there, does it suggest that the people might return? Practitioners can readily confirm why this is a difficult concept to glean with certainty and it presents obvious difficulties for the foreclosing party in establishing whether the property is vacant, thus eliciting the $25,000 undertaking.
- When the vacancy has occurred sufficient to elicit the requirement is another murky assessment. It is apparent that if the property is vacant at the inception of the action, the undertaking is required. But if it becomes vacant during the course of the foreclosure, the responsibility is fuzzy, although it may very well be that the town would determine during the action that there is a vacancy and make a demand for the undertaking.
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Assaults

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by, "the owner."[3] That is not the lender. It is the borrower who owns the premises and the responsibility to maintain property should be with that person. But the town has elected to shift responsibility and therefore makes this demand of the foreclosing party. A lender, holding only a lien—not ownership—would posit that it should not be responsible for this obligation and it is certainly not anything that the mortgage ever contemplated. This is interference with a contractual relationship.

• Because a foreclosing party includes any "person," the town is also imposing this undertaking obligation upon, for example, an elderly couple who may sell their house and move to Florida but needs to take back a purchase money mortgage to facilitate the sale. Or there could be a person who makes a mortgage loan to a neighbor or a relative and suffers a vacant property and the need to foreclose. They too—under the language of this statute—are obliged to submit a $25,000 undertaking. Whether they have the wherewithal to do that may be quite doubtful.

• Any notice to be sent to the foreclosing party will go to its last known address. But that will be the address in the mortgage. If the lender or foreclosing party has changed its corporate status, or been taken over, or if the entity or person who held the mortgage has moved, the address in the mortgage itself will remain the same, not reflecting the change. Consequently, it is possible, indeed probable in more than a few instances, that a notice demanding the payment may not be received—thereby invoking the major penalties delineated in the law.

• Whether the expenditures advanced and expended by the town's sanitation commissioner can be added to the mortgage debt is uncertain. The problem is that no mortgage by direct language contemplates an expenditure of monies to be deposited with a municipality to be spent as that governmental entity deems appropriate regarding maintenance. It would take some stretching to fit it into standard language, thus creating uncertainty in determining its inclusion. This puts the money at risk of not being recoupable. At the very least, it suggests that lenders will need to amend their mortgages to anticipate such a situation.

• While a $25,000 undertaking is substantial enough, it is apparent that the foreclosing party can be liable for more because the sum on deposit must be replenished as it is drawn down.

In the end, the new law is laden with confusion and dangerous aspects which need attention. Even if that attention is given, the concept of causing the holder of a lien to deposit $25,000 (with potentially greater liability) for the privilege of enforcing a defaulted mortgage is a bizarre notion. Foreclosing in this venue just became much more expensive.

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Standing Defense

Then there is a frightening statute just passed in the New York State Assembly providing that a borrower does not waive the defense of a foreclosing lender's lack of standing even if that defense is not asserted in a pre-answer motion or in an answer. (This is to be via a new RPAPL §1302-a). While the senate must yet vote on it as well, it may indeed become law and it is a very serious matter for lenders and servicers. We will explain.

The supposed defense of lack of standing has for a number of years been a particular favorite of defaulting borrowers. They readily assert it—after all, it is hardly unknown to their attorneys—and this serves as a source of much delay in the foreclosure process. While it is true that on some occasions a foreclosing party has not been careful enough to have the note in its possession prior to initiating the foreclosure, or neglected to have an assignment of the note (and mortgage which goes with the note) prior to inception, most of the time there really is no issue.

But the most creative of obfuscation presents challenges in this arena: how to satisfactorily demonstrate delivery of the note, meeting claims about a missing allonge, an assignment page unstapled from the note, among a number of others. While lenders typically prevail in the end, they are subject to much agony in the process.

Perhaps because an issue of standing is or would be apparent at the inception of any case, it is a defense which if not interposed in a motion seeking to dismiss a complaint, or if not part of an answer to a complaint, is deemed waived—as a matter of statute in New York.[4] Much case law over all the years has strongly supported this.[5] Borrowers cause enough mischief presenting the defense in a motion or in an answer.

What if they decide to try the defense long after the summary judgment has been granted or after a judgment of foreclosure and sale has been entered? It should not surprise lenders and servicers to learn—they probably already know—that borrowers will indeed present this defense at any time in the case. But when they do, the current law is absolutely clear that it is too late—the defense is waived if, as noted, it has not appeared earlier in the case in a pre-answer motion or in the borrower's answer.

Comes the state Legislature which believes that borrowers have great difficulty in some majority of cases in determining who is the owner of the loan to determine if the party foreclosing is the right one. So they say. This is not at all the experience of mortgage holders because, however, this is the view of the Legislature, they seek remedial action through the mentioned bill which passed in the assembly in May 2016. While a part of that law is that the defense cannot be made after a foreclosure sale (one must be thankful for small favors) it would be available even after a sale if the foreclosure action proceeded on a default in appearing by the borrower.

So what does all this mean in the end? A borrower would now be free to hold in reserve a usually illusory standing defense until sometime in the middle of the case or at the end of the action. This could be employed as a tactic to garner further delay or to force a settlement. Or, a borrower could choose to default in the foreclosure action, await a foreclosure [illegible] then launch the defense e[illegible] the sale.

If borrowers believe t[illegible] foreclosing lender is no[illegible] the holder of the note [illegible] mortgage, they are free [illegible] that defense in an answ[illegible] in fact they do, multitu[illegible] times, even without basi[illegible] ers and servicers will l[illegible] of the opinion that the [illegible] this new legislation is fa[illegible] best. And it does pose [illegible] to yet clog and delay the [illegible] sure process even mor[illegible] Empire State.

1. Effective May 24, 2016.

2. The significant infirmities i[illegible] er maintenance requirement ar[illegible] in "The Trouble With The Lend[illegible] nance Obligation," NYLJ, Aug. 3[illegible] 5, col 2. For further discussion [illegible] man On New York Mortgage Fo[illegible] §27.12, LexisNexis Matthew Be[illegible] 2016).

3. See inter alia, *The Prudence West Seventy-Third Street Corp.* 2015 (1932); *Holmes v. Graven* N.Y. 148, 188 N.E. 285 (1933); *Co v. Primer Realty Corporation*, 2[illegible] 27 N.Y.S.2d 850 (1st Dept. 1[illegible] *Guar. & Trust Co. v. Feldon Realt[illegible] tion*, 149 Misc. 206, 267 N.Y.S. 4[illegible] 1933); *Goodell v. Silver Creek Na[illegible]* N.Y.S.2d 572 (Sup. Ct. 1944); *Fi[illegible] wide Bank v. Fouche*, NYLJ, Jun[illegible] at 27, col. 2 (Sup. Ct. N.Y.Co., Leh[illegible]

4. CPLR R 3211(e).

5. See inter alia, *HSBC Bank [illegible] v. Forde*, 124 A.D.3d 840, 2 N.[illegible] (2d Dept. 2015); *Bank of New Y[illegible] Trust Company v. McColl*, 116 A[illegible] 985 N.Y.S.2d 255 (2d Dept. 20[illegible] *Bank USA, N.A. v. Pacyna*, 112 A.[illegible] 978 N.Y.S.2d 392 (2d Dept. 2013); *III, LLC v. Enttienne*, 120 A.D.3d[illegible] N.Y.S.2d 548 (2d Dept. 2014); *[illegible] Mortgage Acquisition Corp. v. F[illegible]* A.D.3d 821, 979 N.Y.S.2d 620 2014). For extensive further citat[illegible] Bergman On New York Mortgag[illegible] sures §19.07[1], LexisNexis Matt[illegible] er (rev. 2016).