Bruce J. Bergman

EXPERT OPINION

No Pre-Foreclosure Notice to Borrower's Estate

In his Foreclosure Litigation column, Bruce Bergman discusses the recent decision in 'HSBC Bank USA, N.A. v. Shah,' where the defendant argued that the foreclosing plaintiff failed to demonstrate strict compliance with the 90-day letter pre-foreclosure notice provision. He writes that the case "offers a modicum of solace, under concededly limited but not so uncommon circumstances."

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Real Estate

By Bruce J. Bergman

While by now this should be an old story for lenders and servicers involved with New York mortgages, the need to send a pre-foreclosure notice per RPAPL §1304 to the borrower in the home loan foreclosure case is a constant source of lender and servicer defeats when foreclosures are started. It is truly astonishing. While there is no doubt that lenders get it right at least some of the time (maybe most of the time) it seems that a majority of the *reported* cases—primarily the ones that are appealed—rule *against* the mortgage holder. Typically the issue arises at the summary judgment stage so if the foreclosing plaintiff loses there—especially after an appeal—the time consumed by the process is both extraordinary and meaningful.

In parsing the foreclosing party's losses, most often the mortgage holder is found unable to demonstrate mailing of the 90-day pre-foreclosure notice. That results in denial of a motion for summary judgment (or an order to appoint a referee) with the necessity then to either conduct a trial on the issue of service of the notice, or the need on the part of the mortgage holder to discontinue the action and start all over again. It should be apparent that either choice is both expensive and time consuming.

The requirements for the 90-day notice are actually not that difficult to achieve—it needs to say certain things (pursuant to the statute) in a certain size type and it needs to be mailed by regular mail and certified mail. While there should be little doubt that lenders and servicers *do* send the notice, the difficulty is *proving* it when borrowers challenge compliance with the statute—which they do regularly. It is recognized that this is a fertile area of defense and borrowers' attorneys seize upon it with regularity, especially because extensive case law declares mailing the notice to be a condition precedent to foreclosure [see case law citation at *1 Bergman On New York Mortgage Foreclosure*, §5.22, LexisNexis, Matthew Bender (rev. 2021)].

Case law reveals that the infirmity seems to be the person selected by the lender or servicer to demonstrate the mailing. Too often, that individual is not familiar enough with the business records of the mortgage holder, or does not produce those records.

An affidavit of service of mailing the pre-foreclosure notice would suffice, as would testimony regarding the lender's or servicer's standard mailing procedures. But, as noted, much of the time the mortgage holder is not up to the task. Why in the presence of experience foreclosing plaintiffs still fail to meet the test is puzzling.

A case of recent vintage, however, offers a modicum of solace, under concededly limited but not so uncommon circumstances—and serves also to highlight a broader point. [*HSBC Bank USA, N.A. v. Shah*, 185 A.D.3d 794, 128 N.Y.S.3d 32 (2d Dept. 2020)]

In the action, the borrower had died and an executor of his estate had been appointed. That defendant argued that the foreclosing plaintiff failed to demonstrate strict compliance with the 90-day letter pre-foreclosure notice provision.

The court disagreed and ruled for the foreclosing plaintiff. The essence of the holding was that while a home loan in foreclosure upon a property used as the borrower's principal residence requires a pre-foreclosure notice, it is a notice that must be sent to the *borrower*. In this case, though, the defendant was not a borrower for the purposes of the controlling statute (RPAPL §1304). The defendant—the executor—did not sign the home equity line mortgage or the amendments to the agreement and was not named a borrower on the mortgage instrument. The party who died—the actual borrower—was the only one who had signed all the documents. Therefore, the court found the pre-foreclosure notice inapplicable in that instance, i.e. where the defendant was not the borrower. And here the executor of the estate was not the borrower.

Foreclosing plaintiffs still need to do their best to assure the ability to demonstrate service of the pre-foreclosure notice—when needed—and confirmation new clarifies that it is not needed where the borrower is deceased and the defendant is the estate representative.

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