Back Yet Again as Borrower Defense: The 30-Day Notice

By Bruce J. Bergman

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As lenders and servicers well know (even if they did not read these columns) New York imposes by statute a 90-day notice to be sent to the borrower as a prerequisite to acceleration and foreclosure.[1] Attorneys for lenders and borrowers would know this as well. Presumed knowledge aside, for some reason, lenders have had difficulty in actually *proving* the mailing of that notice and there are literally hundreds of cases in New York where foreclosures are defeated for want of that element of proof.[2] The 90-day notice provision remains a commonplace defense and one which more than occasionally meets with success. What is most often happily forgotten (certainly from a lender's point of view) is the *30-day* notice required by the Fannie Mae Freddie Mac uniform mortgage instrument.[3]

Some 20 years ago and more, this was a particular bugaboo for lenders—borrowers raised the defense with the same regularity that they offer the defense regarding the 90-day notice. Even though the 30-day notice requirement had existed for years, lenders back then had some difficulty in proving the mailing of *that* notice and lost more than a few cases for want of demonstrating that mailing. Over time, however, lenders became much more attuned to the obligation, complied with it punctiliously, and the defense faded away. For whatever reason, though, it has emerged anew from time to time (we have commented upon it when encountered) and two fairly recent cases confirm that the defense is not moribund but can be successfully pleaded against a foreclosure.[4]

If a lender thought about it, inserting in a mortgage the *obligation* to send a 30-day notice as a condition precedent to accelerating the mortgage balance would be rejected. But it has been a part of the uniform instrument for decades and lenders have learned to live with it. It is typically paragraph 22 of that mortgage form and it requires that the notice letter be sent by *regular mail* (although certified mail can be added but it is not a substitute). The letter must then contain certain representations delineated in the mortgage. Lenders can prepare affidavits of mailing of this notice in advance, or maintain specific records showing the mailing, or obtain a receipt form the post office for the mailing, or produce a person who can testify as to knowledge of the mailing procedures. In sum, having been exposed to it for decades, lenders should be armed to demonstrate the mailing.

In *U.S. Bank v. Negrin*, however, the court found that the foreclosing plaintiff failed to demonstrate compliance with the condition precedent in the mortgage.[5] All it produced were the unsubstantiated and conclusory statements in an affidavit of an employee of the plaintiff's servicer indicating that the required notice of default was sent in accordance with the terms of the mortgage.[6] Copies of the notice of default were also submitted, but these failed to show that the required notice was actually mailed by first class mail or delivered to the notice address if sent by other means as required by the mortgage agreement.[7] Therefore, the summary judgment granted by the trial court was reversed on appeal.[8]

In *Wells Fargo Bank v. McKenzie* case, the court observed that where a party alleges that the plaintiff failed to comply with a condition precedent pursuant to the enforcement of the mortgage, the plaintiff is then obliged to present suffi-

cient evidence to establish that it did indeed comply.[9] Here though, the plaintiff failed to establish compliance because its submissions did not establish that the notice was sent by first class mail or actually delivered to the notice address as required by the terms of the mortgage—a similar conclusion to the prior case.[10] In addition, the affidavit of the servicer failed to lay a proper foundation for the admission of records concerning the plaintiff's mailing of the notice of default, another reason underpinning the finding of the plaintiff's inability to show compliance with the notice requirement.[11]

So this is an old story which one would think does not need retelling, but actual cases advise that lenders still must pay attention to this issue.

Endnotes

1. R.P.A.P.L § 1304.
2. *See, e.g., H & R Block Bank v. Liles,* 186 A.D.3d 813, 130 N.Y.S.3d 521 (2d Dep't 2020).
3. Fannie Mae Security Instruments, ¶26, https://singlefamily.fanniemae.com/fannie-mae-legal-documents.
4. *U.S. Bank N.A. v. Negrin,* 186 A.D.3d 754, 131 N.Y.S.3d 702 (2d Dep't 2020); *Wells Fargo Bank, N.A. v. McKenzie,* 186 A.D.3d 1582, 131 N.Y.S.3d 692 (2d Dep't 2020).
5. *Negrin,* 131 N.Y.S.3d at 704.
6. *Id.*
7. *Id.*
8. *Id.* at 705.
9. *McKenzie,* 131 N.Y.S.3d at 694.
10. *Id.*
11. *Id.* at 695.