FORECLOSURE LAW

Lenders Fail Again With the 90-Day Notice

By **Bruce J. Bergman**

While standing *may* be the most common defense in a residential foreclosure action, there should be little doubt that the RPAPL §1304 90-day pre-foreclosure notice mandate is surely the most insidious.

There are literally hundreds of cases where lenders lose the foreclosure (or at least are denied summary judgment) for perceived failure to comply with the notice obligation. It is more than apparent that the obligation—a strictly enforced condition precedent to foreclosure in New York—is an ambush and a quagmire.

This becomes more obvious with the incessant issuance of cases defeating foreclosures and the reasons for this, if anything, are for the foreclosing party more frustrating than ever.

Stressing the actual consequences of case interpretations (even when plaintiffs win) is immediately meaningful. The 90-day notice is a prerequisite to accelerations so the imperative has always grafted at least an additional 90 days upon the process. Once that period expires, the mortgage holder is free to initiate a foreclosure and accelerate by so reciting in the complaint. (The complaint must also state compliance with the notice provision so there is yet another place to stumble, albeit avoided with relative ease.)

In response, borrowers can and quite often do challenge the propriety of the notice. Usually the thrust is that it was never received, although these can be challenges to the contents of the notice or its mode of transmittal.

ZIMMYTWS VIA ADOBE STOCK

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Once an answer contains this defense—as so often it will—the plaintiff is obliged to prove compliance in a motion for summary judgment. That process of course consumes many months. If summary judgment is denied and the plaintiff elects to appeal, the action is stalled for the duration of the appeal—a year or two. If the appeal fails, the plaintiff is likely banished to sending a fresh notice for the privilege of starting the action anew; all told, a practical fiasco.

While case law indicates that most often the mortgage holder's problem is an inability to prove the mailing, there are other reasons which can trip the foreclosing party. Two recent cases (of so many) make the point. [*Hudson Valley Federal Credit Union* v. *Tavares*, 206 A.D.3d 891, 170 N.Y.S.3d 597 (A.D.2 Dept. 2022); *U.S. Bank National Association, As Trustee for Lehman Mortgage Trust Mortgage Pass-Through Certificates, Series 2007-8* v. *Sackaris*, 74 Misc.3d 923,164 N.Y.S.3d 294 (Sup. 2022).]

In the *Hudson Valley* case, the trial court not only denied summary judgment to the foreclosing plaintiff, but granted summary judgment to the defaulting borrower dismissing the foreclosure.

Upon appeal, the denial of summary judgment to the foreclosing party was upheld but dismissal of the case was reversed. While that represented some saving grace, it also meant that the foreclosing party was involved in the case for at least two years (probably more) mired by the sole question of whether the predicate 90-day notice has been sent. This might be called bizarre.

The point of this case was that the 90-day notice requires that the notice attach a list of housing counseling agencies in New York State, including at least five in the county where the property is located.

Here, the foreclosing plaintiff assuredly included a lengthy list of housing counseling agencies throughout New York State but, as the borrower protested, it failed to establish that the list contained at least five housing agencies serving the particular county where to the property was found.

Finding that the plaintiff did not make a *prima facie* case for compliance with the notice, the Second Department affirmed the denial of summary judgment but found a question of fact about the notice, requiring a trial, so that dismissal of the case was not proper. Again as a practical matter, this means that the mortgage holder faced a time consuming trial (which it might not win) or in the alternative, the need to discontinue and start all over all with incurrence of very substantial time, effort and expense. (Lenders might wonder whether the ability to enforce a mortgage should turn on whether the lender met a burden of supplying the names of five housing counselors in the county where the defaulting borrower resided.)

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The next case for attention (*U.S. Bank National Association*) ran afoul of what is commonly

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known as the Kessler doctrine which holds that inclusion of any material in the separate 90-day notice envelope to the borrower that is not expressly delineated in the statute constitutes a violation of the separate envelope requirement. In short, any other material or papers, even if helpful or meaningful—or innocuous—void the efficacy of the 90-day notice.

The plaintiff breached that requirement here which not only defeated summary judgment but, because it was clearly established that the foreclosing party had indeed violated the Kessler doctrine, the foreclosure was *dismissed*. The mortgage holder was constrained to start the foreclosure all over again—first sending a new 90-day notice that it could hope would establish the requirements of the statute.