

Yet Another Lender Failure With 30-Day Notice

This is a subject we thought was long ago disposed of: lender problems with the requirement of the Fannie Mae/Freddie Mac uniform instrument that a prerequisite to acceleration (and therefore foreclosure) is the sending to the borrowers of a certain 30-day notice of default. How hard is that to do? The ready answer is "not really so challenging." But the more relevant or incisive question to be asked—on those once commonplace occasions when borrowers deny receipt—is whether the foreclosing party can *prove* that the notice was sent.

The answer there is "sometimes not," as a case as recent as June 2023 ruled, to the dismay of a hapless mortgage holder. [*Wilmington Savings Fund Society, FSB v. Racer*, 217 A.D.3d 730, 191 N.Y.S.3d 642 (2d Dept.)]

This review moves immediately to the underlying and somewhat different essence of the recent case. When a lender or investor buys a mortgage note—that is, of course, purchasing a mortgage—how will that note assignee be able to prove that they 30-day notice was sent by its assignor?

While, as noted, proving the mailing of the 30-day notice is always a potential issue, the practical difficulty in that effort is elevated when a file is inherited, a file which might not contain the necessary support to demonstrate the mailing of the mandated 30-day notice. Such was the issue, and the downfall, in the cited case.

Before proceeding further, it is

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important to emphasize that the 30-day notice is a creature of the mortgage contract. The ubiquitous and even more perilous 90-day notice requirement in New York as a condition precedent to home loan foreclosures is a different, albeit somewhat related subject beset with its own greater difficulties, the source of constant lender defeats in foreclosure actions.

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The 30-day notice, on the other hand, was more a lender's nemesis around the time of the millennium when the defense was pervasive, very much in vogue. Ultimately, foreclosing lenders faced the problem and for the most part solved it. Therefore the defense later arose only infrequently, perhaps best assessed as intermittently. Nonetheless, in 2020 a few heavily ligated cases raised the point anew although they seemed to fade away yet again.

Returning to the heart of the recent case, which cited considerable case law (the issue is hardly new) the Second Department ruled

that the foreclosing plaintiff failed to establish compliance with the mortgage agreement provision requiring it to send defendants a notice of default containing certain information and setting forth a 30-day cure period.

The problem was that the affidavit of an employee of plaintiff's servicing agent was found insufficient to establish that the notice was, sent by first-class mail or actually delivered to the notice of address, if sent by other means, as required, by the mortgage agreement. This was so because the deponent failed to provide any evidentiary basis for his conclusion that a prior loan servicer had mailed the default letter to the defendants. The difficulty confronting the plaintiff as assignee is apparent.

Focusing then on the nuance; here, when a residential note in default is purchased, and where a foreclosure has begun, the assignee may be compelled to prove compliance with the 30-day notice requirement.

In turn, the assignor's file will need to contain appropriate support demonstrating compliance with the mandate. If it does not, and assuming the defense of non-receipt is raised, the assignee plaintiff may be in an untenable/unwinnable situation.

The result could be—as it was in the recited case—the need to face a trial or to discontinue the action and begin it anew. Assuming no statute of limitations involvement (which so often lurks), the action is now afflicted with the time, interest accrual and legal expense attributable to prosecuting the foreclosure—disproportionately incurred and a threat to the integrity of the loan.

All this arising from the once believed innocuous 30-day notice requirement? In this case yes, and it could happen again.

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