The 90-Day Notice: Still More Mischief!

The 90-day pre-foreclosure notice requirement remains a formidable, commonplace defense for defaulting borrowers. Even if mortgagees prevail, although they lose with frequency, they still waste excessive time and money in resisting the onslaughts.

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By Bruce J. Bergman

Can this be possible? The requirement to send the defaulting borrower in a home loan mortgage case a 90-day pre-foreclosure notice has been in force since 2008. One might surmise that most conceivable issues have been uncovered and adjudicated in the hundreds (and hundreds) of decisions where the statutory obligation of RPAPL §1304 has been raised as a defense. Not yet. Seventeen years of borrowers asserting this most fertile of defenses has proven insufficient to calm the mayhem. Three recent cases underscore the point.

A foundational problem with all this, which might not be so apparent, is that should a lender lose on the issue of notice in Supreme Court, it might need to appeal. Even if it wins at the trial court level, it is the borrower who typically pursues appeal.

The likely net result of that is years of litigation, much legal fee expenditure and an uncertain result. This assures that some percentage of mortgage foreclosure cases will be bogged down in extensive delay beyond the lengthy durations that foreclosure cases already consume.

Regarding one of the recent cases, should a foreclosing lender have failed to comply with RPAPL §1304, the foreclosure is subject to dismissal, draconian enough under the circumstances.

Assuming no intercession of the statute of limitations, initiating the action anew may be unpalatable, but not fatal. However, in *Wells Fargo Bank, N.A.* v. *Palaigos*, 2025 WL 610598, ____ N.Y.S.3d ____ (2d Dept. 2025) the trial court, in finding that the plaintiff was unable to demonstrate compliance with mailing of the notice, dismissed the case *with prejudice*. That of course *was* fatal.

On appeal the Second Department ruled that failure to satisfy a condition precedent, i.e., the notice pursuant to RPAPL §1304, is not a final judgment on the merits. Therefore, the case should not have been dismissed with prejudice and the plaintiff was entitled to start the action anew (pursuant to CPLR §205(a) or CPLR §205-a). Yes, the plaintiff ultimately prevailed, but at the cost of the aforementioned years of delay and incurrence of substantial expense. This comes close to involving mention of a pyrrhic victory.

In another recent case, the lender encountered the “Kessler Doctrine” relating to the separate envelope rule. That is, that the 90-day notice had to be in a separate envelope from any other information that the foreclosing party desired to send.

Ultimately Kessler was reversed by—the Court of Appeals which ruled that accurate statements which furthers the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute any "other notice" violative of the separate envelope rule.

Undaunted by such a holding, the borrower in *Wells Fargo Bank, National Association* v. *Smart*, 234 A.D.3d 1016, 225 N.Y.S.3d 699 (2d Dept. 2025) received the largess of the trial court which denied summary judgment to the foreclosing party on the ground that inclusion of a HAMP notice in the 90-day envelope violated the statute.

On appeal, the HAMP information was deemed relevant to avoiding foreclosure, and not false or misleading—therefore not in violation of the separate envelope requirement.

Again, the plaintiff ultimately prevailed, but still suffered the practical setback of time and expense. Thus, the notice requirement of RPAPL §1304 continues to be a potent weapon.

In Federal National Mortgage Association v. Williams-Jones, 2025 WL 610563, ___ N.Y.S.3d ___ (2d Dept. 2025) the foreclosing lender manifestly stumbled.

The statute requires that the 1304 notice be written verbatim as the statute recites. One aspect is that the borrower is alerted to call the New York State Department of Financial Services at its toll-free helpline with a required recitation of that phone number. This one was tough to get wrong, but here the lender prepared the notice but omitted the mandated phone number. This was easy to avoid but the lender managed to fail nonetheless, resulting in success in the trial court but reversal in the Appellate Division. Thus, the lender lost *and* suffered the delay and expense.

Conclusion

The 90-day pre-foreclosure notice requirement remains a formidable, commonplace defense for defaulting borrowers. Even if mortgagees prevail, although they lose with frequency, they still waste excessive time and money in resisting the onslaughts.

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