How Tough Is the Pre-Foreclosure Notice Requirement?

Bruce Bergman discusses the recurring failure of mortgage servicers to properly prove compliance with New York's 90-day pre-foreclosure notice requirement.

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By Bruce J. Bergman

Answer: Apparently too tough for many, perhaps most mortgage servicers. There could be an article at least once a week making this point and case law examples would still not approach being exhausted.

A recent case tells this story yet again, but also presents a road map (not the first time though) which serves as a guide so foreclosing parties can avoid this commonplace disaster. [*Deutsche Bank National Trust Company v. Palomaria*, 80 A.D.3d 1109, 218 N.Y.S.3d 417 (2d Dept. 2024)]

This review addresses the problem of *proving* the mailing of the 90-day condition precedent predicate notice to home loan foreclosures. There are many more areas of concern regarding the pre-foreclosure notice which can torpedo a foreclosing party. For an extensive analysis of the broader issues, see 1 *Bergman On New York Mortgage Foreclosures* § 5.22, LexisNexis Matthew Bender (rev. 2024).

The seriousness of all this is worthy of stating at the outset. Here, the foreclosing plaintiff was successful in the trial court; despite borrower claims that the pre-foreclosure notice was not received and that plaintiff failed to prove the mailing. The action proceeded all the way to judgment of foreclosure and sale. But then the Appellate Division *reversed* and sent the case back to the complaint stage. Therefore, the plaintiff suffered years of delay, considerable legal expense (likely not available to be recovered) and at best was banished to an early stage of the case.

But with proof of the predicate notice having failed, the plaintiff would need to hope that it could prove the mailing at a trial (with the further delay and cost that imposes). And if that seemed an unlikely outcome, then the plaintiff would be constrained to discontinue the action, send a new 90-day pre-foreclosure notice and be sure to have the ability to absolutely prove that mailing. Considering the additional time in pursuing discontinuance, followed by yet another 90-day hiatus (for the notice), previous invocation of the word “disaster” seems apt.

Possible Remedy

The title of this exploration is a question. Another question can also be asked. Is there no remedy for the incessant, seriatim failures suffered by plaintiffs in endeavoring to prove mailing the 90-day notice mandated in home loan foreclosures by RPAPL §1304? It is likely impossible to answer the question satisfactorily.

The path to correct procedure emerges from reading the cases by noting judicial evaluation of plaintiff missteps in all the cases addressing proof of the mailing. So in a sense there is a remedy. But the path must be followed punctiliously by foreclosing mortgage holders. Since case law confirms that the ability

to adopt the advice seems too often unachieved, the overall answer to the question posed remains elusive

How the plaintiff stumbled in the cited case presents that mentioned roadmap anew.

In attempting to prove mailing of the notice, the plaintiff offered the affidavit of a document execution specialist employed by the plaintiff's loan servicer. While that person stated that he had personal knowledge of the servicer's business records, and further stated that according to those business records he reviewed the 90-day notices were served by a certified and first class mail at the mortgage premises, he did not attest that he was familiar with the standard office mailing procedures of the third party vendor that apparently was the entity that sent the notices on behalf of the plaintiff. Accordingly, the court ruled that the document specialist's affidavit did not establish proof of a standard office mailing procedure designed to ensure that items were properly addresses and mailed.

In addition, that affidavit failed to address the nature of the relationship between the servicer and the vendor and whether the vendor's records were incorporated into the servicer's own records or routinely relied upon in its business.

In sum, the affidavit did not succeed in laying a foundation for the admission of a transaction report generated by the vendor.

Finally, the tracking numbers on the copies of the notices submitted by the plaintiff alone were insufficient to establish prima facie, proper mailing pursuant to RPAPL §1304.

So, there are things that can be done, procedures to be followed. This case is yet another example of foreclosing plaintiff's somehow failing to adopt what would be successful procedures.

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