BERGMAN ON FORECLOSURES

Honing In on the Notice of Sale

By Bruce J. Bergman

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Foreclosing plaintiffs and their attorneys are all too familiar with the desperation of many defaulting borrowers which leads to litigation and delay in the foreclosure process. New York State happens to be one of the more prominent venues suffering extensive delays in the foreclosure arena. What is also recognized is that the zeal to oppose foreclosures does not necessarily dissipate merely because a foreclosure sale is imminent or is conducted. Regarding the latter, what is encountered from time to time is an attempt by a defaulting borrower to vacate a foreclosure sale on the claimed ground that a notice of the sale was not received. This was the subject of a recent case.[1]

While the principles expressed in this case are not unusual – they are fairly standard – being aware of them is nonetheless helpful and meaningful.

Speeding first to the result, the trial court denied the borrower's motion to vacate the sale and the Second Department affirmed. Some of the basic tenets recited by the Appellate Division in its affirmance follow.

First, a party to a foreclosure action who has appeared in this action and has not waived service is entitled to be served with all papers in the action, including the notice of sale – pursuant to CPLR 2103.

With that in mind, CPLR 2003 empowers the court to set aside a judicial sale within one year for non-compliance with the requirements of the CPLR as to the notice, time or manner of such sale, critically though, if a substantial right of a party was prejudiced by the defect.

Likewise, RPAPL 231(6) provides that at any time within one year after a sale, the court, upon terms which are just, has the ability to set aside the sale for neglect to comply with the provisions of the cited section as to notice, time or manner of such sale – again, if a substantial right of a party was prejudiced by that defect.

In the cited case, the foreclosing plaintiff opposed the motion to vacate and was found to have prima facie demonstrated evidence of proper service of the notice of sale. Meaningfully, and this is of wide application, the defendant's bare and unsubstantiated denials of receipt of the notice of sale are insufficient to rebut a Plaintiff's showing that there was indeed a mailing. While that finding alone should have closed the matter, the court added that the defendants failed to establish that they were prejudiced by any defect in service of the notice of sale.

This confirms what other cases have said. Even if it can be shown that the notice of sale was not served as required, if the defendant is unable to demonstrate that it was prejudiced by that lack of notice, an attempt to overturn the sale is likely to be denied.

Endnote

1. *L&L Capital Partners, LLC* v. *Elohim, Inc.*, 229 A.D.3d 614, 215 N.Y.S.3d 432 (2d Dep't 2024).