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Recent Efforts to Speed Up Foreclosure Proceedings in N.Y.

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As a result of governmental intervention, New York boasts one of the longest foreclosure timelines in the country, taking an average of 1,061 days from the date of the filing of the foreclosure action to the sale of the property at auction, which is almost double the national average of 625 days.1 Most of these foreclosure cases are not contested, and those that see battle are based on technicalities to prolong the case while the borrower lives in the home for free.

The delay effects both lender and borrower as well as the public at large. First, as a result of burdening statutes and the lengthy foreclosure timeline, a number of lenders have left the residential foreclosure market making for less places to go shopping for a loan. Second, borrowers that surrender their homes relatively quickly will not be saddled with a judgment against them so large that it makes it impossible to start over on the road to buying another home. Third, the longer the foreclosure proceeding, the less homes there will be for sale on the market for buyers who can afford them, therefore, limiting the number of sales and raising home prices unjustifiably. It is a frequent occurrence that a modification made on a loan is quickly defaulted upon—thus providing further delay unnecessarily.

The state Legislature and the state courts have taken action to expedite foreclosure proceedings. This article discusses some of these changes and how they will affect the New York foreclosure process.

Weapon #1 for Borrowers

Borrower's attorneys have their favorite weapons to delay and prolong foreclosure proceedings. The number one weapon of choice is establishing lender proof of compliance with the 90-day pre-foreclosure notice requirement imposed by RPAPL §1304. This past Spring, the Appellate Division, Second Department put an arrow

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through this defense in part.

RPAPL §1304 provides that, at least 90 days before commencement of a residential mortgage foreclosure action, a lender, its assignee, or mortgage loan servicer is required to mail to the borrower the form notice provided in the statute (the "90-day notice").2

The purpose of the 90-day notice is to provide a borrower with notice of his or her default and an opportunity during the 90-day time period to "attempt to reach a mutually agreeable resolution" with the lender.3

RPAPL §1304 sets forth detailed requirements for the 90-day notice, including the exact manner in which the notice must be mailed, however, there is no express requirement in the statute for the lender to submit an affidavit of service or an affidavit of mailing of the notice.4

In U.S. Bank v. Carey5 and Flagstar Bank v. Jambelli,6 the Appellate Division, Second Department reversed, on the law, two lower court decisions, denying the plaintiffs' motions to have a referee appointed to compute the amount due and owing under the loan.7

In both Carey and Jambelli, the defendant borrowers did not appear or answer the complaint, and did not oppose the motion to have a referee appointed.8 Further, the plaintiffs in both actions established their entitlement to the appointment of a referee by submitting the mortgage, the unpaid note, and evidence of the borrowers' default.9

Despite these facts, both lower courts denied the plaintiffs' motions on the sole ground that the plaintiffs failed to establish compliance with the RPAPL §1304 90-day notice requirement, even though the borrowers failed to appear and raise the defense.10

In reversing the lower courts' decisions, the Second Department held in each case that "failure to comply with RPAPL 1304 is not jurisdictional…Rather, it is a defense which may be raised at any time…"11

Stated otherwise, failure to comply with the 90-day notice requirement does not deprive the court of its ability to preside over the foreclosure action.12 Statutorily, failure to comply with the 90-day notice requirement is merely a defense that may be raised by a borrower to a residential foreclosure action.13

The Second Department further held that in cases where the borrower has not raised the defense of failure to comply with RPAPL §1304, "the plaintiff [is] not required to disprove that defense."14

The holdings in Carey and Jambelli make clear that a plaintiff does not need to affirmatively demonstrate compliance with RPAPL §1304 in actions where the defense has not been raised.

Open Issue

Still remaining as an open issue is the type of proof required to demonstrate that the 90-day notice was mailed to the borrower in compliance with RPAPL §1304 in an action where the defense was raised by an appearing borrower.

A review of recent lower court decisions confirms that there is a divide among the lower courts on the type of proof required.

Some lower courts hold that an affidavit of service of the 90-day notice from the person, who physically mailed the notice, is required to establish strict compliance with RPAPL §1304,15 while other lower courts hold that

an affidavit based on business records from the plaintiff confirming that the 90-day notice was mailed, together with copies of the 90-day notice containing either the tracking number for the certified mailing or certified mailing receipt, is sufficient to establish compliance with RPAPL §1304.16

As stated above, there is no express requirement in RPAPL §1304 for the lender to submit an affidavit of service of the 90-day notice.

This summer, Governor Andrew Cuomo signed into law Chapter 73 of the Laws of New York, which, inter alia, includes several technical and substantive amendments to RPAPL §1304.17

Notably, RPAPL §1304 was not amended to add a requirement for the lender to submit an affidavit of service of the 90-day notice, despite the vast case law on this issue and divide among the lower courts.18

Moreover, as is established by the holdings in Carey and Jambelli, mailing of the 90-day notice is not something which must be done in order for courts to have the ability to preside over a foreclosure action.19

Accordingly, it is wholly unreasonable to require plaintiffs to provide an affidavit of service from the person who physically mailed the 90-day notice in order to establish compliance.

In the majority of contested residential foreclosure actions prosecuted by the authors' law firm, the borrowers had no valid defenses to the actions, had failed to make a loan payment for years, and used any means possible to prevent and delay the progression of the action, including raising the defense of failure to comply with RPAPL §1304.

Since the receipt of the notice is not a statutory requirement, a borrower does not have to allege that he did not receive the notice. He only has to allege that the notice was not properly sent. This is why defense counsel would not allege that the borrower never received the notice.

Thus, requiring an affidavit of service of the 90-day notice from the person who physically mailed the notice (i) places an unnecessary and undue burden on lenders, and (ii) accomplishes the borrowers' goal of delaying and preventing the progression of the action that, resultantly, prolongs the time that the borrowers are able to reside at the mortgaged premises, essentially, "for free" in actions where there is no defense for their failure to pay.

Settlement Conference

The mandatory foreclosure settlement conference requirement imposed by CPLR §3408 is one of the leading causes of delay in residential foreclosure actions, taking approximately nine months to complete.20

The purpose of the settlement conference is to provide the borrower with an opportunity to negotiate with their lender in order to determine whether "the parties can reach a mutually agreeable resolution to help the defendant [borrower] avoid losing his or her home…"21

In the majority of residential foreclosure actions prosecuted by the majority of New York law firms, the borrowers have no intention of, or lack the financial ability to, settle the action.

Instead, the borrowers use the settlement conference requirement solely as a means of delaying the action by, among other tricks, (i) failing to timely submit a loan modification application and additionally requested documents, (ii) submitting misleading and/or incomplete financial information, and (iii) requesting multiple adjournments of the conference(s).

In the majority of cases where a settlement is reached, it is in the form of a loan modification application, which the borrowers frequently default under within several months, putting the plaintiff lender back to square one.

In a seeming attempt to address this issue, CPLR §3408 was recently amended by Chapter 73, to, inter alia, now require that the borrower bring documents to the initial conference including "information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income…."22

As a result of this amendment, the plaintiff and presiding judge or referee will be able to review the documentation provided by the borrower at the initial conference to determine whether a loan modification, reinstatement, or payoff are viable settlement options.

Prior to the amendment, CPLR §3408 provided that the borrower "should" bring documentation to the initial conference, which seldom happens.23

As a result, borrowers lacking the financial means to modify were submitting loan modification applications, thereby unduly delaying the settlement conference process.

While the recent amendment will not guard against all situations causing undue delay in the settlement conference process, it should, hopefully, at least provide some relief by removing loan modification as a possible means of settlement in clear cut cases.

Further, in cases where it appears that loan modification may be a potentially viable option, and where a loan modification application was previously submitted by the borrower, the plaintiff will be able to use the previous application as a potential means to ensure that misleading or inaccurate financial information is not provided by the borrower in any newly submitted loan modification application.

Vacant Properties

As of May 19, 2016, 3,352 of the residential properties actively in the foreclosure process in New York are vacant and abandoned.24 Chapter 73 has created new laws regarding vacant and abandoned properties, and aims to "curb the threat posed to communities by these 'zombie properties.'"25

One component of the new law provides for expedited foreclosure proceedings. When a property is deemed vacant and abandoned, RPAPL §1309 creates an expedited application by which plaintiffs will now be able to move by order to show cause directly seeking a judgment of foreclosure and sale, without first moving for an order of reference, in all counties. As the borrower in the abandoned property cases typically or almost never appears in the action, the proceeding can go directly to judgment and removes the standard and lengthy requirement of having a referee appointed to compute the amount due and owing to the lender.26 This statute should work in shaving months off the foreclosure process allowing the lender to recapture the residence and the community to have a new homeowner instead of a blighted property.

Chapter 73 adds RPAPL §1308, which extends a lenders obligation to maintain vacant and abandoned properties to the time at which the lender "has a reasonable basis to believe that the residential real property is vacant and abandoned…"27

If a lender fails to maintain the property, the lender could, inter alia, be fined up to $500 per day that the violation continues, or a lender could be sued by the Department of Financial

Services and forced to take action to take care of the property.28

Conclusion

Although the newly enacted vacant home expedited foreclosure process law and the recent case law defeating one disingenuous argument from the debtor's defenses, as well as requiring informed settlement conferences, are all positive steps toward efficient results for all, much more needs to be done to expedite foreclosure proceedings, so that lenders continue to lend, and more home buyers have the chance to find affordable homes when more properties are available for purchase.

ENDNOTES:

1. RealtyTrac, Q1 2016 U.S. Foreclosure Market Report, Jan. 12, 2016, http://www.realtytrac.com/news/foreclosure-trends/q1-2016-u-s-foreclosure-market-report/.
2. RPAPL §1304(1).
3. See New York State Senate, Introducer's Memorandum in Support Bill Number: S66007 (Senator Jeffrey Klein).
4. RPAPL §1304(2).
5. U.S. Bank N.A. v. Carey, 137 A.D.3d 894, 28 N.Y.S.3d 68 (App. Div. 2d Dept. 2016).
6. Flagstar Bank, FSB v. Jambelli, 2016 NY Slip Op 04384 (App. Div. 2d Dept. 2016).
7. Carey, 137 A.D.3d at 895, 28 N.Y.S.3d at 70; Jambelli, 2016 NY Slip Op 04384.
8. Id.
9. Id.
10. Id.
11. Id.
12. Pritchard v. Curtis, 101 A.D.3d 1502, 957 N.Y.S.2d 440 (App. Div. 3d Dept. 2012) ("The Legislature would not have denominated this as a defense if a violation of the notice provisions deprived the court of subject matter jurisdiction.").
13. RPAPL §1302(2) ("It shall be a defense to an action to foreclose a mortgage…that…the actions of the lender violate…section thirteen hundred four of this article.").
14. Id.
15. See e.g. Ocwen Loan Servicing, LLC v. Dusenbury, 2016 NY Slip Op 30537(U) (Sup. Ct., Queens Cty. 2016) ("With respect to RPAPL §1304, however, plaintiff has failed to meet its prima facie burden of establishing "strict compliance" with the statute, since plaintiff has failed to produce an affidavit of service of the requisite 90-day notice."); Deutsche Bank Natl. Tr. Co. v. Donohue, 2016 NY Slip Op 50222(U), 50 Misc. 3d 1221(A) (Sup. Ct., Suffolk Cty. 2016) ("Due proof the mailing of the RPAPL §1304 notice is established by submission of an affidavit of service.").
16. See e.g. U.S. Bank N.A. v. Pelaez, 2016 NY Slip Op 30759(U) (Sup. Ct., Queens Cty. 2016) (holding that a copy of the 90-day notice together with an affidavit based on business records confirming that the 90-day notice was mailed, constitutes sufficient proof of compliance with RPAPL 1304); Green Tree Servicing v. Edwards, 2015 NY Slip Op 50999(U), 48 Misc. 3d 1207(A) (Sup. Ct., Richmond Cty. 2015) (holding that a copy of the 90-day notice containing the tracking number for first class mail as well as the reference number for certified mail together with an affidavit based on business records confirming that the 90-day notice was mailed, constitutes sufficient proof of compliance with RPAPL 1304).
17. See http://assembly.state.ny.us/leg/?default_fld=&leg_

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