Lenders Blasted for 90-Day Notice (With One Saving Grace)

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By Bruce J. Bergman | July 03, 2024

While lenders and servicers with New York portfolios should long have been exceptionally familiar with the requirement, such presumed awareness nonetheless seems to little diminish the constant—often fatal losses suffered. And so it has been our wont to be appalled by constant lender defeats for all the years the mandatory 90-day notice prerequisite to declaring due the home loan mortgage balance has been in existence. Foreclosing mortgage holders lose on this point with unceasing regularity, confirmed by case law—yet again.

Where Did This Come From?

Although the debate on the advisability of the 90-day notice requirement (RPAPL §1304) effectively ended in the aughts, comment by way of background can have a salutary effect.

The Fannie Mae/Freddie Mac uniform instrument (universally employed for home loans) always required a 30-day notice as a condition precedent to acceleration and foreclosure. Moreover, lenders almost invariably extended more time then that with the goal of avoiding foreclosures. (There is a view in some quarters that lenders are anxious to foreclose; such is universally rejected by mortgage holders.)

Legislative bodies typically hold hearings to instruct them as to the need for legislation. Whether such was ever pursued by the New York solons on this notice issue has never been revealed.

The Legislature, it seems, simply believed that extending pre-foreclosure notice to borrowers to 90 days (the 30-day notice must still be sent but it is separate and does not add on to the duration) was a good idea. That the procedure would be a trap for mortgage holders (the wary or the unwary) was obvious at the outset. But then, the landmines should over time teach avoidance of the problems. That is what has not occurred and which results in a plethora of expensive, time consuming cases which lenders lose in such profusion.

The Apparent Difficulties

There are too many ways mortgage holders can lose when faced with the 90-day obligation.

The statute recites the precise language that the 90-day notice must contain. Mortgage holders should not stumble here but they still do on occasion, albeit rare. One difficulty encountered is that in addition to the precise language of the notice, the mailing must include a list of housing counselors for the area where the property is situated. How lenders founder on this obvious requirement is puzzling but it does happen from time to time.

Some lenders feel compelled to include *additional* material in the notice envelope. This led to a period controlled by the "Kessler Doctrine" were the inclusion of *anything* in addition voided the 90-day notice. Reversal of "Kessler" ultimately ensued so that additional notices, so long as helpful

and not confusing are deemed acceptable. Nonetheless, an occasionally overzealous mortgagee can err and include yet further material which might run afoul of the idea of avoiding confusion. Lenders do not need yet another reason for the notice to be declared void.

Then there is the multiple envelopes mandate. If for example the borrowers are a husband and wife, on too many occasions (there are reported cases on this) the mortgage holder will send one letter addressed to "Mr. and Mrs. …". This fails the test. *Each* borrower is entitled to their own separate notice in a separate envelope. This lesson has been clear for a while. Nonetheless, some foreclosing mortgagees still send one letter to groups of borrowers. Again, there are reported cases in this regard.

To challenge receipt of the notice, one would think the posture must be specifically pleaded by the objecting borrower. Not so. The necessity for an affirmative defense would seem appropriate, but case law provides that a specific denial of the allegation in the complaint that the notice was sent will suffice to preserve the issue. [*U.S. Bank National Association v. Glasgow*, 218 A.D.3d 717, 194 N.Y.S.3d 40 (2d Dept. 2023), citing *Nationstar Mtge., LLC v. Osikoya*, 205 A.D.3d 1038, 1040, 169 N.Y.S.3d 643; cf. *Deutsche Bank Natl. Trust Co. v. Wentworth*, 211 A/D/3d 684, 687, 181 N.Y.S.3d 99.]

When adding up the various seemingly peripheral glitches which can torpedo a lender, the sum can be seen certainly as an annoyance, but not something monumental. Fulfilling the latter category, however, is the overridingly commonplace inability of the foreclosing mortgage holder to *prove* that the 90-day notice was actually mailed. A citation of 31 recent cases, most of which defeated the foreclosing party follow just so that the

volume of litigation can be readily visualized. [*JPMorgan Chase Bank, N.A. v. Bonilla*, 2024 WL 2035376 (2d Dept. 2024) (notice not proven); *U.S. Bank National Association v. Kissi*, 219 A.D.3d 1551, 197 N.Y.S.3d 534 (2d Dept. 2023) (notice not proven); *U.S. Bank National Association v. Yoel*, 219 A.D.3d 1462, 196 N.Y.S.3d 157 (2d Dept. 2023) (notice not proven); *Wilmington Trust, N.A. v. Meyerhoeffer*, 219 A.D.3d 549, 194 N.Y.S.3d 81 (2d Dept. 2023) (notice not proven); *U.S. Bank, N.A. v. Maiorino*, 219 A.D.3d 538, 194 N.Y.S.3d 130 (2d Dept. 2023) (question of fact as to delivery of notice); *U.S. Bank National Association v. Chrismas-Beck*, 219 A.D.3d 534, 195 N.Y.S.3d 198 (2d Dept. 2023) (wrong language used in notice); *Bank of America v. Gonzalez*, 219 A.D.3d 433 (2d Dept. 2023) (notice proven); *U.S. Bank National Association v. Glasgow*, 218 A.D.3d 717, 194 N.Y.S.3d 40 (2d Dept. 2023) (notice proven); *Deutsche Bank National Trust Company v. Hennessy*, 218 A.D.3d 740, 192 N.Y.S.3d 682 (2d Dept. 2023) (notice not proven, need separate envelope for each borrower); *Ditech Servicing, LLC v. McFadden*, 217 A.D.3d 923, 193 N.Y.S.3d 37 (1st Dept. 2023) (notice not proven); *U.S. Bank Trust, N.A. v. Smith,* 217 A.D.3d 899, 191 N.Y.S.3d 485 (2d Dept. 2023) (notice not proven); *HSBC Bank USA, N.A. v. Schneider*, 216 A.D.3d 1148, 191 N.Y.S.3d 68 (2d Dept. 2023) (notice not proven, needed separate envelopes); *Bethpage Federal Credit Union v. Hernon*, 218 A.D.3d 895, 190 N.Y.S.3d 372 (2d Dept. 2023) (notice not proven); *Bank of New York Mellon v. Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 (2d Dept. 2023) (notice not proven); *HSBC Bank USA National Association v. Kalenborn*, 215 A.D.3d 930, 188 N.Y.S.3d 566 (2d Dept. 2023) (notice inadequate, not given to second borrower); *Freedom Mortgage Corporation v. King*, 215 A.D.3d 923, 189 N.Y.S.3d 201 (2d Dept. 2023) (notice not proven*); U.S. Bank National Association v. Cambardella*, 214 A.D.3d 925, 187 N.Y.S.3d 56 (2d

Dept. 2023) (notice proven—additional material in envelope not an issue); *Prof-2013-S3 Legal Title Trust v. Johnson*, 214 A.D.3d 745, 185 N.Y.S.3d 238 (2d Dept. 2023) (90 day notice proven, filing with superintendent of financial service not proven); *U.S. Bank National Association v. Thomas*, 211 A.D.3d 1078, 182 N.Y.S.3d (2d Dept. 2022) (notice not proven); *HSBC Bank USA, N.A. v. Michalczyk*, 211 A.D.3d 914, 180 N.Y.S.3d 580 (2d Dept. 2022) (notice not proven); *21st Mortgage Corporation v. Nodumehlezi,* 211 A.D.3d 893, 180 N.Y.S.3d 568 (2d Dept. 2022) (notice not proven); *Federal National Mortgage Association v. Raja*, 211 A.D.3d 692, 181 N.Y.S.3d 103 (2d Dept. 2022 (notice not proven); *HSBC Bank USA, National Association v. Gordon,* 210 A.D.3d 877, 179 N.Y.S.3d 111 (2d Dept. 2022) (notice not proven); *HSBC Bank USA, N.A. v. Martin*, 210 A.D.3d 872, 179 N.Y.S.3d 100 (2d Dept. 2022) (notice not proven); *Merrill Lynch Credit Corporation v. Nicholson*, 210 A.D.3d 758, 179 N.Y.S.3d 69 (2d Dept. 2022) (question of fact as to service of notice); *MTGLQ Investors, L.P. v. Assim*, 209 A.D.3d 1006, 176 N.Y.S.3d 698 (2d Dept. 2022) (notice proven); *Wells Fargo Bank, N.A. v. Kowalski,* 209 A.D. 3d 925, 177 N.Y.S.3d 98 (2d Dept. 2022) (notice not proven); *Bank of New York Mellon v. Mannino,* 209 A.D.3d 707, 177 N.Y.S.3d 67 (2d Dept. 2022) (notice not proven); *Wells Fargo Bank, N.A. v. Murray*, 208 A.D.3d 924, 174 N.Y.S.3d 715 (2d Dept. 2022) (notice not proven); *Deutsche Bank National Trust Company v. Ghosh*, 208 A.D.3d 857, 174 N.Y.S.3d 708 (2d Dept. 2022) (notice not proven); *Wells Fargo Bank, N.A. v. Cascarano*, 2-8 A.D.3d 729, 174 N.Y.S.3d 394 (2d Dept. 2022) (notice not proven).]

In addition, hundreds more cases like this can be found at 1 Bergman On New York Mortgage Foreclosures, §5.22, note 5 LexisNexis Matthew Bender (rev. 2024).

This persistent inability to actually prove the mailing is the heart of the hundreds and hundreds of decisions rejecting the cases of foreclosing plaintiffs. To state the obvious, while losing is never welcome, it can be observed that overwhelmingly the reported cases arise from the Appellate Division. That means that after a motion for summary judgment was lost by a foreclosing plaintiff (occasionally it is a defeat upon a defendant's motion to dismiss) all those months are then subjected to an additional two years or so in the appellate process. If the foreclosing party loses—as the surfeit of reported cases so readily confirm is typical—the foreclosure may have been dismissed, or it may return to the beginning. Either way, interest has accrued for years as have legal fees, in all a genuinely untenable position for the foreclosing party.

The Savings Grace

One might inquire, is there is no surcease for the foreclosing party? The answer is not much, but something.

The defense of failure to serve the 90-day notice is so often asserted and so

fertile, it encourages other defendants to attempt the ploy. Here is where the foreclosing party is rescued. The defense of failure to send the 90-day notice is personal to the mortgagor and so a non-mortgagor cannot raise it when the borrower has defaulted and not itself cited the point.

Similarly stated, non-compliance is a personal defense which cannot be postulated by one who is not the original mortgagor but rather is a stranger to the note and mortgage. [See inter alia *Bank of America, N.A. v.*

Castillo, 2023 WL 2035542 (2d Dept.); *U.S. Bank, N.A. v. Orlando*, 2024 WL 1645125 (2d Dept.).]

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