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Failure to Show "Strict Compliance" with State Requirements Dooms Mortgage Foreclosure Action

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The author discusses a recent appellate court decision dismissing a mortgage foreclosure action where the plaintiff did not strictly comply with requirements imposed by New York state law.

Since the financial crisis began, more and more courts across the country have been highly sensitive to homeowners' interests in mortgage foreclosure cases. As a result, judges have been closely examining allegations contained in complaints filed by lenders or their agents to ensure that they meet all statutory and regulatory requirements. When the plaintiffs have fallen short, foreclosure actions have been delayed — or dismissed.

For example, last year in New York, in *First National Bank of Chicago v. Silver*,[1] an intermediate appellate state court held that the plaintiff in a foreclosure action had the burden of demonstrating compliance with New York Real Property Actions and Proceedings Law ("RPAPL") 1303, a notice requirement of the state's Home Equity Theft Prevention Act ("HETPA").[2] Accordingly, it found that proper service of the Section 1303 notice with the summons and complaint was a condition precedent to the commencement of a foreclosure action, and that noncompliance had to lead to the dismissal of the complaint.

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Recently, in *Aurora Loan Servs., LLC v. Weisblum*,[3] a New York appellate court considered another HETPA notice, which RPAPL 1304 says must be served at least 90 days prior to commencement of a mortgage foreclosure action. Consistent with the rationale of *Silver*, the appellate court determined that proper service of a Section 1304 notice also was a condition precedent to the commencement of a foreclosure action. Finding that the plaintiff in *Weisblum* had failed to establish compliance with Section 1304, the appellate court ruled that the complaint against the homeowners had to be dismissed.

THE DEBT

As the appellate court explained in its decision, the case arose on April 7, 2006, when Steven and Patti Weisblum obtained a mortgage loan of $672,000 from Credit Suisse Financial Corporation and gave a first mortgage on the premises to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Credit Suisse. After a series of assignments, the first mortgage was ultimately assigned to MERS, as nominee for Lehman Brothers Bank, FSB.

On December 11, 2006, the Weisblums obtained a mortgage loan of $32,000 from Lehman Brothers and gave a second mortgage on the property to MERS, as nominee for Lehman Brothers. On the same date, the Weisblums executed a "Consolidation, Extension and Modification Agreement" (the "CEMA"), whereby the first and second mortgages were consolidated into a single lien in the amount of $704,000 held by MERS, as nominee for Lehman Brothers. In the CEMA, the Weisblums were collectively defined as the "borrower," and they both signed the agreement. Annexed as an exhibit to the CEMA and expressly incorporated by reference was the consolidated note in the amount of $704,000, dated December 11, 2006. The parties to the consolidated note were Lehman Brothers, as lender, and Steven Weisblum, as borrower.

On January 16, 2009, MERS, as nominee for Lehman Brothers, executed a written document purporting to assign the first note and mortgage in the amount of $672,000 to Aurora Loan Services, LLC. The assignment was recorded on May 6, 2009, which was after Aurora had initiated a foreclosure action against the Weisblums based upon the consolidated note and CEMA. The appellate court noted that Aurora had produced no documents estab-

lishing an assignment to it of the second note and mortgage in the amount of $32,000, nor of the consolidated note and the CEMA in the amount of $704,000.

THE DEFAULT AND RPAPL 1304 NOTICE

The Weisblums defaulted on the consolidated note in 2007. At that time, as noted above, MERS, as nominee for Lehman Brothers, still held the consolidated note and mortgage. On May 21, 2007, Aurora, apparently acting in the capacity of debt collector, sent a letter to Steven Weisblum, informing him that the loan was in default and that he had the right to cure the default.

On December 11, 2008, Aurora addressed a letter (the "RPAPL 1304 notice") to Steven Weisblum at the mortgaged home. In the RPAPL 1304 notice, Aurora stated it was acting as a debt collector and informed Steven Weisblum that the loan was in default, that he had the right to cure the default, and that his failure to cure the default within 90 days might result in Aurora commencing a legal action against him. The RPAPL 1304 notice contained all statutorily-required language, except it did not include "a list of at least five housing counseling agencies" with their "last known addresses and telephone numbers."[4]

Although reference was made to an enclosure described as "Counseling Agency List Form No. 704-3204-1008," the record did not contain such an enclosure or reflect that one was served with the notice. Nor did Aurora submit an affidavit of service establishing the content of the RPAPL 1304 notice and its enclosure, if any, or the manner in which, and to whom, the RPAPL 1304 notice was mailed.

THE FORECLOSURE PLEADINGS AND RPAPL 1303 NOTICE

By summons and complaint dated March 27, 2009, Aurora commenced a foreclosure action against the Weisblums, alleging its status as the "holder of a note and mortgage being foreclosed" under an assignment that had been "sent for recording" in the County Clerk's Office. Aurora further alleged it had complied with the provisions of RPAPL 1304, the Weisblums were in default, and the principal balance of $704,000 was due and owing.

Together with the summons and complaint, Aurora served a notice pursuant to RPAPL 1303 entitled "Help for Homeowners in Foreclosure," containing warnings about foreclosure rescue scams and other information. The notice included all of the statutorily-required content.[5] Affidavits of service established that a process server unsuccessfully attempted to effect personal service and thereafter served the summons, complaint, and RPAPL 1303 notice upon Steven and Patti Weisblum by affixing those papers to the door of their home on April 6, 2009, and mailing copies to the home by first class mail on April 8, 2009. The process server averred that the RPAPL 1303 notice, as served, was printed on blue paper, with 20 point type for the heading and 14 point type for the body of the notice.

The Weisblums filed a verified answer dated May 4, 2009, in which they asserted affirmative defenses including Aurora's lack of standing and its failure to comply with the pleading requirements of RPAPL 1302 and the notice requirements of RPAPL 1303 and 1304.

SUMMARY JUDGMENT

Aurora moved for summary judgment on the complaint and for related relief. In a supporting affidavit, a vice president of Aurora averred that the full principal amount of the consolidated note, $704,000, was due and owing, and contended that the Weisblums' affirmative defenses were without merit. Aurora contended that it had properly mailed the RPAPL 1304 notice to Steven Weisblum, who was the only borrower designated on the consolidated note, and had properly served the RPAPL 1303 notice on both the Weisblums, as established by the affidavits of service. With respect to its standing, Aurora contended it was the holder of the mortgage by delivery without a written assignment and there was no obligation to record a written assignment prior to commencement of the action.

The Weisblums cross-moved for summary judgment dismissing the complaint on the grounds that Aurora had failed to properly serve the notices required by RPAPL 1303 and 1304. In their supporting affidavits, Patti Weisblum declared she had not received either the RPAPL 1303 notice or the RPAPL 1304 notice, and Steven Weisblum swore that he had not received the RPAPL 1304 notice via certified or registered mail. The Weisblums con-

tended that the RPAPL 1303 notice printed on white paper, as shown in the exhibit to Aurora's motion papers, contravened the statutory requirement to print the notice on colored paper. With respect to the RPAPL 1304 notice, the Weisblums contended that service upon Steven Weisblum was insufficient because Patti Weisblum was also identified as a "borrower" in the CEMA. Moreover, the Weisblums noted that Aurora failed to submit affidavits of service establishing compliance with the statutory requirement that the RPAPL 1304 notice be sent to both borrowers, Steven and Patti Weisblum, by registered or certified mail and also by first class mail.

As an additional ground for summary judgment dismissing the complaint, the Weisblums contended that Aurora did not meet the pleading requirements of RPAPL 1302 and, in effect, did not have standing to maintain the action because it could not plead or demonstrate a proper assignment to it of the CEMA and consolidated note. The Weisblums pointed to various irregularities in the purported assignment to Aurora from MERS, as nominee for Lehman Brothers, dated January 16, 2009, and contended that its recording on May 6, 2009, after this action was commenced in March 2009, rendered it invalid.

The trial court granted Aurora's motion and denied the cross motion, holding that the affidavits of service established proper service of RPAPL 1303 notice on blue paper, and that the Weisblums' RPAPL 1304 defense was without merit. The trial court determined that, although Patti Weisblum was a "borrower" under the CEMA and entitled to RPAPL 1304 notice, Aurora's failure to serve her with the notice was "not fatal" since the Weisblums both participated in "the mandatory settlement conference"[6] and no prejudice to the Weisblums had been identified. Further, the trial court found no merit to the Weisblums' contention that Aurora had failed to plead and prove that it was the holder of the CEMA simply because the assignment was not recorded prior to commencement of the action.

After the *Silver* decision, the Weisblums moved for leave to renew based upon a change in the law, contending that service of RPAPL 1304 notice was a condition precedent to foreclosure. Aurora responded that the Weisblums, in attending the settlement conference, had waived any failure of Aurora to comply with a condition precedent in not serving the RPAPL 1304 notice on Patti Weisblum.

The trial court granted the Weisblums' motion to renew and adhered to its original determination. The trial court noted that *Silver* emphasized HETPA's purpose to afford "greater protections to homeowners confronted with foreclosure" in holding that the plaintiff's failure in that case to serve the RPAPL 1303 notice required dismissal of the action. The trial court found that in this case, by contrast, RPAPL 1303 notice was properly served. With respect to RPAPL 1304 notice, the trial court determined that the great protection intended by HETPA was afforded Patti Weisblum because she "had either actual or constructive notice of RPAPL 1304 by virtue of service of [that notice] upon her husband," and she appeared in the action and attended the settlement conference. The case reached the Appellate Division, Second Department.

RPAPL 1303

In its decision, the appellate court first found that Aurora had fully complied with the condition precedent of properly serving the RPAPL 1303 notice on both of the Weisblums at the commencement of its action.

As the appellate court observed, notice pursuant to RPAPL 1303 must be "delivered" with the summons and complaint in the foreclosure action[7] and that proper service was a condition precedent to the commencement of the action that was the plaintiff's burden to meet. Here, it found, contrary to the Weisblums' contention, that Aurora satisfied this burden with affidavits of service establishing proper service on both of the Weisblums of the RPAPL 1303 notice with the statutorily-required content, printed in the required type size on colored paper.[8] The appellate court declared that "Patti Weisblum's bare and unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service created by the affidavits of service."

Accordingly, the appellate court agreed, the trial court had correctly decided that Aurora had satisfied this condition precedent to the commencement of its action.

RPAPL 1304

The appellate court, however, reached a different result with respect to the Weisblums' claim under RPAPL 1304.

It explained that in deciding in *Silver* that compliance with RPAPL 1303 was a mandatory condition precedent to the commencement of a foreclosure action, it was persuaded by the "explicit statutory requirements and mandatory language of RPAPL 1303, as well as the Legislative purpose behind HETPA." It added that in the Weisblums' case it was making "clear" what was "implicit" in *Silver*, namely, that proper service of the RPAPL 1304 notice containing the statutorily-mandated content was "a condition precedent to the commencement of the foreclosure action." Aurora's "failure to show strict compliance" required that its action be dismissed, the appellate court decided.

The appellate court reasoned that RPAPL 1304, like RPAPL 1303, contains specific, mandatory language in keeping with the underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure. Both statutes have titles containing the word "required."[9] Moreover, the appellate court continued, the content, timing, and service provisions of RPAPL 1304 are very specific and couched in mandatory language: "[A]t least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" of certain statutory-specific information.[10] The notice must be prefaced with the warning, "YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY," and must contain the specific language set forth in RPAPL 1304(1), including information concerning the homeowner's right to cure a default and access to counseling agencies to obtain financial help. Indeed, the appellate court pointed out, the RPAPL 1304 notice must include "a list of at least five housing counseling agencies as designated by the division of housing and community renewal, that serve the region where the borrower resides" with their "last known addresses and telephone numbers."[11] Additionally, the appellate court noted, with regard to the manner of service, RPAPL 1304 is equally precise: "Such notice shall be sent by such lender, assignee or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage…in a separate envelope from any other mailing or notice."[12]

Neither the Weisblums nor Aurora disputed that the Weisblums' consolidated loan fell within the definition of subprime and that RPAPL 1304 was

applicable to their loan. They disagreed, however, regarding the proper party or parties to whom the RPAPL 1304 notice must be sent.

As the appellate court noted, RPAPL 1304 provides that notice must be sent to the "borrower," a term it does not define. Aurora conceded that it did not send RPAPL 1304 notice to Patti Weisblum but contended that she was not a "borrower" within the meaning of the statute because only Steven Weisblum was identified as a "borrower" on the consolidated note. The appellate court was not persuaded by this argument. It pointed out that, contrary to this contention, the Weisblums both executed the CEMA, were collectively defined in the CEMA as the "borrower" and, under that definition as "borrower," agreed to pay the amounts due under the consolidated note, which was expressly incorporated by reference in the CEMA. The CEMA also provided that the holder of the consolidated note "may enforce its rights" against each "borrower" as defined in the CEMA, and Aurora was seeking to enforce its rights under the consolidated note and mortgage against both of the Weisblums. Accordingly, the appellate court ruled that, in light of the language in RPAPL 1304 that the lender must send the notice at least 90 days before it "commences legal action against the borrower, including mortgage foreclosure," the record was sufficient to establish that Patti Weisblum was a "borrower" within the meaning of the statute, entitled to receive notice 90 days prior to commencement of the action.

The appellate court then explained that, pursuant to RPAPL 1302, Aurora's complaint contained an allegation that it had complied with RPAPL 1304. It then held that proper service of RPAPL 1304 notice on the borrower or borrowers was a condition precedent to the commencement of a foreclosure action, and the plaintiff had the burden of establishing satisfaction of this condition. Thus, in support of its motion for summary judgment on the complaint, Aurora was required to prove its allegation by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing required denial of the motion, regardless of the opposing papers.

In the appellate court's view, Aurora failed to meet its prima facie burden in several respects. As noted, Aurora conceded that the RPAPL 1304 notice was not sent to Patti Weisblum. Moreover, the RPAPL 1304 notice provided with Aurora's motion papers did not contain the statutorily-required list of

counseling agencies. Nor did Aurora submit an affidavit of service to establish proper service on both borrowers "by registered or certified mail and also by first-class mail" to their last known address.[13] Therefore, the appellate court ruled, the trial court should have denied Aurora's motion for summary judgment on the complaint insofar as asserted against the Weisblums.

Moreover, the appellate court ruled, with respect to the Weisblums' cross motion, the Weisblums established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by relying upon this same evidence, further supported by their personal affidavits attesting that Patti Weisblum had not received RPAPL 1304 notice and Steven Weisblum had not received RPAPL 1304 notice by registered or certified mail. According to the appellate court, Aurora did not rebut this showing and, thus, the cross motion for summary judgment dismissing the complaint insofar as asserted against the Weisblums should have been granted on this ground.

Interestingly, the appellate court added that in light of its determination that RPAPL 1304 notice was a mandatory condition precedent, it was not persuaded by Aurora's argument based on the alleged lack of prejudice to the Weisblums. Among other things, the appellate court decided that Aurora's "substantial failure" to comply with RPAPL 1304 could not be deemed "a minor irregularity" that could be overlooked.

STANDING

Another important aspect of the appellate court's decision relates to the Weisblums' argument that Aurora did not have "standing" to bring the foreclosure action.

As the appellate court explained, to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage. A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint. Thus, as long as the plaintiff can establish its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint, the recording of a written assignment after the

commencement of the action does not defeat standing. Here, however, the appellate court found that Aurora had failed to make this showing.

As the appellate court noted, in this case the note and mortgage were originally comprised of a first and second note and mortgage, which were consolidated into a single note in the amount of $704,000 and the single lien reflected in the CEMA. The document submitted by Aurora in support of its motion for summary judgment and in opposition to the Weisblums' cross motion purported to be an assignment of only the first note and mortgage in the amount of $672,000 to Aurora by MERS, as nominee for Lehman Brothers. However, the appellate court emphasized, Aurora failed to produce evidence of MERS' authority to assign the first note. On its motion for summary judgment, Aurora failed to provide a copy of the first note but submitted a copy of the original first mortgage and a series of assignments culminating in the purported assignment of the first note and mortgage to Aurora. The first mortgage was originally held by MERS, as nominee for Credit Suisse; the mortgage document recited that the lender on the first note is Credit Suisse, but, the appellate court ruled, there was nothing in this document to establish the authority of MERS to assign the first note. MERS later assigned the first mortgage "together with" the underlying note, and thereafter, successive assignees assigned the first mortgage "together with" the underlying note. The appellate court explained that although, in some circumstances, the assignment of a note may effect the transfer of the mortgage as an inseparable incident of the debt, in this case the assignment instruments purported to do the opposite, without any evidence that MERS initially physically possessed the note or had the authority from the lender to assign it.

Moreover, according to the appellate court, Aurora produced no documents indicating an assignment to it of the second note and mortgage or of the entire consolidated note and CEMA in the amount of $704,000. Although Aurora's vice president averred in conclusory fashion that Aurora became holder of the mortgage which was the subject of the action "by delivery without a written assignment," the affiant failed to give any factual detail of a physical delivery of both the consolidated note and the CEMA to Aurora prior to the commencement of the action. Thus, according to the appellate court, Aurora failed to establish its standing to commence the action against the Weisblums.

CONCLUSION

More and more courts are insisting that mortgage holders and other entities seeking to foreclose on a home mortgage strictly comply with all statutory and regulatory requirements before they will be allowed to foreclose on the mortgage. The burden is a great one, especially given the number of mortgages currently in foreclosure, but courts have decided that it is one that plaintiffs must meet, given their objectives.

NOTES

[1] 73 A.D.3d 162 (2d Dep't 2009).

[2] *See* Real Property Law 265-a. HETPA was enacted in July 2006. It consisted of amendments to the Banking Law, Real Property Law, and RPAPL, and its underlying purpose was to afford greater protections to homeowners confronted with foreclosure (*see* Senate Introducer Mem in Support, Bill Jacket, L 2006, ch 308, at 7-9; *Countrywide Home Loans, Inc. v Taylor*, 17 Misc. 3d 595 (Sup. Ct. Suffolk Co. 2007).

[3] 2011 N.Y. Slip Op. 04184 (2d Dep't May 17, 2011).

[4] RPAPL 1304(2).

[5] *See* RPAPL 1303(3).

[6] *See* CPLR 3408.

[7] RPAPL 1303(2).

[8] *See* RPAPL 1303(2),(3); CPLR 308(4).

[9] RPAPL 1304 ("Required prior notices"); RPAPL 1303 ("Foreclosures; required notices").

[10] RPAPL 1304(1).

[11] RPAPL 1304(2).

[12] RPAPL 1304(2).

[13] RPAPL 1304(2).