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The Problem With 30-Day Cure Letters Has Not Gone Away

Some recent foreclosure cases in New York show that the 30-day notice defense is alive and well.

by Bruce J. Bergman

Servicers will recognize that borrowers' defenses to foreclosure can change over time - some finding fashion for a few years and fading away as new ones arise to replace them.

Such a situation seems to apply to the 30-day notice of default, which, some years ago, was often found in borrower answers but then drifted into disuse. This occurred perhaps because statutorily mandated notices - the 90-day notice prerequisite in New York, for example - seemed more potent, or at least more fertile, as a method to attack foreclosures.

Yet, some recent cases in New York demonstrate that the 30-day notice defense is alive and well and, in fact, has burned servicers when foreclosures were dismissed for want of proof that the notice was sent. (See GMAC Mortgage LLC v. Bell, 2015, and Wells Fargo Bank N.A. v. Eisler.)

Historically, there was no imperative (in New York) that a defaulting borrower be given an opportunity in writing to purge the default. The general rule had been that demand for payment is not a prerequisite to commencement of a mortgage foreclosure action. (Notice of default has been added by statute as a prerequisite to acceleration of certain residential mortgages.)

But, the mortgage could so provide. That is precisely what the Fannie Mae/Freddie Mac Uniform Instrument does, as stated in paragraph 21 ("Lender's Rights If Borrower Fails To Keep Promises and Agreements"). Emphasis is placed upon the Fannie Mae/Freddie Mac version because it is so widely employed in the residential mortgage situation. Nevertheless, any mortgage - if such is the agreement of the parties - can mandate a notice to cure as a prerequisite to acceleration.

If a lender thought about it, preparing and sending a notice that grafts more than 30 days onto the collection or foreclosure process - and that, additionally, has the potential for error or mischief - would be an idea quickly discarded. After all, it would only be the most unusual exception if a lender did not volitionally call or write to the borrower concerning the default.

Servicer issues and concerns about the 30-day imperative include the following:

- There should not be a need to automatically extend the protracted foreclosure path by 30 days;
- Fannie and Freddie have always required notices in the collection process anyway, so it is not as if borrowers are unaware of their defaults;
- Even if the mortgage at issue is not a Fannie or Freddie form, sending various notices before initiating an action is the norm because avoiding foreclosure is invariably a lender or servicer goal;
- If the default is non-payment upon maturity, a 30-day notice would make little sense; there would be nothing to reinstate or cure - the balance would simply be due;
- If the borrower has died, there would be an unresolved issue as to whom the notice would be sent - and whether it would even be required; and

• In the end, all that an obstreperous borrower would have to do to create an issue would be to declare non-receipt of the notice, and the foreclosure would immediately become a litigated case, sure to suffer delay. However, the ultimate question to be resolved would not be whether the borrower had received the 30-day notice, but whether it had been mailed as the mortgage provides (e.g., regular mail); the servicer would, then, have to prove that the notice was mailed as per the mortgage.

In the GMAC case cited earlier, there was the usual default, a foreclosure had begun, an answer was interposed, the foreclosing plaintiff moved for summary judgment and the defaulting mortgagor cross-moved for summary judgment on the grounds that a condition precedent - the sending of the 30-day default/cure notice - did not take place.

Unfortunately for the lender, the court found that the borrowers had established that the plaintiff failed to satisfy a condition precedent to the commencement of the action because it failed to provide them with a notice of default in the payment of their mortgage obligations - which, as was typical, was mandated by the terms of the mortgage itself.

Here was the plaintiff's problem. It relied on the affidavit of its authorized officer as to the mailing. But, the court found that it did not raise a triable issue. The affidavit, which asserted that the notice of default was sent in accordance with the terms of the mortgage, was unsubstantiated and conclusory and, even when considered with a copy of the notice of default, failed to show that the required notice was, in fact, mailed by first-class mail or actually delivered to the address.

A similar pattern existed in the aforementioned Wells Fargo case. There, the borrowers alleged, in response to a foreclosure complaint, that the condition precedent required a notice of default that the plaintiff had not given. The foreclosing plaintiff, as usual, moved for summary judgment, and the borrowers cross-moved to dismiss the complaint for failure to comply with the condition of notice of default.

The borrower won, and the foreclosure was dismissed. Here is why: Again, the foreclosing plaintiff's support for its motion for summary judgment and its opposition to the motion to dismiss for failure to receive the notice of default consisted of unsubstantiated and conclusory statements in an affidavit of one of the plaintiff's employees. That affidavit indicated that the required notice of default was sent according to the terms of the mortgage, and a copy of that notice was attached. But, this is not proof that it was mailed by first-class mail or actually delivered. Therefore, the plaintiff could not support summary judgment and could not refute lack of notice, upon which basis the action was dismissed.

What, then, is the standard for demonstrating that the default notice was sent? One method is to prepare a contemporaneous affidavit of service for all of the notices that go out from a servicer on any given day. Though it is true that this can be pointedly cumbersome, it is worthy of consideration. As an alternative, an affidavit reciting the methodology of the servicer in preparing and transmitting the letter in the normal course of business from one station to another and then to a receptacle maintained by the U.S. Postal Service can meet the test. Neither method was used in the cited cases, and so the mortgage holders lost.

The lesson in the end is sobering and noteworthy. Most residential mortgage forms will require a 30-day notice of default as a prerequisite to initiating a foreclosure. Even if state law requires other notices, that will not obviate the need to send the 30-day notice.

The mortgage recites what the letter must say and how it is to be transmitted. Compliance with both requirements by the servicer will be essential.

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But then, the servicer must establish a method to actually prove that the notice was mailed. Borrowers will continue to deny its receipt, and that shifts the burden to the servicer. It is a time-worn cliche, but it finds application here: Forewarned is forearmed. SM

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