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The State of Foreclosures in 2012

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A Roundup of Foreclosure Law Decisions in 2012


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BY ADAM LEITMAN BAILEY AND DOV TREIMAN

We reviewed every Appellate Division case in the first eleven months of 2012. In raw count, the lenders beat the borrowers by a rough margin of 2:1, but that number does not necessarily reflect a swing in sensitivities. The appellate division decisions in 2012 showed strict application of the laws and notable lack of sympathy for borrowers evidenced by recent years' legislative enactments, issuing decisions that were decidedly pro-lender. One trend continuing in 2012 is that the Second Department has the lion's share of the reported cases and is therefore the most fruitful source of stare decisis.

Standing, Basic Principles

The 2012 cases adhered to the principle that mere servicers who cannot account for the whereabouts of the promissory note lack standing to bring a foreclosure action.1 Practitioners in the field refer to these as "where's the note?" defenses and see them in any case where the servicer is other than the originator of the mortgage. Since the borrower has no way of knowing if the note actually traveled with the mortgage, savvy defense counsel always interpose the defense and hope for the best. In CSFB 2004–C3 Bronx Apts v. Sinckler,2 the record seems to imply that the mortgagor assumed that a "where's the note" defense would be available and was simply disappointed when it turned out that the mortgagee actually had it. The Appellate Division's uncharacteristic rapid reversal (four months!) of the trial court probably indicates the appellate panel's impatience with trial court decisions based on mercy rather than law. Something similar happened in Deutsche Bank Trust Americas v. Codio,3 where the plaintiff was able to produce an allonge (a document showing the actual chain of assignment with original signatures at each endorsement) showing it to have been the proper assignee of the mortgage. Clearly such matters can be a question of fact.4 However, other cases have stated that there are methods for foreclosing without actually possessing the promissory note.5

Repairs to Standing

If standing was defective at the time of the commencement of the action, it appears that the standing cannot be corrected. The decision standing for that idea, U.S. Bank v. Dellarmo,6 showed that the attempted correction was not itself correct and therefore the principle we set forth could be distinguished as mere dicta. Although already implied in 2011, 2012 made it clear that if the plaintiff in a foreclosure proceeding lacks standing at the time of commencing the action, later acquisition of that standing does not cure the action. It must be commenced from scratch—but only if it can be.

If, however, the plaintiff did have standing to bring the action in the first place, the proper plaintiff may assign both the mortgage and the lawsuit to a successor. Under such circumstances, it is proper to amend the caption to reflect the new parties.7 However, substitution in the action (and amendment of the caption) is not mandatory, but rather the original action can proceed as is after the assignment.8 A purchaser of a failed bank's assets has standing to commence a foreclosure action, even if it is immune from whatever counterclaims the borrower may have asserted against the failed bank.9

It may be that while searching for the proper plaintiff, the statute of limitations has run so as to intercept the suit. Oddly, however, this can actually run in favor of the lender. Normally, part of the bringing of a foreclosure action is the acceleration of all future payments on the mortgage to being due and payable forthwith. However, if in the prior action, the lender lacked standing to bring the suit at all, the lender also lacked standing to accelerate the note. Thus, when the proper plaintiff comes along to bring the suit, that plaintiff can accelerate what remains on the note and is not already barred by the statute of limitations.10 While this does not give the plaintiff 100 percent of the borrowed funds, it can give the plaintiff considerably more than the zero it would have gotten had the previous plaintiff's acceleration been effective.

While normally we think of standing issues as being relative to the standing of the plaintiff, the standing issue can arise with respect to the defendants as well. Thus, where property is owned as tenants by the entirety and only one spouse signs the note and mortgage, the foreclosure proceeding cannot be prosecuted against the nonsignatory spouse and, of course, therefore is of little value as against the signatory spouse. In other words, whether or not a house divided can stand, if it's divided, it can't be foreclosed on.11 Where the proceeding is brought against a dead person, there is no fixing it.12 One must start the proceeding against the personal representative of the estate. Where the defendant claims to hold a superior mortgage herself, the foreclosure proceeding may also be defeated.13

Fraudulent Practices

In foreclosures, anyone can be guilty of fraud: lender, assignee, or even the homeowner.

Since the passage of The Home Equity Theft Prevention Act (HETPA), codified as Chapter 308 of the Laws of 2006,14 the kinds of behavior characterized as "predatory lending" has undeniably diminished. As a result, by 2012, the amount of case law under the statute had considerably dropped off. Where it does appear, however, is in dealing with the question of whether the mortgage was valid in the first place and therefore qualified to be an appropriate instrument upon which to foreclose. A consumer seeking to resist a foreclosure must show either substantively that she was taken advantage of in predatory practices or that the loan was issued after the HETPA law went into effect creating presumptions of pre-

dation. (Emigrant Mortg. v. Fitzpatrick).15 It should be noted that Fitzpatrick holds the consumer responsible for the contents of the great mass of information presented at the time of loan applications and closings and does not take into account the well-known phenomenon that people simply do not read these materials. The court rejected the sympathetic approach, instead holding:

Here, the plaintiff's evidence established that Fitzpatrick was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income. Such evidence established its prima facie entitlement to judgment as a matter of law dismissing the second affirmative defense. In opposition, Fitzpatrick failed to proffer any evidence sufficient to raise a triable issue of fact as to whether the plaintiff made any materially misleading statements or committed any misconduct with respect to the subject loan.

Although the originating bank may have done nothing at all, that does not mean that an assignee of the bank is equally innocent. Where the one who is sitting as plaintiff in the foreclosure proceeding actually maliciously caused the default, while the foreclosure proceeding itself may still lie, ancillary relief within the court's discretion is properly denied the plaintiff.16 However, it is unclear whether if the predatory practice had been committed by the initial plaintiff in the suit whether the foreclosure relief in chief would also have been denied.

Where the premises are conveyed out from under a mortgage in order to avoid the mortgage, no matter how many such conveyances there are, they can all be set aside and the foreclosure allowed to proceed.17

Mortgages routinely contain clauses indicating that they are the complete understanding of the parties and that there are no oral representations or that any such oral representations are "merged" into the mortgage. However, a so-called "merger clause" in a mortgage will not necessarily bar claims of fraudulent representations, at least not where the clause is "bare bones." Thus, the mortgage itself is vulnerable to attack through oral testimony claiming fraudulent inducement. (LibertyPointe Bank v. 75 East 125th Street, LLC18). Contrast this with Emigrant Mortg. v. Fitzpatrick, supra,19 that refuses to allow an attack on the mortgage based on a predatory lending claim where the mortgage transaction included boilerplate disclosures. Philosophically, these two cases are difficult, if not impossible to reconcile. We note, in this regard that LibertyPointe is from the First Department, whereas Fitzpatrick is from the Second Department and may therefore represent contrary views that will develop their own body of developing precedent.

Inadequate Consideration

Normally, land is sold on a flat fee basis. The price is set for the parcel, regardless of the size of the parcel. However, where the premises were supposed to be sold on a price per acre basis and there was less acreage than actually contracted for and the borrower defaults, the smaller size of the property is not a complete defense to the foreclosure. The foreclosure can proceed, but the amount foreclosed upon will be reduced downward.20 In Thompson v. Naish21 the Fourth Department held that where the borrower pays the full amount demanded, but pays it late, the borrower is still in default of the mortgage and foreclosure is appropriately ordered. That is not as harsh a rule as it appears, given RPAPL §1341, permitting the defendant to pay off the remaining sums (the late fees and such) owed in order to prevent the sale of the property.

Counterclaims

A waiver in a mortgage of defenses or counterclaims does not preclude a counterclaim based on fraud, if properly asserted.22

Mortgagees in Possession

Finally, we note under Bank of America v. Oneonta, L.P.,23 that a mortgagee in possession after an order of reference can safely expect reimbursement for the items spent after the appointment of a referee only if they are actually specified in the mortgage instrument allowed to be advanced, but nothing else—reimbursement should only be approved for expenditures that are necessary to maintain the premises. The referee the court appoints on the plaintiff's motion, not the plaintiff, is charged with running the property. While the plaintiff in that case was simply out of luck in expending other funds for which reimbursement was refused, the Third Department precisely states what the plaintiff could have done to ensure that it would not be expending funds not subject to reimbursement.

The court wrote, "The prudent course for plaintiff would have been to seek court approval in advance of undertaking any actions that might be deemed ultra vires and obtaining permission to act and add the expenditure to the amount of its judgment, or move to expand the receiver's powers and have the court authorize him to undertake those actions or make those expenditures." (emphasis supplied). In other words, rather than spending the funds and hoping for the best, the plaintiff could have sought court permission to spend the money itself or empower the receiver to do so. Consistent with our theme of strict enforcement, we find the court looking to the mortgage instrument itself and allowing only those expenses expressly specified in it—absent the prior permission. The Appellate decision does not rule out the idea that Trial Term could have gone beyond the four corners of the mortgage in the sound exercise of discretion, given adequately persuasive reasons to do so prior to the making of the expenditure.

Conclusion

All four Appellate Divisions should be applauded and lauded for following the rule of law and enforcing contracts as written in 2012. Such rulings should keep the few lenders left lending, knowing that they will have the ability to collect the borrowed money or homes pledged albeit a few years after starting an action.

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Endnotes:

1. In the Second Department: U.S. Bank v. Dellarmo, 94 A.D.3d 746, 942 N.Y.S.2d 122; Citibank v. Van Brunt Properties, 95 A.D.3d 1158, 945 N.Y.S.2d 330; U.S. Bank v. Cange, 96 A.D.3d 825, 947 N.Y.S.2d 522; Wells Fargo Bank v. Hudson, 98 A.D.3d 576, 949 N.Y.S.2d 703.
2. 96 A.D.3d 680, 949 N.Y.S.2d 21 (1st Dept. 2012).
3. 94 A.D.3d 1040, 943 N.Y.S.2d 545 (2d Dept. 2012).
4. Deutsche Bank Nat. Trust v. Rivas, 95 A.D.3d 1061, 945 N.Y.S.2d 328 (2d Dept.).
5. Bailey & Weinstein, "Using the Judicial System to End the Foreclosure Crisis," New York Law Journal, Aug. 8, 2012.
6. 94 A.D.3d 746, 942 N.Y.S.2d 122 (2d Dept.).
7. Citibank v. Van Brunt Properties, 95 A.D.3d 1158, 945 N.Y.S.2d 330 (2d Dept.); GRP Loan v. Taylor, 95 A.D.3d 1172, 945 N.Y.S.2d 336 (2d Dept. 2012).
8. IndyMac Bank v. Thompson, —N.Y.S.2d—, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (AD 2d Dept. 2012).
9. JP Morgan Chase Bank v. Miodownik, 91 A.D.3d 546, 937 N.Y.S.2d 192 (1st Dept.).
10. Wells Fargo Bank v. Burke, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dept.).
11. U.S. Bank v. Lieberman, 98 A.D.3d 422, 950 N.Y.S.2d 127 (1st Dept.).
12. Wendover Financial Services v. Ridgeway, 93 A.D.3d 1156, 940 N.Y.S.2d 391 (4th Dept. 2012).
13. South Point v. Redman, 94 A.D.3d 1086, 943 N.Y.S.2d 543 (2d Dept. 2012).

14. Parts of HETPA appear in §595 of the Banking Law, §265-a of the Real Property Law and §1303 of the Real Property Actions and Proceedings Law, the last of which being specifically concerned with foreclosure.
15. 95 A.D.3d 1169, 945 N.Y.S.2d 697 (2d Dept. 2012).
16. Norwest Bank Minnesota v. E.M.V. Realty, 94 A.D.3d 835, 943 N.Y.S.2d 113 (2d Dept. 2012).
17. Pritchard v. Curtis, 95 A.D.3d 1379, 944 N.Y.S.2d 341 (3d Dept.).
18. 95 A.D.3d 706, 946 N.Y.S.2d 26 (1st Dept. 2012).
19. 95 A.D.3d 1169, 945 N.Y.S.2d 697 (2d Dept. 2012).
20. Shufelt v. Bulfamante, 92 A.D.3d 936, 940 N.Y.S.2d 108 (2d Dept. 2012).
21. 93 A.D.3d 1203, 940 N.Y.S.2d 714 (4th Dept. 2012).
22. Archer Capital Fund v. GEL, 95 A.D.3d 800, 944 N.Y.S.2d 179 (2d Dept. 2012).
23. 97 A.D.3d 1023, 949 N.Y.S.2d 794 (3d Dept. 2012).

Foreclosure Cases

You can see the entire cases annotated with descriptions at www.alblawfirm.com/Foreclosures2012

*Score**:*

Against mortgagee (17 cases): 1, 3, 5, 10, 14, 22, 23, 25, 27, 28, 30, 32, 35, 37, 40, 43, 47

Pro mortgagee (32 cases): 2, 4, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 26, 29, 31, 33, 34, 35, 36, 38, 39, 40, 41, 42, 44, 45, 46

Lessons Learned:

I. SUBSTANTIVE LAW

A. STANDING

1. Standing remains an issue, regardless of MERS. While the 2012 case law shows a definite trend favoring lenders in standing issues, it does not repudiate the leading cases[1] that established standing as a problem for the lending industry and may simply be explained by lenders who know that they do not have physical possession of the note simply not attempting to bring the foreclosure action at all.
    a. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1
    b. *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 A.D.3d 1158, 945 N.Y.S.2d 330 (Second Dept. 2012) –12
    c. *US Bank Nat. Ass'n v. Cange*, 96 A.D.3d 825, 947 N.Y.S.2d 522 (Second Dept. 2012) –42
    d. *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012) –45
    e. *CSFB 2004–C3 Bronx Apts LLC v. Sinckler, Inc.,* 96 A.D.3d 680, 949 N.Y.S.2d 21 (First Dept. 2012) –13 In *Sinckler*, the record seems to imply that the mortgagor assumed that a "where's the note" defense

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**page numbers based on full document posted on website*

[1] *Bank Of N.Y. v. Silverberg,* 86 A.D.3d 274, 926 N.Y.S.2d 532 (Second Dept. 2011) –Additional Study Materials 2

would be available and was simply disappointed when it turned out that the mortgagee actually had it. Something similar happened in *Deutsche Bank Trust Co. Americas v. Codio,* 94 A.D.3d 1040, 943 N.Y.S.2d 545 (Second Dept. 2012)—16 where the plaintiff was able to produce an allonge showing it to have been the proper assignee of the mortgage.

f. It is a question of fact that must be established. *Deutsche Bank Nat. Trust Co. v. Rivas,* 95 A.D.3d 1061, 945 N.Y.S.2d 328 (Second Dept. 2012)—15, but *Rivas* does not set forth in the decision just what the question of fact is questioning.

g. *HSBC Bank USA v. Hernandez,* 92 A.D.3d 843, 939 N.Y.S.2d 120 (Second Dept. 2012) –22 appears to be a case where the bank tried to bluff its way through, even though it may not have had possession of the note or a clear chain of title to it. While it survived summary judgment, most notably it was not granted summary judgment when its summary judgment papers apparently failed to include the note. Thus, although it survived the appeal, it appears unlikely that it will prevail in the case.

2. If standing was defective at the time of the commencement of the action, it *appears* that the standing cannot be corrected. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1.

a. However, if standing is proper in the plaintiff at the time of commencement of the action, but a proper assignment is effected during the prosecution of the action, the action itself may, in effect, be assigned, and the caption amended to reflect the substitute mortgagee. *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 A.D.3d 1158, 945 N.Y.S.2d 330 (Second Dept. 2012) –12; *GRP Loan, LLC v. Taylor,* 95 A.D.3d 1172, 945 N.Y.S.2d 336 (Second Dept. 2012) –20

b. Substitution in the action (and amendment of the caption) is not mandatory, but rather the original action can proceed after the assignment. *IndyMac Bank F.S.B. v. Thompson,* --- N.Y.S.2d ----, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (App.Div. Second Dept. 2012) – 23

3. Acceleration Standing and Statute of Limitation; One who lacks standing to bring a foreclosure action, lacks the capacity to accelerate the entire note and thus cannot start the running of the statute of limitations to bar the later payments due on the installment note. *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 943 N.Y.S.2d 540 (Second Dept. 2012) – 2

4. An assignment of a mortgage will not be given effect absent proof of physical possession of the note. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1

5. A purchaser of failed bank's assets has standing to commence a foreclosure action, even if it is immune from whatever counterclaims the borrower may have asserted against the failed bank. *JP Morgan Chase Bank Nat. Ass'n v. Miodownik,* 91 A.D.3d 546, 937 N.Y.S.2d 192 (First Dept. 2012) –24

6. Where property is owned as tenants by the entirety and only one spouse signs the note and mortgage, the foreclosure proceeding cannot be prosecuted against the nonsignatory spouse. *US Bank Nat. Ass'n v. Lieberman,* 98 A.D.3d 422, 950 N.Y.S.2d 127 (First Dept. 2012) –43

B. MORTGAGEES IN POSSESSION

1. Appellate Division allows for receiver to reimburse lender two items explicitly state in mortgage and note. For example,

C. QUALITY OF TITLE

1. Constant unsuccessful efforts by the mortgagor to defeat the foreclosure proceeding are insufficient to make the title unmarketable enough to relieve a successful bidder at the foreclosure sale from going forth with the sale. *Bank of New York v. Segui,* 91 A.D.3d 689, 937 N.Y.S.2d 95 (Second Dept. 2012) –8

2. Where the Defendant claims to hold a superior mortgage herself, the foreclosure proceeding may be defeated. *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012) –37

D. PREDATORY AND FRAUDULENT PRACTICES

1. A consumer seeking to resist a foreclosure must show either substantively that she was taken advantage of in predatory practices or that the loan was issued after the law went into effect creating presumptions of predation. *Emigrant Mortg. Co., Inc. v. Fitzpatrick,* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (Second Dept. 2012) –17 It should be noted that this decision holds the consumer responsible for the contents of the great mass of information presented at the time of loan applications and closings and does not take into account the well-known phenomenon that people simply do not read these materials.

2. Where the one who is sitting as Plaintiff in the foreclosure proceeding actually maliciously caused the default, while the foreclosure proceeding itself *may* still lie, ancillary relief within the court's discretion is properly denied the Plaintiff. *Norwest Bank Minnesota, NA v. E.M.V. Realty Corp.,* 94 A.D.3d 835, 943 N.Y.S.2d 113 (Second Dept. 2012) –30. *Norwest* is unclear

whether if the predatory practice had been committed by the initial plaintiff in the suit whether the foreclosure relief in chief would also have been denied.

3. Where the premises are conveyed out from under a mortgage in order to avoid the mortgage, no matter how many such conveyances there are, they can all be set aside and the foreclosure allowed to proceed. *Pritchard v. Curtis,* 95 A.D.3d 1379, 944 N.Y.S.2d 341 (Third Dept. 2012) –33

E. MERGER CLAUSE

1. A merger clause in a mortgage will not necessarily bar claims of fraudulent representations, at least not where the clause is "bare bones." Thus, the mortgage itself is vulnerable to attack through oral testimony claiming fraudulent inducement. *LibertyPointe Bank v. 75 East 125th Street, LLC,* 95 A.D.3d 706, 946 N.Y.S.2d 26 (First Dept. 2012) –27. Contrast this with *Emigrant Mortg. Co., Inc. v. Fitzpatrick,* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (Second Dept. 2012) –17 that refuses to allow an attack on the mortgage based on a predatory lending claim where the mortgage transaction included boilerplate disclosures. Philosophically, these two cases are difficult to reconcile.

F. VALUE OF MORTGAGED PREMISES

1. Where the premises were supposed to be sold on a price per acre basis and there was less acreage than actually contracted for, then the foreclosure can proceed, but the amount foreclosed upon will be reduced downward. *Shufelt v. Bulfamante*, 92 A.D.3d 936, 940 N.Y.S.2d 108 (Second Dept. 2012) –35

G. PAYMENT

1. Where mortgagor pays the full amount demanded, but pays it late, the mortgagor is still in default of the mortgage and foreclosure is appropriately ordered. *Thompson v. Naish,* 93 A.D.3d 1203, 940 N.Y.S.2d 714 (Fourth Dept. 2012) –39

II. PROCEDURAL LAW

A. SOURCES OF PROCEDURAL LAW

1. Impliedly, trial courts have the power to require additional paperwork beyond what would appear on the face of the statute in order to grant foreclosure on default.

    a. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012) —6; Compare, *Brusco v. Braun*, 84 NY2d 674, 645 NE2d 724, 621 NYS2d 291 (1994)—Additional Study Materials 1

b. Such additional paperwork can be required by an Administrative Order issued by the State's Chief Administrative Judge. *Flagstar Bank v. Bellafiore,* 94 A.D.3d 1044, 943 N.Y.S.2d 551 (Second Dept. 2012) –18; *US Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (Second Dept. 2012) –44; *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012) –45

B. BENCH AND BAR

1. There appears to be evidence of hostility to the Plaintiff's bar among at least some trial judges. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012)—6; *IndyMac Bank F.S.B. v. Thompson,* --- N.Y.S.2d ----, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (App.Div. Second Dept. 2012)—23; *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012) –37; *U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ----, 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012) –40 (In the *Gonzalez* case, the hostility appears well justified.)

2. It is error for a trial court *sua sponte* to dismiss a foreclosure action for failure to timely file requested affirmation, absent extraordinary circumstances. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012)—6

3. Trial court hostility to default foreclosure judgments remains very much in play. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012) —6

C. PERSONAL JURISDICTION

1. The general hostility to personal jurisdiction defenses throughout New York practice holds true in foreclosure actions as well.

   a. *Bank of New York v. Espejo,* 92 A.D.3d 707, 939 N.Y.S.2d 105 (Second Dept. 2012)—7

   b. *Cantor v. Flores,* 94 A.D.3d 936, 943 N.Y.S.2d 138 (Second Dept. 2012) –9

   c. *Christiana Bank & Trust Co. v. Eichler,* 94 A.D.3d 1170, 942 N.Y.S.2d 241 (Third Dept. 2012)—11.

   d. *U.S. Bank Nat. Ass'n v. Hossain,* 94 A.D.3d 979, 943 N.Y.S.2d 140, 2012 N.Y. Slip Op. 02864 (Second Dept. 2012) –41

   e. *HSBC Bank USA N.A. v. Thomas,* 92 A.D.3d 531, 939 N.Y.S.2d 346 (First Dept. 2012) –21

   f. *Reich v. Redley,* 96 A.D.3d 1038, 947 N.Y.S.2d 564 (Second Dept. 2012) –34

g. *Wells Fargo Bank, NA v. Edwards*, 95 A.D.3d 692, 945 N.Y.S.2d 44 (First Dept. 2012) –46

h. However, where there are specific denials of the propriety of service of process, a mortgagor can effect the vacatur of the foreclosure judgment. *Deutsche Bank Nat. Trust Co. v. DaCosta,* 97 A.D.3d 630, 949 N.Y.S.2d 393 (Second Dept. 2012)—14. However, *DaCosta,* while stating that the facts of its case showed a sufficiently specific denial, it sets no explicit standards for that explicitness.

D. DEFENSES

1. Where a mortgagor has a defense to the foreclosure proceeding, such as the failure to serve a pre-litigation contractual notice, it is waived unless raised in an answer or motion under CPLR 3211(a). *Signature Bank v. Epstein,* 95 A.D.3d 1199, 945 N.Y.S.2d 347 (Second Dept. 2012) –36

2. Affirmative defenses will be permitted to survive a motion to dismiss so long as there are issues of fact as to whether it really exists or not. *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012)—37

3. There are no defenses available to a junior lien holder in a reforeclosure action. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank Nat. Trust Co.,* 92 A.D.3d 768, 939 N.Y.S.2d 82 (Second Dept. 2012) –38

4. Regardless of misbehavior by the plaintiff's attorney, late answers or motions to dismiss are inexcusable. *U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ---- , 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012) –40

E. COUNTERCLAIMS

1. A waiver in a mortgage of defenses or counterclaims does not preclude a counterclaim based on fraud, if properly asserted. *Archer Capital Fund, L.P. v. GEL, LLC,* 95 A.D.3d 800, 944 N.Y.S.2d 179 (Second Dept. 2012) –4

F. CONSOLIDATION

1. Where there is a question about the validity of the mortgage, an action trying out that question should be consolidated with a foreclosure action. On the practical level, this means that while foreclosure actions typically move quickly through predictable stages, the foreclosure action will be slowed down to a crawl through the discovery process in the validity suit. *American Home Mortg. Servicing, Inc. v. Sharrocks,* 92 A.D.3d 620, 938 N.Y.S.2d 202 (Second Dept. 2012) –3

G. INTERVENTION

1. Unrecorded contract vendees are entitled to intervene in foreclosure proceedings so as to exercise whatever lien they may have against the sale proceeds, but not so as to interfere with the foreclosure itself. *Global Team Vernon, LLC v. Vernon Realty Holding, LLC,* 93 A.D.3d 819, 941 N.Y.S.2d 631 (Second Dept. 2012) –19

2. Where it appears that there may have been fraud in the conveyance underlying the grant of the mortgage, one contesting the bona fides of the conveyance should be granted intervention, notwithstanding possible statute of limitations issues. *JP Morgan Chase Bank, Nat. Ass'n v. Kalpakis*, 91 A.D.3d 722, 937 N.Y.S.2d 105 (Second Dept. 2012) –25

H. STAYS

1. Foreclosure proceedings are appropriately stayed pending related bankruptcy proceedings. *Capital One, N.A. v. Waterfront Realty II, LLC,* 94 A.D.3d 683, 942 N.Y.S.2d 131 (Second Dept. 2012) –10

2. A stay is not effective if not served in strict compliance with the methodology dictated in the order granting the stay. *Lenders Capital LLC v. Ranu Realty Corp.,* --- N.Y.S.2d ----, 2012 WL 4868325, 2012 N.Y. Slip Op. 06890 (First Dept. 2012) –26

I. SUMMARY JUDGMENT

1. The mortgagor seeking to resist summary judgment in a foreclosure proceeding, must set forth more than mere suppositions of the bases for the various defenses available to a foreclosure defendant. Hoping to find something in discovery is not enough. *New York Community Bank v. Parade Place, LLC,* 96 A.D.3d 542, 947 N.Y.S.2d 426 (First Dept. 2012) –29

J. DEFICIENCY JUDGMENT

1. There is a 90 day period after the Referee's conveyance of title, during which the Plaintiff may move for a deficiency judgment. Refusal of the deed did not stop the running of that limitations period. Thus, the Petitioner, by wasting time seeking to manipulate the deed, lost the ability to get the deficiency judgment. *M & T Real Estate Trust ex rel. M & T Real Estate, Inc. v. Doyle,* 93 A.D.3d 1331, 941 N.Y.S.2d 422 (Fourth Dept. 2012) –28

2. Where the purchaser at a foreclosure sale would have a claim against the mortgagor, but fails to move for a deficiency judgment within the 90 day period, that claim is wholly extinguished, both as to the main debt and ancillary charges. *Option One Mortg. Corp. v. J.P. Morgan Chase & Co.,* 93 A.D.3d 480, 940 N.Y.S.2d 225 (First Dept. 2012) –32

K. CORRECTION OF IMPROPERLY JOINED PARTIES

1. Where the proceeding is brought against a dead person, there is no fixing it. *Wendover Financial Services v. Ridgeway,* 93 A.D.3d 1156, 940 N.Y.S.2d 391 (Fourth Dept. 2012) –47

L. TECHNICAL FLAWS

1. Minor technical flaws in every stage of the foreclosure proceeding are subject to the same kinds of forgiveness as in any other action under CPLR 2001[2]. *NYCTL 2005–A Trust v. Rosenberger Boat Livery, Inc.,* 96 A.D.3d 425, 947 N.Y.S.2d 2 (First Dept. 2012) –31

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[2] CPLR 2001:

Mistakes, omissions, defects and irregularities. At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

Foreclosure in 2012: Part II

By Adam Leitman Bailey and Dov Treiman*

This is the second of our two part series reviewing the appellate law of foreclosure developed in the Appellate Divisions in 2012.

The Nitty Gritty

The Chief Administrative Judge of the State has issued directives requiring an affirmation by plaintiff's counsel that all the papers are proper and true.[1] The courts have upheld these additional procedures, although they have decreed that it is error for a trial court *sua sponte* to dismiss a foreclosure action for failure to timely file requested affirmation, absent extraordinary circumstances.[2]

While the Appellate Divisions have approved this procedure, it is not beyond doubt that the Court of Appeals will approve of it. In *Brusco v. Braun,*[3] the Court of Appeals disapproved piling procedures on above those set forth in the summary proceedings statute. The Court wrote:

> Article 7 represents the Legislature's attempt to balance the rights of landlords and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property ... The statute attempts to protect a landlord's right to promptly recover premises occupied by a non-paying tenant but also to ensure that tenants are not unjustly evicted from their homes. Tenants are protected by multiple notice provisions and by the continuing jurisdiction of the Civil Court over the landlord/tenant disputes. …. These safeguards ensure adequate notice and judicial oversight of tenants' rights. The statute does not authorize the judges to fashion additional, individualized protections upsetting the legislative scheme.

Other Defenses

Where a mortgagor has a defense to the foreclosure proceeding, such as the failure to serve a pre-litigation contractual notice, the defense is waived unless raised in an answer or motion under CPLR 3211(a).[4] Contrast this with the statutory notices that are seen as so essential to the proceeding, that defendants can raise the plaintiff's failure to serve them "at any time."[5]

However, minor technical flaws in every stage of the foreclosure proceeding are subject to CPLR 2001's[6] same kinds of forgiveness as in any other action.[7]

Affirmative defenses will be permitted to survive a motion to dismiss so long as there are issues of fact as to whether the defense really exists or not.[8]

Most attorneys are aware that any parties not named in a foreclosure proceeding do not have their rights cut off in that proceeding. Somewhat more arcane, however, is the actual proceeding found at RPAPL §1352. These additional proceedings are known as "strict foreclosure" and "reforeclosure." There are no defenses available to a junior lien holder in a reforeclosure action.[9]

Regardless of misbehavior by the plaintiff's attorney, late answers or motions to dismiss are inexcusable.[10] While we have seen that the "where's the note?" defense speaks to flaws in the plaintiff's case known exclusively to the plaintiff, generally speaking, the defendant remains responsible to know what defenses may be available. The mortgagor seeking to resist summary judgment in a foreclosure proceeding, must therefore set forth more than mere suppositions of the bases for the various defenses available to a foreclosure defendant. Hoping to find something in discovery is not enough.[11]

Counterclaims

A waiver in a mortgage of defenses or counterclaims does not preclude a counterclaim based on fraud, if properly asserted.[12]

Other Procedural Issues

Where there is a question about the validity of the mortgage, an action trying out that question should be consolidated with a foreclosure action. On the practical level, this means that while foreclosure actions typically move quickly through predictable stages, the foreclosure action will be slowed down to a crawl through the discovery process in the validity suit.[13]

Unrecorded contract vendees are entitled to intervene in foreclosure proceedings so as to exercise whatever lien they may have against the sale proceeds, but not so as to interfere with the foreclosure itself.[14] Where it appears that there may have been fraud in the conveyance underlying the grant of the mortgage, one contesting the bona fides of the conveyance should be granted intervention, notwithstanding possible statute of limitations issues.[15]

Foreclosure proceedings are appropriately stayed pending related bankruptcy proceedings.[16] A stay is not effective if not served in strict compliance with the methodology dictated in the order granting the stay.[17]

Procedure After Prima Facie Case

M & T Real Estate Trust ex rel. M & T Real Estate, Inc. v. Doyle[18] presents an interesting case where the plaintiff as purchaser at the foreclosure auction sought to manipulate the system so as to avoid the expense of recording taxes on a deed. Plaintiff there sought to direct to whom the referee should deed the property rather than accept the deed itself. However, there is a 90 day period after the

Referee's conveyance of title, during which the Plaintiff may move for a deficiency judgment. Refusal of the deed did not stop the running of that limitations period. Thus, the Petitioner, by wasting time seeking to manipulate the deed, lost the ability to get the deficiency judgment. As other cases established, this meant not only the loss of the ability to get a deficiency judgment for the main debt, but for all the other ancillary charges as well.[19] Additional bad news for the successful bidder came in *Bank of New York v. Segui*[20] where the court ruled that constant unsuccessful efforts by the mortgagor to defeat the foreclosure proceeding are insufficient to make the title unmarketable enough to relieve a successful bidder at the foreclosure sale from going forth with the sale.

Finally, we note that a mortgagee in possession after an order of reference can expect reimbursement for taxes and insurance advanced after the appointment of a referee, but nothing else–reimbursement should only be approved for expenditures that are necessary to maintain the premises.[21] The referee the court appoints on the plaintiff's motion is charged with running the property, not the plaintiff.

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[1] *Flagstar Bank v. Bellafiore,* 94 A.D.3d 1044, 943 N.Y.S.2d 551 (Second Dept. 2012); *US Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (Second Dept. 2012); *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012).

[2] *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012).

[3] 84 NY2d 674, 645 NE2d 724, 621 NYS2d 291 (1994).

[4] *Signature Bank v. Epstein,* 95 A.D.3d 1199, 945 N.Y.S.2d 347 (Second Dept. 2012).

[5] *First Nat. Bank of Chicago v. Silver*, 73 A.D.3d 162, 899 N.Y.S.2d 256 (Second Dept. 2010).

[6] CPLR 2001:

Mistakes, omissions, defects and irregularities. At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

[7] *NYCTL 2005–A Trust v. Rosenberger Boat Livery, Inc.,* 96 A.D.3d 425, 947 N.Y.S.2d 2 (First Dept. 2012)

[8] *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012).

[9] *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank Nat. Trust Co.,* 92 A.D.3d 768, 939 N.Y.S.2d 82 (Second Dept. 2012).

[10] *U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ----, 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012).

[11] *New York Community Bank v. Parade Place, LLC,* 96 A.D.3d 542, 947 N.Y.S.2d 426 (First Dept. 2012).

[12] *Archer Capital Fund, L.P. v. GEL, LLC,* 95 A.D.3d 800, 944 N.Y.S.2d 179 (Second Dept. 2012).

[13] *American Home Mortg. Servicing, Inc. v. Sharrocks,* 92 A.D.3d 620, 938 N.Y.S.2d 202 (Second Dept. 2012).

[14] *Global Team Vernon, LLC v. Vernon Realty Holding, LLC,* 93 A.D.3d 819, 941 N.Y.S.2d 631 (Second Dept. 2012).

[15] *JP Morgan Chase Bank, Nat. Ass'n v. Kalpakis*, 91 A.D.3d 722, 937 N.Y.S.2d 105 (Second Dept. 2012).
[16] *Capital One, N.A. v. Waterfront Realty II, LLC,* 94 A.D.3d 683, 942 N.Y.S.2d 131 (Second Dept. 2012).
[17] *Lenders Capital LLC v. Ranu Realty Corp.,* --- N.Y.S.2d ----, 2012 WL 4868325, 2012 N.Y. Slip Op. 06890 (First Dept. 2012).
[18] 93 A.D.3d 1331, 941 N.Y.S.2d 422 (Fourth Dept. 2012).
[19] *Option One Mortg. Corp. v. J.P. Morgan Chase & Co.,* 93 A.D.3d 480, 940 N.Y.S.2d 225 (First Dept. 2012).
[20] 91 A.D.3d 689, 937 N.Y.S.2d 95 (Second Dept. 2012).
[21] *Bank of America, N.A. v. Oneonta, L.P.,* 97 A.D.3d 1023, 949 N.Y.S.2d 794 (Third Dept. 2012).

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TITLE LITIGATION

The New Rules Of Foreclosure Litigation



By **Adam Leitman Bailey** | **Dov Treiman** | And **Alison Weisman**

Since the first loans and mortgages changed hands with cloaks and stone in Israel[1] and Greece[2] thousands of years ago,[3] never previously had mortgages caused a worldwide economic collapse of financial markets. Unfortunately, as the federal and state government as well as some judges place barriers and hurdles breaking contracts and preventing lenders from collecting monies owed to them, or foreclosing on the homes pledged as collateral, lenders may eventually run away from traditional lending, leading to a new world of lending where cash and goods are king, bartered in exchange for property. This would destroy most of the equity acquired in an owner's home. Strange judicial decisions have come down and played their part in slowing down the foreclosure process or simply eviscerating the foreclosure action.

Fortunately, our appellate courts have come to the rescue and brought the essentials for any government: law and order and predictability of law so that business people and consumers alike can prepare contracts without uncertainty. One of the worst fears of every real estate and dirt lawyer is the unknown of what a court will do if a problem arises with a contract.

Having reviewed all of the appellate foreclosure cases since January 2010, we will discuss some of the most important foreclosure cases decided in that period. Our goal is not to denounce or praise these cases but to teach the practitioner and title professional how to proceed in this new era of mortgage and foreclosure litigation. As a general rule, the courts continue to show far greater restraint against enforcing lenders' claims, but our review has shown that when lender's counsel prepares the papers meticulously in accordance with the new laws, properties do go to judgment and sale.

One interesting pattern has emerged. Although the counties of the Second Judicial Department[4] account both for roughly 50 percent of the population and 50 percent of owner-occupied housing in the state of New York, over 70 percent of foreclosures in the state were in the Second Department.[5] While we decline to speculate as to the economic or sociological reasons for the statistical discrepancy, it does mean that the Second Department is leading the way in making foreclosure law.[6]

No Sale Pending Modification

In *Aames Funding Corp. v. Houston*,[7] the Second Department stayed a foreclosure sale pending a determination on his application for a residential mortgage modification pursuant to the federal Home Affordable Mortgage Program (HAMP).[8]

The loan servicer had notified the homeowner that he might be eligible for a loan modification under HAMP, and the homeowner submitted an application to the loan servicer. While the homeowner's application was pending, the lender published a notice of foreclosure sale.

As a general rule, the courts continue to show far greater restraint against enforcing lenders' claims.

The court cited Version 2.0 of the "Making Home Affordable Program Handbook,"[9] which was in effect at the time the lower court denied the homeowner's motion to stay the foreclosure sale. The handbook stated, in pertinent part, that "a servicer may not refer any loan to foreclosure or conduct a scheduled foreclosure sale unless and until…the borrower is evaluated for HAMP and is determined to be ineligible for the program."

Since the loan servicer was a participant in the HAMP program, it was barred from scheduling a foreclosure sale during the HAMP process.

Single Lawsuit Rule

Under New York's equitable relief doctrine, when a borrower defaults on mortgage payments, a lender seeking repayment of a loan may proceed either at law to recover a judgment for the mortgage debt, or may bring an action in equity to foreclose the mortgage, but not pursue both remedies at the same time.[10]

However, that does not deprive a foreclosure plaintiff of a money judgment. In the event the foreclosure sale is insufficient to satisfy the debt, attorney fees, and court costs and expenses, the plaintiff may move for a judgment for those sums within the context of the foreclosure action.[11] The plaintiff must move for such judgment within 90 days after the date of the consummation of the sale by the delivery of the referee's deed to the purchaser[12] at the foreclosure sale.

Generally, plaintiffs move for a deficiency judgment simultaneously with moving to confirm the sale, but the deficiency judgment motion does not enjoy the same flexibility as the confirmation motion.[13] Courts strictly enforce this 90-day period and uniformly treat it as a statute of limitations, beginning on the date that a properly executed deed is delivered, not when it is recorded.[14] Failure to serve the notice of motion within this period serves as a complete bar to the entry of a deficiency judgment.[15]

In *Aurora Loan Services v. Lopa*,[16] the Second Department held that the equitable relief doctrine does not prevent a plaintiff in a foreclosure complaint from also requesting a deficiency judgment.

In *Aurora*, a lender brought suit to foreclose on a mortgage. The lender prayed for deficiency judgment against the homeowner in the event that the amount realized by the sale was less than the amount of the mortgage debt. The court reasoned that while a lender may not simultaneously pursue both a remedy at law and a remedy in equity, a prayer for deficiency judgment within the context of an actual mortgage foreclosure complaint does not constitute a separate action for money judgment. Looking to RPAPL §1371(2), permitting a plaintiff in a foreclosure action to "make a motion in the action for leave to enter a deficiency judgment," the court allowed the prayer for deficiency judgment in the foreclosure complaint as incidental to the principal relief demanded.

Illiteracy No Defense

Although it involved a tax foreclosure and not a mortgage foreclosure *Matter of City of Rochester* (*Duvall*) shows the limits on the courts' extent of consideration and mercy, and its ruling applies not only to all species of foreclosures, but potentially to all species of New York litigation altogether.

The Third Department clearly sympathized with petitioner-homeowner's situation as an illiterate, 91-year-old man who lost his home to tax foreclosure, but found that defendant's illiteracy was not a proper basis on which to attack foreclosure papers or their predicate notices. The respondent, City of Rochester (city), sent notices of an outstanding

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tax bill and of an impending tax foreclosure action to the homeowner by ordinary mail. After receiving only a small portion of the payments from the homeowner over a two-year period, the city sold the property and the homeowner was personally served with a 10-day notice to quit.

In determining whether the notice was reasonable, the majority took into account the status and conduct of the homeowner as well as the burden placed on the city in providing reasonable notice.[18] The court determined that the city's actions in mailing the notice to the homeowner were reasonably calculated, under all the circumstances, to inform the homeowner of the impending foreclosure action and afford him an opportunity to present his objections.[19]

A two-judge dissent, without going into detail, opined that the city was or should have been aware that the homeowner was illiterate, and his illiteracy was a significant circumstance or condition that weighed against a "reasonable calculation"[20] that the usual method of mailing the foreclosure notice would inform the homeowner of the foreclosure action. Consequently, the dissent concluded that the homeowner was not provided with adequate notice of the impending taking.

The dissent further concluded that there were reasonable steps that the city could have taken to inform the homeowner of his tax delinquency but refused to set forth what those could have been. We note that a two-justice dissent in the Appellate Division, under CPLR 5601, automatically entitles the appellant to an appeal as of right to the Court of Appeals. We find ourselves wondering whether the two dissenting justices were therefore setting up the matter so as to give nature enough time to moot the most serious considerations in the case. Were *Duvall* not decided the way it was, not only in foreclosures, but in any kind of suit, anybody with any kind of inability to read English would seem automatically entitled to special considerations that would make litigation in New York impossible to pursue. The majority holding in *Duvall* therefore seems mandatory, two dissenters notwithstanding.

Due Process

In tax foreclosures, there are special considerations of due process attaching only because the government is seeking to seize property. In *Matter of Orange County Commissioner of Finance v. Helseth*,[21] the Court of Appeals held that the county was only obligated to give singular notice of the foreclosure action, as that was the underlying governmental action threatening the landowners' property interests. However, while it is generally a uniquely governmental function to lay and collect taxes, due process concerns also attach when a government is the lender and bringing a mortgage foreclosure.

The state may not deprive a person of property without due process of law, meaning giving notice "reasonably calculated, under all the circumstances," to inform the party whose rights are to be affected of the opportunity to appear and be heard.[22] Constitutional due process does not require that notice be given for each successive stage of the foreclosure proceedings.

In *Matter of Orange County Commission of Finance*, the landowners owned an unimproved piece of property, not their residence. When the landowners were informed that the county was sending their tax bills to this empty lot, they filed a change of address form with the county. Over a year later the landowners paid that year's real property taxes at the county office, directly informing them of their then-current address. Despite these attempts to inform the county of their proper address, the landowners did not receive any additional real estate property tax bills or correspondence for the property.

The next year, the landowner's failed to pay taxes on the property and the county commenced a tax lien foreclosure action. The county mailed the notice to the property in conjunction with other forms of valid service.

Following a default judgment of foreclosure, the county sent the landowners a letter by certified mail, return receipt requested, to the property's address informing the landowners that the county had acquired title to the property. The letter further advised the landowners of a local law, which afforded them a release option, permitting them to repurchase the parcel through a release of the county's interest. This letter came back to the county as "unclaimed."

While in the past two years courts have shown themselves particularly solicitous of borrowers' rights in foreclosure proceedings, we see from this brief survey that the courts are far less solicitous of taxpayers' rights.

Since the release option was a discretionary, permissive remedy that was available to the landowners after the property's lawful foreclosure and conveyance to the county, the court found the landowner's property interest lawfully extinguished in spite of the sending of mail to an address the county had reason to know was bad.[23]

The Court of Appeals distinguished the U.S. Supreme Court holding in *Jones v. Flowers*,[24] because in *Jones* the public tax sale was in lieu of a foreclosure proceeding and therefore, the public tax sale constituted a governmental taking that required due process.[25] The court held that *Jones* does not expand the municipality's obligations beyond the due process required for the actual tax lien foreclosure sale.

Conclusion

While in the past two years courts have shown themselves particularly solicitous of borrowers' rights in foreclosure proceedings, we see from this brief survey that the courts are far less solicitous of taxpayers' rights. At least when it comes to foreclosure, the courts appear far more willing to give leeway to the government than to banks.

1. There are references in the Old Testament that provide evidence that there was lending among individuals in the ancient world. Both the Books of Exodus and Deuteronomy indicate that there was lending and that personal property collateral was used to assure repayment of loans. Debtors would pledge their personal property to creditors for the creditor to hold until the debtor repaid the loan. If the loan was not repaid, the creditor was able to sell the pledged property. The Books of Exodus and Deuteronomy refer to two types of collateral: cloaks and millstones. Millstones were equipment used to grind wheat into flour and were valuable possessions because an owner would use a millstone to produce a livelihood. Roger D. Billings and Frank J. Williams, "Abraham Lincoln, Esq: the Legal Career of America's Greatest President" 109-112 (2010).

2. In ancient Greece, placing a pillar or tablet on the land, inscribed with the creditor's name and the amount of the debt indicated a pledge for land. H.W. Chaplin, "The Story of Mortgage Law," 4 *Harv. L. Rev.* 1 (1890).

3. The authors wish to credit New York Law School Professor of Law and director of the Center for Real Estate Studies, Andrew R. Berman's article "Once a Mortgage, Always a Mortgage—The Use (and Misuse of) Mezzanine Loans and Preferred Equity Investments" 11 *Stan. J.L. Bus. & Fin.* 76 (2005), for leading them to authority on the history of mortgages.

4. The Second Department includes Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland and Putnam counties.

5. An analysis of http://www.RealtyTrac.com revealed that as of January 2012 there were a total of 1672 foreclosures in New York and 1185 of these foreclosures were in the Second Department.

6. Such as, for example, the Third Department's overwhelming presence in corrections law.

7. *Aames Funding Corp. v. Houston*, 85 A.D.3d 1070, 926 N.Y.S.2d 639 (2d Dept. 2011).

8. Part of the congressional response to the 2008 crisis.

9. One should not mistake the word "handbook" for implying anything less than the full force of law.

10. Real Property Actions and Proceedings Law §1301.

11. *Steuben Trust Co. v. Buono*, 254 A.D.2d 803, 677 N.Y.S.2d 882 (4th Dept. 1998).

12. Real Property Actions and Proceedings Law §1371.

13. *Seiden v. Chagnon*, 33 A.D.2d 951, 306 N.Y.S.2d 847 (3d Dept. 1970).

14. *Cicero v. Aspen Hills II,* 85 A.D.3d 1411, 1412, 926 N.Y.S.2d 680, 682 (3d Dept. 2011).

15. Id., at 1412, at 682.

16. *Aurora Loan Services v. Lopa*, 88 A.D.3d 929, 932 N.Y.S.2d 496 (2d Dept. 2011).

17. *Matter of City of Rochester (Duvall)*, 92 A.D.3d 1297, 939 N.Y.S.2d 214 (4th Dept. 2012).

18. *Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 140, 800 N.Y.S.2d 112, 833 N.E.2d 255 (2005).

19. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

20. *Weigner v. City of New York*, 852 F.2d 646, 650, cert denied 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 (1994).

21. *Matter of Orange County Commission of Finance v. Helseth*, N.Y. Slip Op. 01324 (2012).

22. *Mullane*, at 314, at 657.

23. *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 59, 499 N.Y.S.2d 656, 490 N.E.2d 523 (1986).; RPTL §1123(8).

24. *Jones v. Flowers*, 547 U.S. 220, 224, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

25. See, Bailey & Treiman, "Despite 'Jones,' Ambiguities in Title Chain Can Be Cured," *NYLJ,* June 10, 2009.

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MORTGAGE LITIGATION

Using the Judicial System To End NY's Foreclosure Crisis


By **Adam Leitman Bailey**
And **Jackie Halpern Weinstein**

Standard foreclosure proceedings have been put on pause. This article endeavors to provide instruction on how to cure one of the most frequently stumbled upon legal impediments to litigating these actions—the lost note. Many foreclosure actions are sitting stagnant for months, or even years, as a result of not only a reticent judiciary, but also the lenders' sloppy recordkeeping and loss of documentation evidencing their standing to foreclose on a secured property. A lost note, however, does not necessarily foreordain a losing case.

Many of today's foreclosure actions are commenced, not by original lenders, but by parties who received the mortgages after a series of transfers. In the height of the housing boom, millions of mortgage notes were lost in transit, and the whereabouts of the original paperwork for each individual borrower is now anyone's guess. As a result, since a lender must be the holder or assignee of both the mortgage and the note in order to foreclose,[1] the "show me the note" defense to foreclosure actions became widespread, allowing defaulting borrowers to take advantage of the likelihood that the foreclosing lender or servicer does not physically possess the original note evidencing the right to foreclose.

Recent case law, however, demonstrates that the "show me the note" defense to

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foreclosure actions will not, in all cases, shield the defaulting borrower from liability. In New York, despite a lost mortgage note, a lender can still foreclose, so long as it proves to the court by competent evidence: (i) that it owns the note, (ii) the facts preventing the production of the note, and (iii) the terms of the note.[2] The common characteristic among the cases upholding this procedure is the ability of the foreclosing party to fully detail the note's chain of transfers, to prove the prior holders' intent to transfer, and to explain the reasons for the lost note, coupled with the courts' desire to decide cases in the most equitable fashion given the facts at hand.

Practitioners must learn how to prove a lender's standing despite a lost note when possible, so that the foreclosures can be litigated on the merits, and the economy can start to fully rebound from the painful effects of the housing crisis.

Proving Ownership

There are two ways in New York for a lender to prove from the outset that the underlying note was properly transferred: (i) producing a valid written assignment of the note, or (ii) demonstrating that the note was physically delivered to it.[3]

As was reiterated by the Second Department on June 13, 2012 in *U.S. Bank v. Cange*, 96 A.D.3d 825, producing "…a written assignment of the underlying note… is sufficient to transfer the obligation."[4] A retroactively dated assignment, however, as was confirmed in *Wells Fargo v. Marchione*, 69 A.D.3d 204, cannot be used to prove ownership: "If an assignment is in writing, 'the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated.'"[5] Further, the court in *Countrywide v. Gress*, 68 A.D.3d 709, deciphered that an assignment executed subsequent to filing the complaint, but prior to serving the defendants, will also fail to confer standing.[6] Note that an assignment of the note must not be confused with an assignment of the mortgage, as a mortgage assignment without an assignment of the underlying note is a nullity, and standing will not be established.[7] Indeed, it is a well established doctrine, not only in New

Once the foreclosures are pushed through the pipes, there will be more open houses on the market, the prices will drop, and housing will resultantly be made more affordable.

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York, but in all common law jurisdictions recognizing mortgages, that the mortgage instrument itself is not independently enforceable as a debt.[8]

The alternative to producing a written assignment of the note is to demonstrate to the court that the note was physically delivered to the lender.[9] In *U.S. Bank v. Collymore*, 68 A.D.3d 752, the Second Department confirmed that "…the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." New York courts have repeatedly held that a note and mortgage may be transferred by delivery without a written instrument of assignment.[10]

Determining what constitutes sufficient evidence to prove delivery of a note varies on a case by case basis. It is clear, though, that any affidavit produced in support of this contention should absolutely indicate when the note was physically delivered.[11] In *Collymore*, for example, the Second Department held that an issue of fact remained as to whether the bank had standing because the affidavit of the bank's vice president did not indicate when the note was physically delivered to the bank.[12] Even more recently, in *HSBC v. Hernandez*, 92 A.D.3d at 844, the court held that "the affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action."[13] Conversely, the court in *Cange*, however, held that an uncontroverted computer printout indicating the loan number, the lender's name, and the acquisition date was sufficient to establish delivery.[14]

Production of the Note

After the lender demonstrates that it owns the note, it must then explain to the court the circumstances upon which the note was lost. In New York, the loss of negotiable instruments, such as promissory notes, are addressed in, and protected by, the Uniform Commercial Code. UCC §3-804 (Lost, Destroyed, or Stolen Instruments).

As per the NY General Business Law, the facts preventing production of the note can be demonstrated "by parol or other secondary evidence."[15] Most often, lenders submit affidavits describing exactly what happened to the note, in addition to setting forth a step-by-step explanation of all reasonable efforts taken to find the missing note. But, as was established in *Citibank v. Lin*, "…merely stat[ing] that '[p]laintiff and its servicing agent [are] now unable to locate the…note'" is insufficient.[16]

It is also prudent to confirm in any affidavit that the note has not been sold or transferred to any third party. Although outside the scope of this article, it should be mentioned that the court is authorized in these situations to require security indemnifying the borrower against the possibility of double liability, should the note later turn up in the hands of a holder in due course, who is not the lender.[17] While such a holder of only the note would be unable to foreclose, it would be able to bring an ordinary lawsuit on the note itself, and would even have available the expedited procedures of CPLR 3213, to wit, a motion for summary judgment in lieu of complaint.

Practitioners must learn how to prove a lender's standing despite a lost note when possible, so that the foreclosures can be litigated on the merits, and the economy can start to fully rebound from the painful effects of the housing crisis.

Proving the Terms

Finally, in order to foreclose despite a lost note, the lender must also prove the terms of the missing instrument.[18] The terms of the note can be set forth in the same affidavit setting forth the facts preventing the production of the note, and should include details such as, without limitation, the name of the last holder in possession, the name of the borrower, the name of the person that signed on behalf of the borrower (whether the actual borrower or an agent[19]), the type of note, the effective date, the full value of the note, the payment terms, the loan number, and the amount currently unpaid under the note.

Courts have rejected affidavits, however, which are not based on personal knowledge. For example, in *Lin*, the court denied the lender standing because the "…affidavit relie[d] only 'upon personal knowledge, based on books and records of [the bank].'"[20] The Second Department has suggested, though, as in *Brown Bark v. Weiss & Mahoney*, 90 A.D.3d 963, that attaching a copy of a form note to the affidavit, assuming a form was used to create the lost note, could help prove the terms of the lost instrument.[21]

The Future of Foreclosures

Penalizing the purchasers of notes and mortgages on the secondary market, by interfering with their rights to foreclose on defaulted loans, under which loans the original lenders unequivocally lent hundreds of thousands of dollars per transaction, will do nothing but keep our court system clogged and our economy befogged.

For our economy to fully rebound from the housing crisis, we need to put the homes into the hands of people that can afford them. Once the foreclosures are pushed through the pipes, there will be more open houses on the market, the prices will drop, and housing will resultantly be made more affordable. We cannot keep looking into the past and throwing blame, since there were really no innocent parties to our housing crisis. Rather, we must focus on getting the economy back into shape, and we humbly submit that this article provides an ample framework for expediting the foreclosures that are trapped in our court system simply due to a lost note.

1. *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120 (App. Div. 2d Dept. 2012).
2. UCC §3-804; *Clovine Associates Ltd. Partnership v. Kindlund*, 211 A.D.2d 572, 621 N.Y.S.2d 606 (App. Div. 1st Dept. 1995); *Marrazzo v. Piccolo*, 163 A.D.2d 369, 558 N.Y.S.2d 103 (App. Div. 2d Dept. 1990).
3. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 281, 926 N.Y.S.2d 532, 538 (App. Div. 2d Dept. 2011); *Hernandez*, 92 A.D.3d at 844.
4. *U.S.Bank, N.A. v. Cange*, 96 A.D.3d 825 (App. Div. 2d Dept. 2012).
5. *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 207, 887 N.Y.S.2d 615, 617 (App. Div. 2d Dept. 2009).
6. *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 888 N.Y.S.2d 914 (App. Div. 2d Dept. 2009).
7. *U.S.Bank, N.A. v. Sharif*, 89 A.D.3d 723, 725, 933 N.Y.S.2d 293, 296 (App. Div. 2d Dept. 2011).
8. *Carpenter v. Longan*, 83 U.S. 271 (1872).
9. *U.S.Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 (App. Div. 2d. Dept. 2009).
10. *Flyer v. Sullivan*, 284 A.D. 697, 134 N.Y.S.2d 521 (App. Div. 1st Dept. 1954).
11. *Collymore*, 68 A.D.3d at 754.
12. Id.
13. *Hernandez*, 92 A.D.3d at 844.
14. *Cange*, 96 A.D.3d 825.
15. NY General Business Law §394-a(1).
16. *Citibank, N.A. v. Lin*, 2007 WL 2176294 (N.Y.Sup. 2007).
17. NY General Business Law §394-a(2).
18. UCC §3-804; *Kindlund*, 211 A.D.2d at 62; *Piccolo*, 163 A.D.2d at 369.
19. If it is an agent, the affidavit should set forth any proofs of agency the lender may possess.
20. *Lin*, 2007 WL 2176294.
21. *Brown Bark II, L.P. v. Weiss & Mahoney, Inc.*, 90 A.D.3d 963, 965, 935 N.Y.S.2d 637, 638 (App. Div. 2d Dept. 2011).

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Actively at the helm of the law firm he built from scratch, Adam Leitman Bailey, Esq. practices residential and commercial real estate law. Among New York's most successful and prominent real estate attorneys, Mr. Bailey has been identified among the top five percent of attorneys in the New York area, and named a Super Lawyer by Law & Politics magazine and honored with Martindale-Hubbell "AV" Preeminent rating. During the past four years, the internationally esteemed Chambers & Partners repeatedly selected Mr. Bailey as one of New York's Leading Real Estate lawyers, hailing Mr. Bailey as a "tenacious and confident litigator who is quick-witted in court and respected by the judges", and noting that Bailey is "an extraordinary practitioner who gets great results" quoting a client on Mr. Bailey's "ability to anticipate things before they happen."

Real Estate Weekly recognized that "Adam Leitman Bailey has made a name for himself with his success winning cases in the courtroom." That same newspaper called Mr. Bailey "famous" for his "condominium, foreclosure and tenant representation," and compared his real estate practice to Apple's business. New York Real Estate Journal declared Mr. Bailey to be "one of New York's best real estate attorneys." The New York Times referred to his legal strategy and legislation proposed in one case as "novel," in addition to remarking on how in another case "Adam Leitman Bailey fought on… grinding through excruciating detail and obscure Perry Mason moments." After Mr. Bailey's firm used a forgotten statute to prevail in a landmark federal case, the Wall Street Journal quoted a prominent New York developer's attorney who called the holding a "game changer" affecting real estate nationwide. In another case hailed as "the city's largest condo refund ever" (Curbed NY) involving "a settlement likely to send shivers through the ranks of the city's condo developers" (the New York Post), the settlement he received was the largest condominium settlement in history for one building and the largest government grant ($21 million) for a cooperative in New York history.

Dateline NBC referred to Mr. Bailey as "aggressive, tenacious and smart" in asking him to share his negotiating secrets on its nationally syndicated television program. Mr. Bailey's American advocacy has prevailed in numerous important trials and cases before various courts and trial venues, including Housing, Civil, and New York State Supreme and Federal Courts, as well as various New York Appellate tribunals. Such cases have included:

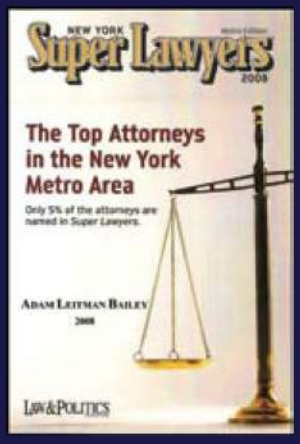
- Lorne v. 50 Madison Avenue LLC, an Appellate Division decision that finds responsibility for repairs of newly constructed buildings remains with Sponsor instead of Condo Board;
- Hartman v. Goldman, an adverse possession case of first impression before New York's Appellate Division;

· 542 East 14th Street v. Lee, a case of first impression before New York's Appellate Division defining expansion of rent regulation law for non-primary residence cases;
· Bacolitsas et al. v. 86th & 3rd Owner, LLC, a case the Wall Street Journal called a "game changer" in which a forgotten federal statute was used to assist numerous purchasers buying iin newly constructed buildings.
· Rivas v. McDonnell, a noteworthy Appellate Division decision involving an interpretation of the recording statute;
· Sky View Parc Purchasers Association, et al. v. FTC Residential Company II, L.P., the largest condominium settlement in New York history;
· Giovanni Indomenico and Jihyun Indomenico et al. v. 123 Washington, LLC (Trump SoHo), where Adam Leitman Bailey prevailed in a settlement providing millions of dollars to clients based on fraud claims under the Federal Securities Law;

Mr. Bailey has successfully defended a number of the leading title companies and lenders in the nation, and prevailed in numerous trials and settlements involving commercial and residential building owners and tenants, real estate developers, real estate brokerages, insurance companies and cooperative and condominium boards. In addition, Mr. Bailey has favorably represented a number of tenant and homeowner associations and commercial and residential tenants, garnering for these persons and associations many millions of dollars in compensation and rent abatements. For clients facing landlords who leave buildings in disrepair, Mr. Bailey has an unusually successful track record of getting those residential towers, apartments, and stores repaired and all services restored.

Mr. Bailey has also applied his expertise in closing various real estate deals and commercial leases. He has been named to the Board of Editors for Commercial Leasing Law & Strategy and has a regular real estate column in the New York Law Journal. Bailey's lease drafting skills received national attention when BlumbergExcelsior, the nation's leading form distributor responsible for over 70 percent of the residential leases signed in the United States, tapped Bailey to draft a new set of New York City, State and national residential and office leases for purchase nationwide. BlumbergExcelsior's principal remarked that Bailey's lease drafting skills were "remarkable." While almost all New York property owners utilize his leases for residential purposes, his commercial leasing ideas and strategies are commonly a part of the entire national commercial leasing scene and have been included in "The Insider's Best Commercial Lease Clauses," published by the Vendome Group.

His success as cooperative and condominium general counsel earned Mr. Bailey recognition in "Who's Who in Real Estate" by Habitat Magazine. As an assistant adjunct professor at New York University, Mr. Bailey teaches commercial and residential landlord-tenant law. This year, Mr. Bailey has taken on the role of author to guide first-time home buyers through the purchase process. John Wiley and Sons has published his first book, Finding the Uncommon Deal: A Top New York Lawyer Explains How to Buy a Home for the Lowest Possible Price which became a number one New York Times bestseller and is available for purchase worldwide. This past year, Mr. Bailey was elected a Fellow of the American College of Real Estate Lawyers (ACREL) where he serves on the Insurance and Title Insurance committees and the American College of Mortgage Attorneys (ACMA).



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