

THE HOME EQUITY THEFT PREVENTION ACT; ANOTHER PITFALL IN THE MORTGAGE FORECLOSURE PROCESS



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New York's mortgage foreclosure process, already a complex and time-consuming affair, just became more so. Real Property Actions and Proceedings Law section 1303, effective February 1, 2007, requires a foreclosing mortgagee to send the mortgagor an additional notice along with the summons and complaint. While seemingly innocuous and easy to comply with, the realities of law practice – especially a high volume mortgage foreclosure practice – will undoubtedly result in situations where the notice is not given and, as a result, a delinquent mortgagor may have ammunition to defend against a foreclosure action. In addition, in those circumstances where the notice is not given, the validity of the foreclosure sale, and the title transferred as a result thereof, may be imperiled.

Section 1303 was added to the Real Property Actions and Proceedings Law as a result of the Home Equity Theft Prevention Act. That act, passed in 2006, was designed to protect financially-distressed mortgagors from mortgage foreclosure rescue scams. While the majority of the Home Equity Theft Prevention Act focuses on conveniences by financially-distressed mortgagors to a third party, which is not discussed here, the Act also adds a new notice requirement, section 1303, to the mortgage foreclosure process.

Real Property Action and Proceedings Law section 1303 requires the mortgagee to deliver to the mortgagor a separate notice along with the summons and complaint. Presumably, then, a process server will deliver the 1303 notice and it will be incumbent upon the mortgagee's counsel to give the notice to the process server along with the summons and complaint.¹ There is no requirement in the statute that the mortgagee file the 1303 notice or that an affidavit of service be prepared to memorialize its service. However, cautious counsel should require his or her process server to include service of the 1303 notice in the affidavit of service of process or in a separate affidavit, and should examine the affidavit(s) to ensure that service of the notice is duly documented.

The notice is to be printed in bold, fourteen-point type (with the title in twenty-point type) and on colored paper that is different than the color of the summons and complaint.² Section 1303(3) sets forth the specific language that is to be included in the notice. The language (vaguely) warns the defaulting mortgagor about mortgage foreclosure rescue scams and advises that there are governmental and not-for-profit agencies that can assist the mortgagor. The notice must include the phone number for a toll-free helpline maintained by the New York State Banking Department as well as the Banking Department's website.³ The Banking Department is to prescribe the telephone number and website address to be included in the notice, and will post on its website the name and contact information of governmental agencies and not-for-profit agencies that can assist

a mortgagor.⁴

The statute does not require that all defendants in a foreclosure action be served with the 1303 notice; only the mortgagor need be served. Moreover, even though the Home Equity Theft Prevention Act is focused on protecting homeowners, the statute does not limit the 1303 notice to residential mortgage foreclosure actions; thus, counsel representing a lender foreclosing on a commercial mortgage is wise to have the additional notice served.

More importantly, the statute is silent as to the effect non-compliance, or partial compliance, has upon the foreclosure action. If the notice is not served, is the action a nullity? What is the impact if the 1303 notice is in regular type or 12-point font? What if the notice is not delivered along with the summons and complaint, but is provided subsequently? The statute provides no guidance as to these questions.

One hopes that courts will take a practical view of the statute's purpose – to give notice so that assistance can be obtained – and that a minor deviation or deviations from the statute will be overlooked. Certainly, where a mortgagor appears in the action by counsel, it seems logical to believe that the defendant will have had, or could have, the assistance that the Legislature intends to make available to the mortgagor (albeit through counsel and not a governmental or not-for-profit agency). Under that circumstance, a court may be willing to overlook non-compliance, or partial compliance, with the statute.⁵ Indeed, one can argue that where partial compliance with the statute is made and the mortgagor has not been substantially prejudiced, a court should overlook any defect in the notice. Courts already overlook irregularities in the notice and conduct of a foreclosure sale.⁶ However, until courts are presented with, and rule on, these issues, there will be uncertainty.

In the interim, how will title companies deal with such issues? Presumably, they will create additional exceptions to insuring title after a foreclosure sale unless counsel for the foreclosing mortgagee can demonstrate compliance with section 1303. And if a foreclosing mortgagee cannot demonstrate compliance, then perhaps the title company will insist that the foreclosing plaintiff commence a proceeding to re-foreclose the mortgage under Article 15 of the Real Property Actions and Proceedings Law, thus adding another step to New York's time-consuming foreclosure process.

Counsel for a secured creditor seeking to foreclose a delinquent mortgage must be aware of the new notice requirement and make sure that, through inadvertence or otherwise, he or she does not give a mortgagor another weapon to use in a foreclosure action or otherwise jeopardize the ability to deliver insurable title at the conclusion of a foreclosure action.

¹ Process serving companies may seek to charge an additional fee for service of this additional notice.

² Real Property Actions and Proceedings Law §1303(2).

³ Real Property Actions and Proceedings Law §1303(3).

⁴ Real Property Actions and Proceedings Law §§ 1303 (4), (5). Based on my phone call to the New York State Banking Department on January 19, 2007, the phone number will be 1-877-Bank-NYS and the website address will be www.banking.state.ny.us with a link to the information.

⁵ This should be true whether or not the mortgagor raises that section as a defense to the foreclosure action.

⁶ See, e.g., Amresco New England II, L.P. v. Denino, 283 AD2d 599 (2d Dept 2001).

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