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Financial Services Litigation Update

Second Department Answers Open Question Concerning RPAPL 1304 and Clarifies Strict Compliance Standard

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On April 20, 2022, the Appellate Division, Second Department answered the open question of whether an alleged inaccuracy in the default amount provided in an RPAPL 1304 ninety-day notice represents a lack of strict compliance with the requirements of the statute in the negative. Keeping true to precedent, the Appellate Division determined that "strict compliance with RPAPL 1304 is satisfied so long as the duration and an amount of the default is contained in the notice, and that any continuing dispute as to the specific amount is an issue that must await the parties' later litigation." The Appellate Division's decision is a welcome relief to lenders that no longer need to fear that an alleged inaccuracy in the amount due provided in ninety-day notice will result in dismissal. Perhaps more importantly, the decision may portend a deterioration of the strict compliance standard annunciated by the Second Department in *Bank of America v. Kessler*.

In *Emigrant Bank v. Cohen*, 2022 NY Slip Op 02532, the plaintiff lender commenced a foreclosure action against, among others, the defendant homeowner/borrower. The borrower answered the complaint asserting several affirmative defenses and counterclaims, including defenses based on the plaintiff's alleged noncompliance with RPAPL 1304 and lack of standing. The lender moved for summary judgment, which the borrower opposed arguing, among other things, that the lender failed to strictly comply with RPAPL 1304 and to demonstrate standing. In reply, the plaintiff submitted a supplemental affidavit, which included new documentary evidence substantiating its standing. The lower court granted plaintiff's motion and the borrower appealed.

On appeal, the borrower reiterated his standing argument and argued that the lender failed to demonstrate strict compliance with RPAPL 1304 by failing to demonstrate compliance with the statute's mailing procedures and by providing an allegedly erroneous default amount in the ninety-day notice.

The Appellate Division addressed the mailing question first, finding that plaintiff's supporting affidavit, which was from a person with direct knowledge of the regular and certified mailings was sufficient to demonstrate compliance. The court further noted that the documentary evidence submitted with the affidavit, which included copies of the ninety-day notice at issue, certified mail receipts and corresponding signed acknowledgment cards, was persuasive.

Next, the Second Department turned its attention to the open question of whether an alleged error in the default amount provided in a ninety-day notice constitutes a lack of strict compliance with the statute. The court began its analysis by examining the statutory text, finding, based on a plain meaning reading, that RPAPL 1301(1) requires lenders to provide homeowners with both the "durational extent and dollar amount of the alleged payment default" in ninety-day notices. However, the statute is silent as to any alleged inaccuracies in the information furnished.

To determine the impact of any alleged inaccuracies, the Appellate Division examined the statute's policy objectives and related case law. Based on its review the court determined that RPAPL 1304 is a notice statute designed to aid the homeowner in attempting to avoid litigation. The Second Department further observed that compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action involving home loans but is not jurisdictional in nature and does not represent the litigation itself. In other words, ninety-day notices are informational in nature, not adjudicative.

After reviewing the statute's policy goals, the Second Department reviewed related case law, finding, as it did recently in *Kessler*, that a lender must strictly comply with the statute's mandates. Notably, however, the court concluded that strict compliance in this context requires only that a homeowner be informed in a ninety-day notice of the duration and dollar amount of the mortgage related default, and that the mortgagee provide notice that includes the number of days of the default, the dollar amount of the arrears and the cure date.

In supporting its determination, the Second Department explained that RPAPL 1304(1) necessarily requires a mortgagee to unilaterally determine the dollar amount that it believes is due and advise the mortgagor of that amount together with the other statutory requirements. The court further reasoned that had the Legislature intended for ninety-day notices to be adjudicative in nature, it would have required mortgagors to provide a breakdown of how the claimed arrears were calculated and/or provide a penalty for alleged inaccuracies. The Second Department further reasoned that infusing an adjudicative mechanism into ninety-day notices would not only run counter to the court's settled law that disputes as to the total amount of indebtedness must await the referee's computation of the amount due but would hinder the Legislature's goal of fostering communication between a mortgagor and mortgagee to avoid foreclosure. As the court explained, if the stated amount due were not subject to discussion and negotiation post-notice and pre-suit, the goal of fostering communication between the parties to avoid foreclosure would be impaired.

Applying the law to the facts, the Appellate Division found that the plaintiff strictly complied with the requirements of RPAPL 1304(1) by advising the borrower of the number of days of the default and the sum claimed to be due.

Nevertheless, the Second Department reversed the lower court's decision granting plaintiff's motion for summary judgment on standing grounds, finding that the lower court improperly considered the documentation submitted with plaintiff's reply. The court recited the settled law that a plaintiff may not use documentation submitted for the first time in reply to establish prima facie proof of standing.

The Second Department's decision is a welcome relief to lenders, which have endured a number of difficult decisions over the past few years, including the Second Department's *Bank of America v. Kessler* decision. Although it is too early to tell whether this decision will mark the beginning of an erosion of the Kessler strict compliance test, the decision is a win for lenders. Lenders can now rest assured that an alleged inaccuracy in the amount of arrears provided in a ninety-day will not be determinative of a future foreclosure action. Any such inaccuracy will not preclude summary judgment and must await the referee's computation to be aired.

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