New Jersey Law Journal

ALM Properties, Inc.
Page printed from: http://www.njlj.com
Back to Article

Notice of Foreclosure Must Identify Lender or Complaint Risks Dismissal

A notice of intention to foreclose must identify the lender, not just the loan servicer, or the foreclosure complaint may be dismissed without prejudice, a state appeals court rules.

David Gialanella

08-08-2011

A notice of intention to foreclose must identify the lender, not just the loan servicer, or the foreclosure complaint may be dismissed without prejudice, a state appeals court ruled Monday.

"A debtor who receives a notice of intention that does not refer to the lender and subsequently receives a foreclosure complaint filed by the lender will be justifiably confused," the Appellate Division said in *Bank of New York v. Laks*, A-4221-09. "

The court vacated a judgment against a couple where the notice failed to name the bank that held their note. Though the violation did not harm the couple — because either way they remained in default — "we cannot conclude that relief is appropriate only when there is a showing of harm," the judges said.

In August 2004, Sarah Laks and her husband, Edward Einhorn, obtained a loan through BSM Financial, secured by a mortgage on their Lakewood home.BSM endorsed the note in blank, allowing whichever entity held it to claim possession. The note was transferred to Bank of New York that October.

The mortgage was held by Mortgage Electronic Registration System Inc. (MERS), a national registry within which participating lenders can transfer interests in mortgages to each other.

Laks first missed a payment in May 2008 and every payment after that. On Aug. 13, Bank of New York's loan servicer, Countrywide Home Loans, sent Laks a notice of intention to foreclose, advising her to pay $21,280 in 30 days or face a foreclosure action.

The notice identified Countrywide as acting on behalf of the note holder — though the note holder was not named — and provided Countrywide's contact information if Laks and Einhorn disagreed about their default status or disputed the amount owed.

MERS assigned the mortgage to Bank of New York, which began foreclosure proceedings on Sept. 24, 2008.

In contesting the foreclosure, the couple acknowledged their default status but claimed the notice was defective because it did not include Bank of New York's name and address.

Bank of New York submitted what it claimed was a true copy of the note — bearing only BSM's endorsement — and moved to strike the couple's answer.

Ocean County Superior Court Judge Frank Buczynski ruled for Bank of New York, holding the notice adequate.

Buczynski denied the couple's motion for reconsideration but directed Bank of New York to show proof it held the note, which it failed to do. The couple then moved to vacate the judgment and dismiss the complaint. Bank of New York then submitted another copy of the note, though it was different — it included two additional endorsements, neither of which belonged to Bank of New York. Buczynski found the proofs adequate and denied the couple's motion.

Appellate Division Judges Jane Grall, Ariel Rodriguez and Laura LeWinn reversed and remanded for an order vacating the judgment and dismissing the complaint without prejudice.

The panel cited a provision of the Fair Foreclosure Act, N.J.S.A. 2A:50-56(c)(11), which says that notice of intention to foreclose must include "the name and address of the lender and the telephone number of a representative of the lender." The statute defines "lender" as the entity holding the mortgage or to which the mortgage is assigned.

Not only did Countrywide fall short of the definition, but the notice stated that Countrywide was acting on behalf of the promissory note's owner, not on its own behalf, the panel said, dispensing with Bank of New York's assertion that it was enough that Laks and Einhorn had the opportunity to contact Countrywide if they wished to dispute foreclosure.

Naming the lender in the notice "is obviously more informative and furthers the Legislature's goal of ensuring that defaulting borrowers are made aware of the situation they face," Grall wrote for the panel. "There is no reason to conclude that the Legislature meant to have lenders serving notices of intention that could leave debtors guessing about the identity of the entity threatening acceleration of a mortgage obligation or a foreclosure action."

Grall said the remedy should be dismissal without prejudice, rather than just re-service of the notice, because the statute entitles the borrower to a conforming notice before, not during, a foreclosure proceeding, and the plaintiff is required to plead compliance with the notice at the outset of the suit.

The opinion "should not be understood to provide an avenue for setting aside a judgment of foreclosure where subsection (c)(11) was not raised prior to entry of judgment," the court noted, because there is "no reason to assume that notices of intention commonly fail to identify the lender."

The panel also noted, in a footnote, that lenders participating in MERS should avoid confusion by obtaining assignment of the mortgage before serving the borrowers with the notice.

Bank of New York's counsel, Mark Winter of Stern, Lavinthal, Frankenberg & Norgaard in Roseland, declines comment.

Laks and Einhorn, who appeared pro se, could not be reached at their listed phone number.