PRE-FORECLOSURE NOTICES MUST HAVE PROOF OF MAILING

One area of foreclosure law that continues to develop in New York relates to proof of mailing of required pre-foreclosure notices. There are generally two notices that must be sent prior to foreclosure; the 30-day breach notice contractually required by most mortgages, and the 90-day statutory notice required by RPAPL § 1304.

Because the 30-day requirement is contractual and thus governed by whatever language exists in any given mortgage instrument, there is not a lot of case law specifically addressing these notices. However, the little that does exist suggests that the standard is comparable to the demonstration required for proving that the 90-day statutory notices were mailed.

Service of the 90-day notice is considered a "condition precedent" to the commencement of foreclosure, and the burden lies with the foreclosing plaintiff to establish that the condition has been satisfied. *See, e.g., CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900 (2d Dept. 2017). What it takes to meet this burden is not consistent among the trial courts throughout New York and may vary depending on the county in which the property sits.

To prove the mailing, there is no requirement of a "particular set of business records," so long as the records offered are admissible under the business records exception to hearsay rule. The mailing "may be proved by any number of documents meeting the requirements of the business records exception to hearsay rule." *HSBC Bank USA, N.A. v. Ozcan*, 154 A.D.3d 822 (2d Dept. 2017). Generally, an "affidavit of service" is required, made by someone with personal familiarity with the servicer's mailing practices and procedures. *See Pappas*, *supra*; *Bank of Am., N.A. v. Wheatley*, 158 A.D.3d 736 (2d Dept. 2018).

There are two paths to making the showing: 1) actual proof of mailing from the USPS; or 2) proof of an office practice or procedure designed to ensure notices are properly addressed and mailed. *Wells Fargo Bank N.A. v. Mandrin*, 160 A.D.3d 1014 (2d Dept. 2018); *U.S. Bank N.A. v. Henderson*, 2018 N.Y. App. Div. LEXIS 49999 (2d Dept. 2018). The former is far cleaner, though you must have both first class and certified proofs of mailings, as to each notice delivered to each address. In many instances, proof of each specific mailing is not available. The latter is also difficult to prove, as there is very little guidance regarding what specifically is required to demonstrate proof of an office practice or procedure. Certain cases also seem to tie in this requirement with whether the affiant has personal knowledge of the mailing and/or the affiant's personal familiarity with the mailing practices. *See*

Henderson, *supra.*; *U.S. Bank N.A. v. Richards*, 155 A.D.3d 522 (1st Dept. 2017); *Nationstar Mortg. LLC v. Cogen*, 159 A.D.3d 428 (1st Dept. 2018); *See TD Bank, N.A. v. Leroy*, 121 A.D.3d 1256 (3d Dept. 2014).

Successful litigants often prevail with a combination of actual proof from the USPS, internal business records corroborating the mailing, and testimony as to the office practice and procedure. *See Ozcan*, *supra*; *Nationstar Motg. LLC v. LaPorte*, 162 A.D.3d 784 (2d Dept. 2018); *CitiMortgage, Inc. v. Wallach*. Conclusory and unsubstantiated statements that the notice was mailed are insufficient. *See Wells Fargo Bank N.A. v. Toral*, 2018 NY Slip Op 31659(U) (Sup. Ct. Suffolk Cty. July 19, 2018).

Failing to strictly comply can lead to dismissal of the case, even if the borrower does not contest (i.e., courts often raise the issue on their own). A dismissal late in the case for failure to prove strict compliance can have disastrous consequences– especially if the statute of limitations threatens a potential restart. The most successful mitigation against this possibility is the use of the best possible mailing proofs and continued affiant training on mailing practices and procedures.