New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 263—NO. 82
WEDNESDAY, APRIL 29, 2020

FORECLOSURE LITIGATION

New Statute Eliminates Waiver of Standing Defense

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Effective Dec. 23, 2019, a new statute—RPAPL §1302-a—eliminates waiver of the standing defense in a home loan foreclosure action even though not raised in an answer or pre-answer motion. Not only does this expose foreclosing lenders to assaults on their foreclosure actions for elusive durations, it raises questions as to the marketability and insurability of titles devolving through foreclosures. With an increased risk of litigation and the resulting inclusion of a title policy exception for challenges to the foreclosure based on lack of standing, foreclosure titles will likely be devalued.

Pre-RPAPL §1302-a

Prior to the amendment, if a borrower were to raise lack of standing as a defense, under RPAPL § 1302 (1)(a), it needed to be made at the time the defendant answered the complaint, otherwise the defense was deemed waived. Another ground upon which a pre-answer motion to dismiss may be made is CPLR § 3211a(3): "the party asserting the cause of action has not legal capacity to sue" (i.e., standing). In this regard, subsection (e) provides that a motion based upon such ground is waived unless raised either by a motion to dismiss or in a responsive pleading.

Therefore, as a matter of statue, the defense of standing is waivable. This axiom is supported by a remarkable abundance of case law. (*US Bank N.A. v. Nelson, 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dept. 2019); Wells Fargo Bank v. Halberstam, 166 A.D.3d 710, 87 N.Y.S.3d 328 (2d Dept. 2018*). For much more extensive citation see 2 Bergman On New York Mortgage Foreclosures §19.07 [1], LexisNexis Matthew Bender (rev. 2019)).

> Title companies have always been uneasy about insuring titles devolving through foreclosures and the new statute only accentuates the risk.

The Statute

The language of the statute is relatively brief, but its affect is expansive:

§ 1302-a. Defense of lack of standing; not waived. Notwithstanding the provisions of subdivision (e) of rule thirty–two hundred eleven of the civil practice law and rules, any objection or defense based on plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant's default.

The new subject section 1302-a specifically eliminates the effect of CPLR § 3211(e) as to lack of standing in a foreclosure action – that is to say, the defense is not waived – although importantly that declaration is confined to a home loan as defined in RPAPL § 1304 (6)(a). Consequently, the waiver for neglect to include the standing defense in a pre-answer motion or in an answer now survives as to any loan not defined as a home loan. It should be noted that home loans are an overwhelming percentage of all mortgage loans made and the foreclosure of such loans are encountered most frequently in title insurance.

What makes section 1302-a so troubling, in addition to its direct conflict with established statutes and case law, is that the defense of standing is

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so prevalent in responsive pleadings and is often raised without merit. This oft-seen defense typically appears (if not in motions to dismiss) in answers interposed by mortgagor defendants. While the defense is also raised at later stages of the action, lenders have always been able to dispose of the challenge with ease since the ability to interpose such a defense was, until now, deemed waived.

Now, however, even if there is an answer, should the standing defense be excluded, for any reason, the borrower will be empowered to assert it (presumably by motion) after the order of reference, after the referee's computations, and after the judgment of foreclosure and sale, even up to the very moment that the auction sale is being conducted. The uncertainty created by the statute places the foreclosing plaintiff in the perilous position of facing the possibility that the standing defense can be held in reserve (and it will be by unscrupulous borrowers) until the proverbial eleventh hour, the moment of the foreclose sale.

What's more, even when the foreclosure sale has been consummated and a referee's deed to a bona fide purchaser for value is recorded, if the borrower (now former owner) defaulted in the action, the right to assail standing survives (and has been both extended and strengthened by the statute). This is the realm where title insurance issues are invoked, and the problem is exacerbated by the question of the duration of the ability of a borrower to raise the defense of lack of standing long after the conclusion of the action and sale (discussed infra).

Infirmities and Dangers

Finality of Judgment. If the borrower neglects to assert a standing defense in a pre-answer motion or in an answer, the foreclosure will eventually proceed to entry of the judgment of foreclosure and sale. On this point, the law has always been clear that once such judgment is entered, all matters of defense which were or might have been litigated in the foreclosure action are deemed concluded. See, inter alia, *Chapman Steamer Collective, LLC v. Keybank National Association, 163 A.D.3d 760, 81 N.Y.S.3d 501 (2d Dept. 2018); Ciraldo v. JP Morgan Chase Bank, N.A., 140 A.D.3d 912, 34 N.Y.S.3d 113 (2016); Feiber Realty Corp. v. Abel, 265 N.Y. 94, 191 N.E. 847* (1934). Similarly stated, a foreclosure judgment is final as to all questions between the parties as well as all defensive matters which either were or might have been litigated in the foreclosure action. (*Retained Realty Inc. v. Koenig, 166 A.D.3d 691, 88 N.Y.S.3d 48 (2d Dept. 2018); Archibald v. Wells Fargo Bank, N.A., 166 A.D.3d 573, 87 N.Y.S.3d 298 (2d Dept. 2018)*).

> Not only does this expose foreclosing lenders to assaults on their foreclosure actions for elusive durations, it raises questions as to the marketability and insurability of titles devolving through foreclosures.

Issues of Marketable and Insurable Title. As noted, while the new statue preserves to the borrower the right to assault the action for lack of standing, even post-judgment and up to the moment of sale, the most parlous aspect is the establishment of the right to assert that defense after the foreclosure sale. This then leads to analysis of the quality of the title being conveyed.

A purchaser at a foreclosure sale is entitled to receive a marketable title (See, inter alia, *Saxon Mortgage Services, Inc. v. Coakley, 145 A.D.3d 699, 43 N.Y.S.3d 97 (2d Dept. 2016*); *Rose Dev. Corp. v. Einhorn, 65 A.D.3d 1115, 886 N.Y.S.2d 59 (2d Dept. 2009); Jorgensen v. Endicott Trust Co., 100 A.D.2d 647, 473 N.Y.S.2d 275 (3d Dept. 1984)*) and a court will not compel acceptance of an unmarketable title. See, inter alia, *Timmermann v. Cohn, 204 N.Y. 614, 204 N.Y. (N.Y.S.) 614 (1912); Heller v. Cohen, 154 N.Y. 299, (1897)*.

Marketable title is defined as a title free from reasonable doubt, although not free from every doubt. (*Saxon Mortgage Services, Inc. v. Coakley, supra. at note 4; Bank of New York v. Sequi, 91 A.D.3d 689, 937 N.Y.S.2d 95 (2d Dept. 2012)*).

To be sure, something more than just a mere assertion of a right is needed to denominate a title as unmarketable or doubtful. (*Saxon Mortgage Services, Inc. v. Coakley, supra. at note 4; Bank of New York v. Sequi, 91 A.D.3d 689, 937 N.Y.S.2d 95 (2d Dept. 2012), supra. at note 6.*)

So, is title unmarketable given the mandates of the new statute? If the standing defense is not raised and the judgment of foreclosure and sale is issued upon the defendant's default, then a potential bidder, and as is the focus here, title companies, will need to review the liti-gation history to locate documentation that supports (and hopefully confirms) standing. If there is no standing issue, although concededly this can be a thorny subject, then marketability is likely not a concern. That a borrower might want to raise an empty defense would not fit the definition of non-mar-ketability, although it is a legitimate and costly concern for title insurers.

But a marketable title is not necessarily an insurable title because the latter may be based upon title insur-ance underwriting standards and best practices, which can, depending on the circumstances, be more conservative then what is required for marketability.

Generally, an insurable title is one that a reasonably prudent title insur-ance company would be willing to insure free from exceptions (other than those

ance rates. (*Laba v. Carey, 36 A.D.2d 823, 321 N.Y.S.2d 159 (2d Dep't), rev'd, 29 N.Y.2d 302, 327 N.Y.S.2d 613 (1971)*).

Duration of Post Sale Attack Upon Title. A primary concern of the new statute is the duration after the sale during which a borrower can assert a standing defense. Recall, this would apply only if the borrower defaulted in the action. The answer to the underlying question will, of course, depend upon the facts.

There is a farrago of sections which apply to sieges upon a foreclosure sale, including CPLR §2003, "irregularity in judicial sale," RPAPL § 231 as to notice, time or manner of foreclosure sale, among others.

In particular, CPLR § 317 provides that a person served with a summons other than by personal delivery [that would be other than CPLR § 308 (2) or (4)] and who did not appear can be allowed to defend the action within one year after obtaining knowledge of entry of the judgment—but not more than five years after that entry. A further condition, however, is a court finding that the person did not personally receive notice of summons in time to defend and that the person has a meritorious defense. (Note that this section does not give rise to a claim that a title devolving thorough a foreclosure is unmarketable. *Argent Mtg. Company v. Leveau, 46 A.D.3d 727, 848 N.Y.S.2d 691 (2d Dept. 2007*).

When the borrower actually obtained knowledge of entry of the judgment would remain an imponderable. Therefore, the permissible duration of attack pursuant to this statute could remain open for up to five years—certainly an expensive (and arguably untenable) period.

Perhaps CPLR Rule 5015(a)(1), entitled "Relief from Judgment or Order," might apply. This provides that the court which rendered a judgment can relieve a party from it upon motion and upon terms as may be just if the motion is made within one year after service of the judgment with notice of entry (upon the party seeking the relief) or when entered, within one year after entry and excusable default is demonstrated. Failure to show a reasonable excuse for a default will be a bar to relief. (*Wells Fargo Bank, N.A. v. Hornes, 94 A.D.3d 755, 942 N.Y.S.2d 129 (2d Dept. 2012), citing Stephan B. Gleich & Assoc. v. Gritispis, 87 A.D.3d 216, 927 N.Y.S.2d 349*). But the new statute likely abrogates any obligation to present an excuse, perhaps rendering application of this section meaningless.

Still further is CPLR Rule 5010(a)(3), which addresses a claim for relief based upon fraud, misrepresentation or other misconduct of an adverse party. Whether this might apply to lack of standing is difficult to say. For this relief there is no express time limit for seeking relief from a judgment. However, the motion must be made within a reasonable time. (*IMC Mtge. Co. v. Vetere, 142 A.D.3d 954, 37 N.Y.S.3d 329 (2016*), citing *Federated Conservationists of Westchester County, Inc., 4 A.D.3d 326, 327, 771 N.Y.S.2d 530 (2004)*). Clearly, a delay of more than five years subsequent to entry of a judgment of foreclosure and sale would be unreasonably long. *(IMC Mtge. Co. v. Vetere, 142 A.D.3d 954, 37 N.Y.S.3d 329 (2016), citing Federated Conservationists of Westchester County, Inc., 4 A.D.3d 326, 327, 771 N.Y.S.2d 530 (2004); Aames Capital Corporation v. Davidsohn, 24 A.D.3d 474, 808 N.Y.S.2d 229 (2d Dept. 2005)*). So too would two years after entry of judgment where the moving party was aware of the situation. (Bank of New York v. Stradford, 55 A.D.3d 765, 869 N.Y.S.2d 554 (2d Dept. 2008)).

Comparing the various sections concerning post-sale action against the judgment suggests a disconnect between each of them and the terms of the new statute. It is therefore difficult, perhaps impossible, to predict how long after a foreclosure sale a defaulting borrower would have to raise a standing defense.

Conclusion

Title companies have always been uneasy about insuring titles devolving through foreclosures and the new statute only accentuates the risk. That a foreclosed owner can, post-sale, endeavor to overturn the foreclosure action by asserting a standing defense presents the dilemma that, absent a title exception, the title insurer will have to pay the cost of litigating the issue. Consequently, title insurers now require the inclusion of an exception in all applicable policies for the interposition of a standing defense pursuant to RPAPL §1302-a.

As threatening as the exception may be seem, most title insurers will omit that exception if an examination of standing confirms that the plaintiff unquestionably had standing at the commencement of the action. Others, however, will be constrained to issue policies with the exception regardless of what the standing analysis revealed. Perhaps not surprisingly, one title insurer has determined that the risk associated with RPAPL § 1302-a. is so great that it will no longer insure any titles whatsoever devolving from foreclosures.

The statute, and the resulting (and necessary) inclusion of an exception for RPAPL §1302-a, leaves purchasers with the risk of litigation and, potentially, loss of title, despite the entry of a judgment of foreclosure and sale and a delivered referee's deed. Whether the draconian strictures of RPAPL § 1302-a will have a chilling effect on the sale of home loan foreclosed properties remains to be seen, but new challenges in the already restrictive and precarious arena of insuring foreclosed properties are most unwelcome.