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TITLE INSURANCE

Title Insurance Coverage Narrowed for Properties Sold Through Foreclosure

By **Jason C. Bergman**

Because so many mortgage foreclosure actions are defended with particular zeal, and because the legal procedure (especially for home loans) is laden with traps, title companies have always been dubious about insuring such titles. Attorneys for foreclosing attorneys and sale bidders can readily attest to this. But passage of a recent statute creates a significant *new* impediment to title insurance for home loan mortgages devolving through a foreclosure sale.

That new statute (RPAPL §1302-a, effective December 23, 2019) provides, in essence, that the defense of lack of standing is (no longer) waivable where the mortgage is categorized as a home loan [the definition of a home loans is found at RPAPL 1304(6)(a)], even though a defendant has neglected to raise the defense in a pre-answer motion to dismiss or in a responsive pleading. If a defendant has appeared, their ability to raise the defense continues to the moment when the hammer falls at the foreclosure auction sale.

If, however, a defendant has defaulted in appearance, then the ability to pursue the defense survives the foreclosure sale, lurking to assault the foreclosure sale title for what is a potentially uncertain duration. However, trial court authority meaningfully clarifies that an excuse for lateness in interposing the defense is still required. [*JP Morgan Chase Bank, N.A.* v. *Carducci*, 67 Misc.3d, 124 N.Y.S.3d 642 (Sup. Ct. West. Co. 2020).] It is primarily that unpredictable exposure which understandably makes title companies more than timorous to insure, and which not incidentally creates problems for foreclosing lenders and foreclosure sale bidders.

The Break with Existing Standards

While revolutionary may be too strong a word to apply to the new statute, it is in any event a drastic alteration in what litigants—and title companies—have understood for as long as anyone can remember.

First, standing was long a defense which could be waived as a matter of statute—CPLR §3211(3)—if not asserted in a motion to dismiss. If not presented in that form, it had to be pleaded in an answer, lest it be waived, again as a matter of statute: RPAPL §1302. These statutes are clear enough and extensive case law supported them. [*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. 2020).] Indeed, the Court of Appeals has

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recently addressed the point, clearly confirming the waivability of the standing defense, albeit upon events occurring prior to the effective date of the new statute. [*US Bank National Association* v. *Nelson*, ____ N.E.3d ____ 2020 WL 7390873 (Mem.), 2020 N.Y. Slip Op. 07661).] The statute was enacted during the pendency of the appeal and as to that the Court stated that it did not reach the issue of whether RPAPL 1302-a affords an opportunity to raise standing at the stage where the plaintiff had applied for judgment of foreclosure and sale. Rather, it opined that defendants were free to apply to the trial court for such relief as may be available under the statute.

While there was occasional nuance to the formulation of waiver, it was minor enough not to change the basic principle. In any event, the statutes (and case law) enunciating waiver lose their effect in home loan foreclosure actions.

Another bedrock principle was the finality of the judgment of foreclosure and sale. Once that was entered, all matters of defense which were—or significantly might have been litigated in the foreclosure action—were 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).] Thus, a party who defaulted was "locked in"; what they could have argued but did not (for our purposes, standing) was concluded.

Title companies, of course, relied upon this dependable state of affairs. Unless standing was part of an ongoing appeal, when the action ended with the foreclosure sale, a defendant hoping to suddenly raise standing was not a factor. Whatever other concerns title companies had with the sturdiness of the title, a standing defect was not among them.

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It is apparent to mortgage foreclosure litigants that the defense of lack of standing has been commonplace for a number of years. Mortgage commerce elicits assignments of mortgage paper frequently so that issues involving proper assignments or note endorsements can readily arise. And the foreclosing party must have been in possession of the mortgage note at the inception of its foreclosure.

While most often the foreclosing plaintiff does indeed have standing, there is room to stumble and so the defense is often interposed. As a practical matter, then, the issue (if there ever was one) will sometimes be resolved in the foreclosure action; that is, it will have been raised, addressed, and resolved (save for an appeal, which is irrelevant to this discussion).

Recalling that a primary concern of the new statute is that a standing defense survives as a threat even after a foreclosure sale, the peril prevails only when a defendant has defaulted. Might a defendant who answered and litigated the standing defense still pursue the claim after the foreclosure sale? They could (anyone can, of course, try anything), but overwhelmingly there would be no basis for it. If the defendant pursues it in federal court, it is barred by the Rooker-Feldman Doctrine. [See, inter alia, *Hachamovitch* v. *DeBuono*, 159 F.3d 687 (2d Cir. 1998); *Dockery* v. *Cullen & Dykman*, 90 F. Supp. 2d 233 (E.D.N.Y. 2000); *1 Bergman On New York Mortgage Foreclosures* 2.23, LexisNexis Matthew Bender (rev. 2020).] If the defendant renews the argument under the existing caption, it would be barred by the law of the case doctrine. [See, inter alia, *Weiss* v. *Phillips*, 157 A.D.3d 1, 65 N.Y.S.3d 147 (1st Dept. 2017); *2 Bergman On New York Mortgage Foreclosures* §21.01 [4], LexisNexis Matthew Bender (rev. 2020). And if a separate action in state court is begun, the doctrine of res judicata should vanquish it. [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); *Dupps* v. *Betancourt*, 121 A.D.3d 746, 994 N.Y.S.2d 633 (2d Dept. 2014); *3 Bergman On New*

York Foreclosures §27.02[1], LexisNexis Matthew Bender (rev. 2020).]

This still leaves a significant portion of home loan foreclosures deleteriously affected by the new statute: cases where a defendant who *might* want to challenge a plaintiff's standing has defaulted in the action. Because the defense of standing is no longer waivable by neglect to raise it in a motion or an answer, a defaulting defendant remains a risk (if not a stalking menace) presumed poised to suddenly emerge post-sale with an attack on the action and the title derived through it. It is that in the end which creates the title insurance problem.

How Long The Post-Sale Attack Lurks

That the possibility of a furtive assault after the foreclosure sale exists can readily be understood as a basis for some title insurers to avoid the risk—either with an exception for the defense arising, or an absolute declination to insure. While it may be that the title company could conclude that the standing was unassailable, even a baseless claim incurs litigation expense (i.e., litigation risk), and that possible expenditure could be reason enough to decline insurance.

Exacerbating the dilemma is the uncertainty in assessing how long a defendant in hiding can remain concealed until emerging. To be sure, laches has proven to be a defense to a post-sale offensive.

Laches can be invoked to preclude relief where a party's action has caused prejudice to another party thereby rendering inequitable the granting of relief. [*First Nationwide Bank* v. *Calano*, 223 A.D.2d 524, 636 N.Y.S.2d 122 (2d Dept. 1966).] Examples of how much delay can call for laches are one year [Id.] or eighteen months. [*Chase Manhattan Mort. Corporation* v. *Anatian*, 22 A.D.3d 625, 802 N.Y.S.2d 743 (2d Dept. 2005).] Helpful though they are, the factors involving laches can vary too much to provide predictability—in any case the time during which a title company could be left wondering appears at least to be lengthy.

Statutes might in theory offer more precision, but examining those which could have application—CPLR §2003, RPAPL §231, CPLR §317, CPLR §5015(a)(1) and CPLR 5010(a)(3)—do not quite connect to the dictates of the new RPAPL §1302-a. They too are uncertain. A discussion of them here would be lengthy and obscure and would not readily underwrite a conclusion. Readers may wish to examine them for an independent evaluation.

Conclusion

The dangers posed by RPAPL §1302-a are such that title insurers now require inclusion of an exception for all applicable policies for (the possible) interposition of a standing defense. This results in the bidder taking on both the cost of defending such a claim and the risk of loss of title. Consequently, the utility of a title policy in certain situations may now become open to some question. The ultimate result may be a chill on the bidding process since more risk is involved. (It may also serve to devalue properties subject to home loans being sold through foreclosures).

That noted, most title insurers will omit the exception if an examination of standing confirms that the plaintiff clearly had standing at the inception of the action. Others, however, will feel compelled to issue policies with the exception regardless of what a standing analysis may reveal. Perhaps not unexpected, one title insurer has concluded that the risk associated with RPAPL §1302-a is so great that it will no longer insure any titles whatsoever conveyed through foreclosures. There are assuredly some concerns here and additional diligence is required to satisfy your title insurer.

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