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# The Defense of Lack of Standing to Foreclose on a Home Loan Can No Longer be Waived in New York

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A new law in New York has given defendants in mortgage foreclosure actions the right to assert a key defense at essentially any time during a foreclosure action on a home loan, thus potentially delaying the foreclosure process for lenders and loan servicers. As detailed below, the new law provides that the defense of "lack of standing" in a foreclosure of a home loan is not waived if the defendant failed to raise the defense at the beginning of the action.

## Background

One of the most heavily contested issues in New York mortgage foreclosure litigation following the 2008 financial crisis was standing to foreclose, *i.e.*, whether the plaintiff had an interest in the claim at issue in the lawsuit that would allow it to sue the mortgagor.

Today, generally, all that is needed for a plaintiff in a foreclosure action in New York to have standing to foreclose is that it be the holder or assignee of the underlying promissory note at the time the foreclosure action is commenced.

Public interest in the securitization of mortgages prior to and around the time of the 2008 financial crisis led mortgagors' attorneys to frequently and routinely allege that the foreclosing plaintiff lacked standing to foreclose based on, among other assertions, irregularities in the promissory note endorsements and/or chain of assignments of mortgage.

In *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, New York's Appellate Division Second Department had held that this defense of lack of standing to foreclose was of the type that could in fact be waived unless it was raised by a defendant at the outset of a foreclosure action and that it had to be raised in an answer to a complaint or in a pre-answer motion to dismiss, otherwise it was indeed waived and could no longer constitute a defense. *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't. 2007); *see also* CPLR 3211(e).

For "home loans," this defense can no longer be waived and under certain circumstances, it can even be asserted after a foreclosure sale.

## RPAPL § 1302-a

On December 23, 2019, Governor Andrew Cuomo signed legislation amending the New York Real Property Actions and Proceedings Law (RPAPL) by adding RPAPL § 1302-a, which became effective immediately.

RPAPL § 1302-a states as follows:

> 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 the 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.

## Applicability to Home Loans

This provision only applies to a "home loan" which is defined in RPAPL § 1304(6)(a) as:

> [A] loan, including an open-end credit plan, in which
>
> (i) The borrower is a natural person;
>
> (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;
>
> (iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and
>
> (iv) The property is located in this state.

Notably, RPAPL § 1302-a does not address the fact that effective January 14, 2020, the term "home loan" is defined under RPAPL § 1304(6)(b)(1) instead of RPAPL § 1304(6)(a).[1] Thus, effective January 14, 2020, it is possible that RPAPL § 1302-a could apply to a "home loan" as defined in the new RPAPL § 1304(6)(b)(1) or a "home loan" as previously defined in RPAPL § 1304(6)(a).[2]

Regardless, based on the definition of "home loan," most commercial mortgage foreclosures will not be subject to this new statute and thus the failure to raise the defense of lack of standing in an answer or a pre-answer motion to dismiss in those foreclosures will still result in a waiver of that defense.

## How is the Defense of Lack of Standing Waived?

The Appellate Division Second Department recently held as follows:

> The [ ] issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose.

*U.S. Bank N.A. v. Nelson*, 169 A.D.3d 110, 117, 93 N.Y.S.3d 138, 144 (2d Dep't. 2019).[3]

Examples of situations where the defense of lack of standing was previously waived include: (i) failing to assert the defense in an amended answer, (ii) serving and filing a limited notice of appearance, and (iii) failing to answer or appear. *See Mortgage Electronic Registration Systems v. Holmes*, 131 A.D.3d 680, 17 N.Y.S.3d 31 (2d Dep't. 2015).

Now, for "home loans," defendants can assert the defense of lack of standing at any stage of the foreclosure action even if they did not assert it at the outset in their answer or in a pre-answer motion to dismiss.

Critically, now, the failure to answer or to appear at any stage of the foreclosure action may *never* result in a waiver of this defense. This is because of the last sentence of RPAPL § 1302-a which states that "[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*." *Id*., (emphasis added). In interpreting this last clause of RPAPL § 1302-a, let's consider four scenarios.

## Scenario 1

A judgment of foreclosure and sale is most frequently-issued "upon a defendant's default" where that defendant failed to answer the complaint, in which case a notice of motion for judgment of foreclosure and sale is usually not required to be served upon that defendant. Thus, let's assume a foreclosure action on a home loan proceeds as follows:

> (1) a defendant fails to answer the foreclosure complaint or otherwise appear in the action, and is thus generally not entitled to service of future court filings,
>
> (2) that defendant is not served (because service is not required) with a notice of motion for judgment of foreclosure and sale, and
>
> (3) the Court grants a judgment of foreclosure and sale and a foreclosure sale is held thereafter.

Under these circumstances, RPAPL § 1302-a may allow the defaulting defendant to vacate both the foreclosure sale and the judgment of foreclosure and sale and then assert lack of standing as a defense or objection.[4]

However, despite a defendant being in default in answering the complaint and in appearing in the action, a foreclosing plaintiff may still choose to serve that defendant with a notice of motion for judgment of foreclosure and sale, which brings us to the second scenario.

## Scenario 2

A foreclosure action on a home loan may alternatively proceed as follows:

> (1) a defendant fails to answer the foreclosure complaint or otherwise appear in the action, and is thus generally not entitled to service of future court filings,
>
> (2) the foreclosing plaintiff nevertheless serves a notice of motion for judgment of foreclosure and sale on that defendant,
>
> (3) that defendant files a response containing objections to the motion for judgment of foreclosure and sale but does not assert any objection or defense based on lack of standing to foreclose, and
>
> (4) the Court grants a judgment of foreclosure and sale over that responding defendant's objection, and a foreclosure sale is subsequently held.

Here, despite that defendant's prior failure to answer the complaint, because of defendant's response to the motion for judgment of foreclosure and sale, the issuance of the judgment should not be deemed to have occurred "upon defendant's default." Thus, that defendant should be deemed to have waived the defense of lack of standing.

## Scenario 3

It is also conceivable that following steps (1) and (2) in Scenario 2 above, step (3) consists of the defendant failing to respond to the motion for judgment of foreclosure and sale despite having been served with it, and thereafter, (4) the Court grants a judgment of foreclosure and sale (without opposition from that defendant) and a foreclosure sale is subsequently held.

Under these circumstances, because of the defendant's failure to respond to the motion for judgment of foreclosure and sale, the issuance of the judgment will likely be deemed to have occurred "upon defendant's default." This would likely result in that defendant being able to subsequently raise the lack of standing defense or objection, as described in Scenario 1, above.

## Scenario 4

Following steps (1) and (2) in Scenario 2 above, consider a step (3) in which that defendant files a response objecting to the motion and raising the defense or objection of lack of standing to foreclose. Clearly, at this stage, waiver of the defense or objection is not an issue because it has been raised.

However, if step (4) consists of the Court granting the judgment over that objection and a foreclosure sale being held thereafter, then that defendant should be barred from subsequently reasserting lack of standing. This is because of (i) the same reason set forth in Scenario 2, *i.e.*, due to defendant's response to the motion for judgment, the judgment itself was not issued upon defendant's default and (ii) the law of the case doctrine, *i.e.*, a body of law that precludes such relitigation given the fact that the issue of standing had already been raised and

fully litigated.

Alternatively, step (4) may consist of the Court denying the motion for judgment on grounds other than lack of standing. However, the Court may thereafter grant a judgment of foreclosure and sale on a subsequent motion, for example, upon plaintiff obtaining leave to reargue or renew the prior motion. In that case, under the law of the case doctrine, that defendant should be barred from raising lack of standing on that second application for a judgment and on any application thereafter if it is determined that the issue of standing was fully litigated and decided on the first application for judgment.

## Post-Judgment and Pre-Foreclosure Sale Assertions of Lack of Standing

The first sentence of RPAPL § 1302-a does not explicitly state that the defense of lack of standing is not waived only for the duration of the foreclosure action, *i.e.*, only prior to judgment. Further, the second sentence only addresses whether the defense of lack of standing is waived *after* the foreclosure sale. Thus, RPAPL § 1302-a does not clearly specify whether the defense of lack of standing is waived during the time period between the issuance of the judgment and the date of the foreclosure sale.

Currently, New York case law provides that a judgment of foreclosure and sale against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been litigated in the foreclosure action. *Wells Fargo Bank, N.A. v. Colace*, 112 N.Y.S.3d 559, 560, (2d Dep't. 2019) (citations omitted). Nevertheless, foreclosure sales are frequently stayed as a result of orders to show cause filed after entry of judgment and prior to a foreclosure sale, and thus whether RPAPL § 1302-a provides an avenue to assert the lack of standing defense or objection during this interim time period, perhaps on such emergency applications, remains to be seen.

## Potential Ramifications

RPAPL § 1302-a may create an incentive for mortgagors to raise the defense of lack of standing later rather than earlier in the foreclosure action, *e.g.*, after a plaintiff obtains summary judgment, to attempt to litigate issues piecemeal and/or further delay the entry of judgment. Mortgagors may even default in answering a foreclosure complaint or responding to a motion for judgment of foreclosure and sale if they or their attorneys know that they might be able to subsequently reopen the foreclosure action based on RPAPL § 1302-a due to lack of standing. However, to vacate their default, usually defendants may also be required to satisfy the requirements set forth in footnote 4, below. Thus, in waiting to make an application to vacate their default and interpose the defense or objection of lack of standing until after the judgment or after the foreclosure sale, defendants run the risk that they may not be able to meet those requirements.

The greater possibility of such post-foreclosure sale litigation invoking RPAPL § 1302-a will undoubtedly impact third parties as well. Title companies and prospective bidders at foreclosure sales may scrutinize foreclosure proceedings more carefully to ensure that the foreclosing plaintiff had standing to foreclose in the event a defendant subsequently attempts to assert otherwise. Potential impacts on the cost of title insurance premiums and/or the insurability of title transfers following foreclosure sales remain to be seen and may be determined on a case-by-case basis. In certain cases, the possibility of having to deal with such post-foreclosure sale litigation

may also result in less competitive bidding by prospective purchasers at foreclosure sales and/or lower successful bid prices.

In fact, the ability of defendants to seek relief pursuant to RPAPL § 1302-a for years after entry of judgment may also impact record retention protocols of financial institutions. In certain cases, owners, holders, and purchasers of home loans may be well advised to retain original promissory notes for several years after the judgment, possibly depending on how the defendants were served with process and/or notice of entry of the judgment of foreclosure and sale. This time period for retention could potentially even surpass the REO sale stage. Moreover, in attempting to mitigate these burdens, process service companies may face greater demands to conduct investigations, where necessary, in order to personally serve borrowers in-hand. *See* CPLR § 317.

In sum, going forward, parties who deal with foreclosure litigation will need to be more cognizant than ever before of the issue of standing to foreclose home loans.

Please note that this is a summary of RPAPL § 1302-a and the potential issues that may arise from this new law. This summary is not intended to constitute legal advice or a definitive review of all potential issues that may arise. If you have any questions regarding RPAPL § 1302-a or foreclosures in general, please feel free to contact Samit G. Patel at (212) 510-2286 or via email at spatel@cullenllp.com.

## References

[1] Effective January 14, 2020, the definition of "home loan" was amended such that (a) the following additional requirement applies: "[t]he principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal housing administration or federal national mortgage association;" and (b) the requirements of subdivision (iii) were amended to state as follows: "[t]he loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling."

[2] Another "possibility" is that since RPAPL § 1302-a applies only to a "home loan" as defined in RPAPL § 1304(6)(a), and since "home loan" is not defined in RPAPL § 1304(6)(a) as of January 14, 2020, then as a result, as of that date, RPAPL § 1302-a has no application at all. However, it is unlikely that courts would interpret RPAPL § 1302-a as such since it would then be rendered entirely meaningless.

[3] This decision is currently on appeal with the New York Court of Appeals.

[4] Still, the defaulting defendants may have to meet additional requirements. For example, under CPLR 5015(a)(1), the court may relieve a defendant from a judgment or order "upon such terms as may be just" upon the ground of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party . . . ." Further, CPLR § 317 provides in pertinent part that: "[a] person served with a summons other than by personal delivery to him or to his agent . . . who does not appear may be allowed to defend the action within one year after he *obtains knowledge of entry of the judgment*, but in no event more than five years after such entry, upon a finding of the court that *he did not personally receive notice of the summons in time to defend* and has a meritorious defense. If the defense is

successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal."  Emphasis added.

## Practices

- Banking and Financial Services

## Attorneys

- Samit G. Patel