

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

Winter 2014

Lenders “Livin’ la Vida Loca” till HETPA Ended The Fiesta

In 2006, New York State enacted the *Home Equity Theft Prevention Act* (“HETPA”) for the purpose of affording greater protection to homeowners who face foreclosure proceedings against their homes. HETPA was instrumental in addressing increasingly rampant swindling where con men, proposing to “help” homeowners out of foreclosure, instead, stole homes and home equity from homeowners through deed/equity thefts and other mortgage foreclosure “rescue” scams. HETPA also gave borrowers greater protection from mortgage lenders (by adding extra steps) in those cases where borrowers couldn’t make mortgage payments and fell into default or foreclosure. HETPA changed certain parts of the Banking Law, Real Property Law (“RPL”), and Real Property Actions and Proceedings Law (“RPAPL”).



HETPA spoils all the lenders’ fun

Among the changes put into place by HETPA were:

- (i) requiring that, at least 90 days before the foreclosure proceedings are brought, a written notice (the RPAPL §1304 notice*) be served upon the “borrower” by regular and certified mail;
- (ii) extending the service of a similar type of “RPAPL §1304 notice” or “90-day notice” called a “pre-disposition notice” upon homeowners who own cooperative apartments, as now required by Uniform Commercial Code (UCC) Section 9-611. It is important to note that, unlike houses which are considered “real property,” cooperative apartments are considered “personalty” in some regards — a person who buys a cooperative apartment is actually buying shares of stock in the cooperative housing corporation and a proprietary lease associated with a particular apartment. Before the enactment of HETPA (as amended by the *Home Equity Theft Prevention Act* of 2009), a co-op unit owner’s shares and proprietary lease could be quickly foreclosed and

auctioned off in a matter of a couple of months. Now, the lender has to wait at least 90 days from the pre-disposition notice to exercise its “non-judicial foreclosure” rights and auction off the collateral (the shares of stock in the cooperative housing corporation) for the loan on the cooperative apartment;

- (iii) requiring the lender or mortgage servicer to file within 3 days of service of the RPAPL §1304 notice certain information with the New York State Superintendent of Financial Services and provide proof of filing; and

- (iv) requiring that a statutorily-specific notice to the homeowner/mortgagor about foreclosure, be served together with the Summons and Complaint (RPAPL §1303 notice**) when foreclosure proceedings are commenced.

(continued)

You're a "borrower"? Says who?

Who is considered a "borrower" who must be served with the RPAPL §1304 notice?

All of the RPAPL noticing requirements under HETPA pertain to residential home loans and are designed to give borrowers notice of default in their mortgage payments or other obligations. Two recent court cases resolved an issue unaddressed in the enactment of HETPA and, more specifically, RPAPL §1304, namely: under the statute, what is the definition of a "borrower" who is entitled to the various notices from the lender or mortgage servicer? As you will see from these recent court cases, this is an important issue.

The Second Department held in *Aurora Loan Services LLC v. Weisblum*, 85 A.D.3d 95, 103 [2 Dept. 2011] that "[P]roper service of the RPAPL §1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of the foreclosure action. The plaintiff's failure to show strict compliance requires dismissal." From this holding, it is certainly apparent that the failure of the mortgage lender/foreclosing plaintiff to serve the RPAPL §1304 notice is fatal to the foreclosure proceedings commenced — before the case can be filed, this first step of serving the notice must be taken.

In *Aurora Loan Services LLC v. Weisblum*, the mortgaged property was owned by a husband and wife. Only the husband signed the note but both the husband and wife signed the Consolidation, Extension and Modification Agreement (commonly known as a "CEMA") to secure the note signed by the husband along with a prior mortgage. Before the mortgage lender brought its foreclosure proceeding to foreclose its consolidated mortgage upon the house, it served the RPAPL §1304 notice on the husband who signed the note. However, the lender did *not* serve the notice on the wife, arguing that she was not a signatory on the note, but only the CEMA. In addition, they argued that service upon her was unnecessary because the wife was not defined in the terms of the note as the "borrower" and, therefore, the plaintiff/mortgage lender was not required to serve the 90-day notice upon her pursuant to RPAPL §1304.

In *Aurora Loan Services LLC v. Weisblum*, the Second Department stated that the co-mortgagor wife (who signed the CEMA but not the note) was deemed a "borrower" under RPAPL §1304 who was also entitled to receive the 90-day notice prior to the commencement of the foreclosure.

In the follow-up case of *Wells Fargo Bank, N.A. v. Miller*, [Sup. Ct. Rockland Co. Index No. 4256/2011, Dec. 11, 2013], the issue was whether a co-mortgagor who did *not* sign the note was also deemed a "borrower," under RPAPL §1304, and, therefore, should have also been served with the requisite 90-day notice. In this case, the mortgage lender (Wells Fargo Bank) provided the court with a copy of the purported notice that it allegedly served upon *one* of the defendants (the husband) and did not provide any proof of service of the requisite RPAPL §1304 notice upon the *other* defendant (the wife). In response, Wells Fargo Bank argued that the defendant/co-mortgagor wife signed only the mortgage and not the underlying promissory note. The underlying promissory note was signed only by the husband. The bank averred that the wife was not a "borrower" within the meaning of the statute and, therefore, was not entitled to the 90-day notice.

Messing with the wrong borrowers

In response, **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, successfully argued to the court that both husband and wife were indeed entitled to be served with the 90-day notice required by RPAPL §1304. Specifically, the lender's own documents were put before the court to prove that the co-mortgagor wife was a "borrower" even under the bank's definition (on the mortgage's first page, in the section entitled "Words Used Often In This Document," the word "Borrower" is stated as "ISRAEL MILLER CHAYA B. MILLER").

In *Aurora Loan Services LLC v. Weisblum*, the Second Department recognized the provision in the mortgage instrument that the lender had the right to "enforce its right" against the subject property. Similarly, in *Wells Fargo Bank, N.A. v. Miller*, the mortgage stated: "each of us is fully obligated to keep all of Borrower's promises and obligations contained in this Security Instrument. Lender may enforce rights under the Security Instrument against each of us individually or against all of us together."

The court was urged, by the defendants/homeowners in *Wells Fargo Bank, N.A. v. Miller*, that it should recognize, similar to the co-mortgagor in the *Aurora Loan Services LLC v. Weisblum* case involving a CEMA, that the co-mortgagor wife who did *not* sign the underlying note has a significant interest in protecting her home from loss in a foreclosure. The design and purpose of RPAPL §1304 is to apprise *all* owners of residential homes that they risk losing their homes because an obligation was not met ("fair warning"). This initial step of the 90-day notice (which is a "condition precedent" to a foreclosure proceeding) adds an extra layer of support to homeowners who face imminent foreclosure but might find a means to remedy an impending predicament: where their property is in foreclosure; their credit history is damaged; and their lending alternatives have disappeared. Moreover, the non-defaulting property owner who put up her home as collateral for a loan to her spouse deserves to know of her spouse's default and apprised of her rights prior to the institution of the foreclosure proceeding. Otherwise, the results would be severely harsh and inequitable.

Action Dismissed

In reaching the ultimate decision to dismiss the foreclosure proceeding brought by Wells Fargo Bank, the Supreme Court Justice held: "Therefore, pursuant to the *Weisblum* case, *supra*, the Court finds that Defendant Chaya B. Miller is a 'borrower' for the purposes of *Real Property Actions and Proceedings Law §1304*, and Plaintiff's failure to comply with the strict mandates of that statute require dismissal of the action without prejudice."

— Richard A. Klass, Esq.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court Street, 28th Floor, Brooklyn, New York. He may be reached by phone at (718) COURT•ST or e-mail at richklass@courtstreetlaw.com with any questions. Prior results do not guarantee a similar outcome.

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Our Office is Expanding

In mid-February, the Law Offices of **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, will move to the 28th floor of 16 Court Street. Our new, custom-designed space will include amenities and state-of-the-art technology to allow us to continue our excellent client service.

Effective February 14th, our new address will be:
16 Court Street, 28th Floor
Brooklyn, NY 11241

All other contact information remains the same.

***The language of the letter for the RPAPL §1304 notice:**

The RPAPL §1304 notice must be accompanied by a list of at least five housing counseling agencies. The language of the letter for the RPAPL §1304 notice is as follows:

YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY

As of ..., your home loan is ... days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of dollars by

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence.)

If you need further information, please call the New York State Department of Financial Services' toll-free helpline at (show number) or visit the Department's website at (show web address)".

****The specific notice for RPAPL §1303:**

The specific notice, to be delivered with the Summons and Complaint, must be printed in big bold letters on colored paper and read as follows:

HELP FOR HOMEOWNERS IN FORECLOSURE

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Summons and Complaint

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

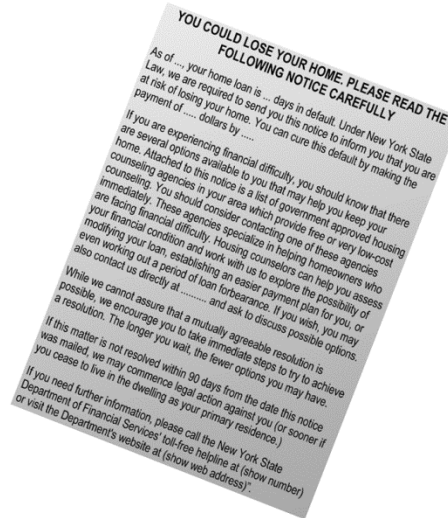
Sources of Information and Assistance

The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Department of Financial Services at (enter number) or visit the Department's website at (enter web address).

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.



Publication Notice: New Book by Richard A. Klass, Esq.

Available now:

Get the e-book today at Amazon.com and Barnes and Noble (www.bn.com) or buy the paperback through the offices of the Law Firm of Richard A. Klass, Esq. Phone: (718) COURT*ST or e-mail richklass@courtstreetlaw.com.

Summary of Contents

If you are faced with a credit card lawsuit, *Successfully Defending Your Credit Card Lawsuit* by Richard A. Klass, may help you present a more robust defense. This book offers sample pleadings and motions, numerous free forms and instructions, and descriptions of the defenses and procedures in the "typical" case. The "typical" collection case lends itself to streamlined events and uncomplicated pleadings and defenses. This book may be a tremendous help in those situations.

Open the book to find...

- ✓ What to do
- ✓ Responding
- ✓ Best Defenses
- ✓ Proof Issues
- ✓ Credit Reporting
- ✓ Credit Card Litigation Flow Chart
- ✓ Responding to the Summons
- ✓ Discovery Proceedings
- ✓ Summary Judgment
- ✓ Trial Matters
- ✓ Post-Trial Matters
- ✓ Settlements
- ✓ Sample Pleadings and Forms
- ✓ Relevant Statutes
- ✓ Ethical Issues in Collection
- ✓ Guide to the Fair Debt Collection Practices Act (FDCPA)
- ✓ Glossary of terms and definitions
- ✓ Handling Identity Theft
- ✓ Helpful Internet Resources



Your Court Street Lawyer's Guide

Successfully Defending Your Credit Card Lawsuit

What to do if you are sued for a credit card debt

By Richard A. Klass, Esq.



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