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# Getting Harder To Blame It on the Bank

## Courts may fashion an appropriate remedy where the lender has failed to serve a compliant notice of intention

**By Scott E. Reynolds**

Approximately one year ago, the New Jersey Supreme Court decided *U.S. Bank Nat'l Assoc. v. Guillaume*, 209 N.J. 449 (2012), which settled the uncertainty surrounding the appropriate remedy available to a trial court when faced with a plaintiff in a foreclosure action who has failed to serve a "notice of intention to foreclose" in compliance with the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53–68. The court in *Guillaume* overruled case law holding that dismissal without prejudice was the sole remedy available to a trial court where the lender has failed to serve a compliant notice of intention, and declared that courts of equity should exercise their inherent equitable powers and discretion to fashion appropriate remedies under such circumstances.

A recent unreported decision by a New Jersey Chancery Court, *Salierno v. Kosky*, BER-F-10013-12 (Ch. Div. Jan. 22, 2013), which declined to dismiss a foreclosure complaint where the lender completely failed to serve a notice of intention to foreclose, may be interpreted as an expansion of the court's holding in *Guillaume*, further eroding the impact of a common defense raised by defendants in foreclosure actions.

The FFA establishes certain requirements residential mortgage lenders must follow in connection with instituting a foreclosure action. The FFA applies to:

> all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated.

N.J.S.A. 2A:50-55.

One of the central components of the FFA is the notice of intention, which serves "the important legislative objective of providing timely and clear notice to homeowners that immediate action is necessary to forestall foreclosure." *Guillaume*, 209 N.J. at 470. In particular, N.J.S.A. 2A:50-56(a) requires that a lender considering foreclosure of a residential mortgage serve the defaulting mortgagor with notice of its intention at least 30 days in advance of the foreclosure action. The notice of intention must contain 11 specific categories of information. N.J.S.A. 2A:50-56(c). Among those items are the name and address of the lender. N.J.S.A. 2A:50-56(c)(11). The FFA, however, is silent with respect to the borrower's remedy where a lender fails to comply with the requirements of a notice of intention, which led to uncertainty among trial courts where a lender failed to serve a notice of intention in compliance with the FFA. That uncertainty was resolved by *Guillaume.*

In *Guillaume*, the residential mortgage lender, U.S. Bank, identified the name and address of its servicing agent — rather than the lender itself — in an initial

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notice of intention, and failed to identify the address of the lender in revised notices. U.S. Bank argued that the identification of its servicing agent, which administered the loan on U.S. Bank's behalf, satisfied the requirement to identify the name and address of the "lender" or, at a minimum, constituted "substantial compliance." The borrower contended that the failure to identify the lender's name and address violated the express terms of the FFA and compelled dismissal of the foreclosure action.

The court rejected U.S. Bank's position that its servicing agent was a "lender" as defined by the FFA. As a result, the notice of intention served by U.S. Bank's servicing agent was held not to satisfy the requirements of the FFA. The court, however, rejected the borrower's position that the FFA mandates dismissal of the foreclosure action. Instead, in settling then-existing uncertainty concerning the appropriate remedy for a lender's failure to serve a compliant notice of intention, the court ruled that "dismissal without prejudice is not the exclusive remedy for the service of a notice that does not satisfy N.J.S.A. 2A:50-56(c)(11)," and held that, depending on the individual circumstances of each case, trial courts "may dismiss the action without prejudice, permit a cure or impose such other remedy as may be appropriate to the specific case ...." *Guillaume*, 209 N.J. at 475 (overruling *Bank of N.Y. v. Laks,* 422 N.J. Super. 201 (App. Div. 2011) (holding that dismissal without prejudice is the exclusive remedy for a violation of N.J.S.A. 2A:50-56(c)(11)).

The court in *Guillaume* stated that courts of equity have the inherent power and capability to fashion appropriate equitable remedies, unique to individual cases involving a failure to serve a notice of intention, including allowing the lender to cure the defective notice in lieu of the harsher remedy of dismissal. Recognizing that courts of equity possess relatively wide discretion to fashion appropriate remedies under the circumstances, the court provided some broad guidelines for trial courts to consider when faced with such situations:

> In determining an appropriate remedy for a violation of N.J.S.A. 2A:50-56(c)(11), trial courts should consider the express purpose of the provision: to provide notice that makes the debtor aware of the situation, and to enable the homeowner to attempt to cure the default. Accordingly, a trial court fashioning an equitable remedy for a violation of N.J.S.A. 2A:50-56(c)(11) should consider the impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default.

*Guillaume*, 209 N.J. at 479 (internal quotations omitted).

Considering the purpose of N.J.S.A. 2A:50-56(c)(11), the court examined the impact the defect in the notice of intention had on the borrowers. Pointing to the borrowers' "thorough familiarity" with the status of their loan, as demonstrated by their consultation with a professional adviser and negotiations with U.S. Bank's servicing agent, the court affirmed the trial court's refusal to dismiss the foreclosure complaint without prejudice in lieu of what the trial court referred to as the less "draconian" remedy of allowing U.S. Bank to cure the defective notice of intention to foreclose.

In *Kosky*, however, a New Jersey Chancery Court extended the reach of *Guillaume* beyond situations where a notice of intention to foreclose is merely defective, but to include situations where a notice was never served in the first place. The plaintiff in *Kosky* was the holder of a residential mortgage. Prior to commencing the foreclosure proceeding, the lender did not serve a notice of intention to foreclose, allegedly believing that the FFA was inapplicable because the mortgage at issue originated from a commercial loan transaction. After the defendant raised a defense that the lender failed to comply with the FFA, the lender filed a motion seeking authorization to serve a notice of intention, nunc pro tunc, but maintained its position that the FFA was inapplicable. In response, the borrower filed a cross-motion to dismiss the complaint for failure to serve the notice.

After determining that the FFA was applicable, the mortgage was residential and the lender was required to serve a notice of intention, the court then addressed the borrower's argument that the appropriate remedy was dismissal without prejudice because the lender failed to serve a notice of intention. The borrower attempted to distinguish *Guillaume*, arguing that a court of equity's discretion to employ remedies less drastic than dismissal was limited to instances where a defective notice of intention was served, not where the lender completely failed to serve the required notice. The court found the borrower's position unpersuasive and that to so limit the holding of *Guillaume* would "put form over substance."

In determining the appropriate remedy, the *Kosky* court focused on whether the lender's failure to serve a notice of intention resulted in prejudice to the borrower. Recognizing that the purpose of the notice of intention is to ensure that homeowners are provided notice in advance of a pending foreclosure so that they have sufficient time and the necessary information to cure the alleged default or raise defenses, the court noted that the borrower was a former bank executive, was knowledgeable regarding the rights of lenders and borrowers in a foreclosure action and was a party to previous foreclosure actions. Based on those facts, the court determined that no prejudice resulted to the borrower by the lender's failure to serve a notice of intention. The *Kosky* court considered it significant that the borrower was unable to articulate why the lack of a notice of intention precluded him from taking any action to remedy the default. Ultimately, the court granted the lender's motion, directing the lender to cure the failure to serve a notice of intention forthwith.

The genesis of the dispute presented in *Kosky* — i.e., confusion on the part of the lender regarding whether adherence to the FFA is required — is not unique. Indeed, it is not uncommon for a lender of a nonresidential mortgage loan to be surprised by the borrower's contention that the lender was required to comply with the FFA and, therefore, serve a notice of intention prior to commencement of foreclosure proceedings. Because the determination of whether the FFA is applicable to a given mortgage loan is determined "at the time the loan is originated," nonresidential mortgage lenders often are confronted with defenses that the FFA applies and a notice of intention should have been served. Given the time period that may elapse from loan origination to default, coupled with the common practice of selling mortgages, piecing

together whether the parties to the loan intended it to be a residential mortgage loan at the time of origination may be a daunting, time-intensive endeavor. Lenders may, however, take certain precautions to minimize a borrower's ability to successfully raise an affirmative defense that the lender violated the FFA, such as requiring the borrower-mortgagor to provide warranties in the mortgage stating that neither the borrower nor a member of the borrower's family has any intention or plan to reside in the mortgaged premises at the time of loan origination. Proactive steps such as this can help minimize the expense associated with resolving disputes over the applicability of the FFA, and provide a lender foreclosing on a nonresidential mortgage with confidence that a foreclosure action will not be unnecessarily delayed by the assertion of a defense that the lender failed to comply with the FFA.

The decision in *Kosky* may be interpreted by some as an inappropriate expansion of the holding in *Guillaume*. Although the court in *Guillaume* may have intended that its holding be limited to instances where a notice of intention is defective due to the lender's failure to include one or more of the 11 categories of information specified in N.J.S.A. 2A:50-56(c), the holding of *Kosky* is logically consistent with the court's reasoning in *Guillaume* — which is that a cure rather than dismissal is appropriate where the defect in notice has not frustrated the purpose of the FFA to provide borrowers with notice that after a loan default has occurred, action must be taken to avoid foreclosure. While there may be some debate over whether the result reached by the *Kosky* court was a logical extension or impermissible expansion of the holding in *Guillaume*, for now *Guillaume* and *Kosky* have diluted a defense often used by defendants attempting to resist or otherwise delay foreclosure proceedings by claiming that the lender failed to comply with the FFA. ■