

The Often Overlooked NY Foreclosure Notice Requirements

By **Christopher Gorman and John Muldoon** (July 2, 2024)

Much of the attention in the commercial mortgage foreclosure arena is focused upon what are, by now, well-documented issues in the office building asset class. Not to be overlooked, however, is mounting data suggesting a great deal of softness in the multifamily residential real estate asset class as well.

Impending maturity dates, rising interest rates and tenant issues are creating headaches for the owners of multifamily residential real estate. These headaches may very well spill over into loan defaults and, ultimately, a wave of foreclosure litigation. Indeed, the data suggests that lenders are seeing mounting defaults for these reasons, and potentially others, in the multifamily residential real estate asset class.

While many of the legal issues that pertain to foreclosures of other commercial asset classes (e.g., office buildings) would apply with equal force to the foreclosure of a multifamily residential building, there is at least one statute with applicability in the multifamily residential foreclosure context that is often overlooked, to the potential detriment of both lenders and borrowers.

That frequently overlooked statutory notice provision is New York Real Property Actions and Proceedings Law Section 1303, and its tenant notice requirements can apply in both the residential and commercial mortgage foreclosure context

Section 1303's tenant notice provisions require, among other things, that tenants be served with a notice, specifying the typeface, font, language and color of the paper on which the notice should be printed, among other things. The stated legislative purpose underscoring Section 1303's tenant notice requirements is "to protect tenants who may not be aware of their rights or even the pendency of the action."

Section 1303's tenant notice requirements have not garnered much attention from litigants or the courts alike, as those requirements have only been the subject of a handful of court decisions since the statute's enactment more than a decade ago. As detailed below, however, litigants, whether lenders or borrowers, ignore the tenant notice requirements of Section 1303 at their own peril.

On the lender side, the law is clear that proper service of the Section 1303 notice upon the tenants is critical where the statute applies because it is a condition precedent to the commencement of a covered foreclosure action, and noncompliance mandates dismissal of the complaint. Further, it is the lender's burden to demonstrate compliance with Section 1303 and the failure to do so as part of the lender's prima facie case mandates denial of a dispositive motion, such as a motion for summary judgment.

On the borrower side, as set forth below, courts have, generally speaking, afforded an expansive and protective interpretation to the tenant notice requirements of Section 1303, often siding with those defending a foreclosure action where the specific tenant notice requirements have not been strictly adhered to.



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Borrowers, therefore, particularly in commercial mortgage foreclosure actions where the statute may be applicable and defenses may otherwise be at a premium, should be verifying compliance with the tenant notice requirements if they are in search of a defense that can delay the prosecution of a foreclosure action or even result in its dismissal.

Set forth below is an overview of some of the requirements of Section 1303's tenant notice provisions that have garnered the most attention from litigants and the courts alike, with an emphasis on the pitfalls and perils that can await the litigant who is not prepared to ensure that the statute's tenant notice requirements are adhered to at the outset of certain foreclosure actions.

The Scope of Applicability of Section 1303's Tenant Notice Requirements

Section 1303(1) requires that the foreclosing party provide notice of a mortgage foreclosure action to, among others, any tenant of residential real property. Section 1303 itself does not define what constitutes residential real property.

The term "residential real property," however, is defined in Section 1305, which provides that "[r]esidential real property 'shall mean real property ... improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes.'"

Given the breadth of the definition of what qualifies as residential real property, since the statute's enactment, courts have ruled that the statute applies to a wide array of properties subject to a foreclosure action.

For instance, in *650 Brooklyn LLC v. Hunte*, the Kings County Supreme Court concluded in 2015 that Section 1303's tenant notice requirements applied to cover a three-story mixed-use building composed of two apartments and a store.[1] The Supreme Court held in *Hunte* that Section 1303 "requires service of the specified notice on 'any tenant of a dwelling unit' without regard to the size or occupancy of the dwelling."

In other words, it is irrelevant that the subject building has a dedicated commercial space, as the definition of residential real property, by its express terms, applies to "real property ... that is or may be used, in whole or in part, as a home residence."

The statute, therefore, applies to a wide range of multifamily residential real property, as well as mixed-use property (i.e., containing both a commercial and residential component), located within New York state. For instance, the statute has been deemed to apply to literally hundreds of thousands of properties within New York City containing both ground floor retail as well as residential apartment units located above the ground floor retail, among many other types of mixed-use property.

The Tenant Notice Must Be on Different Colored Paper Than the Summons and Complaint

The notice requirements in Section 1303 are so exacting that even the slightest misstep can defeat a foreclosure action, including the color of the paper on which the notice is printed. Section 1303(4) requires that the notice "shall be printed on colored paper that is other than the color of the summons and complaint."

In *Bank of America NA v. Lauro*, the Appellate Division, Second Department, concluded in 2020 that a defendant raised a triable issue of fact by challenging the color of the paper, "as he asserted in his affidavit that the notice with which he was served 'was on white colored paper, the same color papers as the summons and complaint.'" [2] In *Lauro*, the process server submitted an affidavit attesting that the notice was printed on yellow paper, but the challenge to the color of the paper raised by the borrower-defendant was deemed sufficient to create an issue of fact depriving the lender of summary judgment.

Thus, although the issue of whether the color of the paper on which the tenant notice was printed is different from the summons and complaint may seem trivial and otherwise easy to prove, that borrowers have been able to prevail on such an issue only emphasizes the need for the lender to ensure strict compliance with Section 1303's tenant notice requirements.

The Manner of Service of the Tenant Notice

The method of service of the Section 1303 tenant notice depends upon two main factors: (1) how many units are in the building; and (2) whether the plaintiff knows the identity of the tenants.

Whether the building has five or more units determines how the notice must be served. For buildings with five or more dwelling units, "a legible copy of the notice shall be posted on the outside of each entrance and exit of the building." [3]

For buildings with five or less units, service is dictated by whether the plaintiff knows the identity of the tenants, which is obviously a standard that has the potential to be fraught with issues. The Section 1303 notice shall be delivered to the tenant by certified mail, return receipt requested, and by first-class mail to the tenant's address at the property if the identity of the tenant is known to the plaintiff, and by first-class mail delivered to "occupant" if the identity of the tenant is not known to the plaintiff. [4]

The plain language of the statute mandates that notice must be provided to any tenant. Courts have interpreted such language to mean that, regardless of whether the tenant is or is not named as a defendant in the foreclosure lawsuit, the tenant is still entitled to a notice in compliance with Section 1303. [5]

Additionally, even if the foreclosing party strictly complies with the notice requirements, mortgagors and tenants are not without recourse. Section 1303(4)'s method of service is dependent upon whether the foreclosing party knows the identity of the building's tenants.

Accordingly, in at least one case, the defendant successfully challenged service of the Section 1303 notice on the ground that the foreclosing party knew the identity of all the building's tenants, yet still failed to comply with the statute's service requirements applicable under such circumstances.

In *Merrill Lynch Credit Corp. v. Nicholson*, the Appellate Division, Second Department, concluded in 2022 that the plaintiff "failed to submit any evidence ... that it was not aware of any tenant's identity"; the defendant, in contrast, submitted affidavits in opposition to the plaintiff's motion for summary judgment stating that the mortgage loan servicer "was aware" of the tenant in the property. [6]

Under those circumstances, the court in *Nicholson* concluded that the "affidavits thus raised triable issues of fact as to whether [the plaintiff] was aware of the identity of a tenant at the

subject property and failed to comply with RPAPL 1303(4) by sending him the required notice by certified mail."

The Statute's 10-Day Service Requirement

While in many respects, the Legislature drafted Section 1303 in exacting detail to ensure strict compliance with its purpose (e.g., the exact words to be used in the notice), one area in which the Legislature did not make the route to compliance abundantly clear is with respect to Section 1303(4)'s 10-day requirement.

Section 1303(4) only states, in relevant part, that "[t]he notice to any tenant ... shall be delivered within ten days of the service of the summons and complaint." Yet, despite courts holding that a plaintiff must strictly comply with all of the requirements of the statute, Section 1303(4) does not specifically address when the 10 days begins to run, as in, what defendant must be served for the 10-day clock to begin to run.

This confusion is only compounded by the fact that, as most foreclosure practitioners know, there are often times many necessary defendants named in a foreclosure action, all of whom, typically speaking, are served at various different times after an action is commenced.

It is not clear, based on the language of the statute itself, if the clock begins to run when the first defendant is served in the action, or whether this clock begins to run once a certain class of defendant (e.g., a defendant with an ownership interest in the subject property) is served. Best practice, therefore, would dictate serving the Section 1303 notice as soon as possible to avoid unnecessary litigation over the above.

Evidentiary Issues in Showing Compliance With the Statute

In addition to complying with the statutory requirements imposed by Section 1303, the foreclosing party must also confront several demanding evidentiary hurdles courts have imposed in order to demonstrate compliance with the statute.

Commonly, foreclosing plaintiffs will attempt to demonstrate compliance with Section 1303 service by submitting an affidavit of service. While an affiant alleges that he provided the purported notice, the court is required to view the actual notice to determine whether the foreclosing party has complied with the statutory requirements imposed by Section 1303.

When submitting an affidavit, plaintiffs often fail to establish that the documents served upon the defendant conformed to the form and substance required by Section 1303 or that the documents served were the correct documents. Rather, as courts have held, an affidavit of service typically demonstrates that documents were served on a particular date to a particular address, not that those documents complied with the requirements of Section 1303.

For instance, in *21st Mortgage Corp. v. Nodumehlezi*, the Appellate Division, Second Department, held in 2022 that the foreclosing party failed to proffer sufficient evidence establishing that it complied with the Section 1303 tenant notice requirements, concluding that an affidavit of service coupled with a copy of the notice with the e-filed pleadings and related documents was insufficient to demonstrate compliance.[7]

Similarly, the Appellate Division, Second Department, in *Flagstar Bank FSB v. Hart*, concluded in 2020 that the process server's affidavit alone failed to demonstrate that the

foreclosing party complied with Section 1303.[8] Rather, as the court concluded in Hart, the process server's affidavit demonstrates statutory compliance if it is accompanied with a copy of the Section 1303 notice or averments that the notice served complied with the requirements of Section 1303 concerning context and form.

Along that same vein, in MTGLQ Investors LP v. Assim,[9] the Appellate Division, Second Department, held in 2022 that actual notice must additionally prove that the correct typeface was used on the notice, pursuant to Section 1303(2) and (4). In that case, the process server's affidavit failed to indicate that the correct typeface was used.

Conclusion

The foregoing is intended to illustrate the challenges faced by foreclosing parties in meeting the evidentiary requirements and other burdens imposed by the courts in showing compliance with Section 1303's tenant notice requirements. While a number of the requirements of the statute seem simple enough when taken at face value to comply with, the reported decisions addressing Section 1303's tenant notice requirements show that it may be more challenging than one might expect for lenders to show compliance with the statutory requirements.

The reported decisions discussed herein, if nothing else, serve as a reminder that courts scrutinize each step of the foreclosure process, emphasizing the importance of strict compliance with Section 1303.

Yet, despite these holdings, based upon a review of the reported decisions and dockets for mortgage foreclosure cases currently pending before New York state courts, it does not appear that many borrowers are raising these issues and/or making these arguments as of yet in cases where the statute applies, including those involving the foreclosure of a mortgage secured by multifamily residential real property.

These arguments, however, certainly will be forthcoming from borrowers in cases covered by the statute in the months ahead based upon the current distress in the real estate markets, including multifamily and mixed-use real estate markets, where Section 1303's tenant notice requirements are applicable.

The anticipation of more and more borrowers raising these issues, and lenders forced to confront the issues raised by the borrowers, of course, provides all the more reason why an understanding of what it takes to comply with the Legislature's strict mandates is critical for lenders and borrowers alike.

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[1] 47 Misc.3d 885 (Sup. Ct. Kings Cnty. 2015).

[2] 186 A.D.3d 659 (2d Dep't 2020).

[3] RPAPL § 1303(4).

[4] *Ibid.*

[5] *Hunte*, 47 Misc.3d at 895-96.

[6] 210 A.D.3d 758 (2d Dep't 2022).

[7] 211 A.D.3d 893 (2d Dep't 2022).

[8] 184 A.D.3d 626 (2d Dep't 2020).

[9] 209 A.D.3d 1006 (2d Dep't 2022).