



PROVING A FORECLOSURE CASE: WHAT NEW YORK COURTS EXPECT

Written by Adam Gross, Esq, Partner

In New York foreclosure litigation...

the quality of the file often determines the outcome long before a judge rules on the merits. Complete documentation, well-supported affidavits, and knowledgeable witnesses aren't just litigation requirements, they're the foundation of a successful case.

Proving a borrower defaulted is only the beginning. Courts expect mortgage servicers to prove every element of their case with competent, admissible evidence, and scrutiny of these elements has increased in recent years. With evolving appellate decisions and the impact of the Foreclosure Abuse Prevention Act (FAPA), the affidavits, exhibits, and testimony often have a greater impact on the outcome than the merits of the claim itself.

Every successful foreclosure case comes down to three basic parts: solid affidavits, business records as exhibits, and credible witness testimony.

It all starts with the business records. A plaintiff must be able to establish standing, prove the borrower's default through admissible business records, and demonstrate compliance with New York's statutory requirements, including the mailing of the RPAPL § 1304 ninety-day notice and completing the required filing with the New York State Department of Financial Services. Those requirements are well established, but courts continue to examine them closely. Missing documents, incomplete records, gaps in the evidentiary foundation, or minor procedural and statutory errors can delay a case for years or even result in dismissal.

Affidavits are just as important. Since most New York foreclosure actions are decided on motion practice, be it on default or summary judgment, the affidavit often becomes the key piece of evidence supporting the motion, referee's computation of the amount due, and Judgment of Foreclosure and Sale. But an affidavit carries

weight only if it's backed by admissible business records attached as exhibits and signed by someone who understands the servicer's record-keeping practices. Courts have become increasingly skeptical of conclusory affidavits that fail to lay the proper evidentiary foundation. This has resulted in referee computations being rejected and \$1.00 damage awards.

Although only a small number of cases go to a hearing for the referee's computation or a full trial, witness testimony still matters. At trial, issues involving standing, statutory notices, servicing transfers, payment histories, or statute of limitations defenses require live testimony. Witnesses should be prepared not only to authenticate business records, but also to explain servicing practices and demonstrate a working knowledge of the records they're relying upon. Good witness preparation will make the difference when live testimony is needed.

For lenders, servicers, investors, and GSEs, successful foreclosure litigation starts long before a complaint is filed. Maintaining complete records, preparing knowledgeable affiants, and building a litigation-ready file from the outset not only improves the chances of success before the court, but also helps reduce delays, control litigation costs, and position the case for success if it ultimately proceeds to trial.

Ultimately, the better the documentation, the stronger the affidavits, and the more prepared the witnesses, the better positioned a lender will be to navigate New York's increasingly demanding foreclosure landscape.

For more information regarding winning affidavits, required business records, or witness training, please contact our office.

As with any matter in New York, New Jersey or Pennsylvania which affects and concerns our clients, we remain available to assist and look forward to hearing from you.

