

Court Places Strict Requirements On Lenders' Notices Of Default Prior To Foreclosures



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In the case of *National City Mortgage Company v. Richards* (10th Dist. 2009), 182 Ohio App. 3d 534, 913 N.E.2d 1007, 2009-Ohio-2556, the court places strict and surprising requirements on lenders with regard to sending notices of default. The court placed two requirements on lenders which deal with notices of default. First, when there are conditions which must be satisfied prior to the initiation of a foreclosure action, the Complaint filed in the foreclosure action should identify those conditions, and state that those conditions have been met. Second, notices of default should be issued strictly pursuant to the terms outlined in the promissory note. While complying with these requirements is not overly difficult, failure to comply can create future headaches in litigation and unneeded expenses.

National City v. Richards stemmed from a foreclosure filed by National City based upon a promissory note and mortgage which were executed in 2004 by Richards in favor of National City. Richards argued at the trial court level that National City failed to provide the contractually required notice of default and its intention to accelerate the debt.

National City argued that a notice of default was prepared and mailed to Richards at her property address via certified mail, but that the certified mail was returned, showing that the notice was unclaimed. Based upon this argument, the trial court granted National City summary judgment.

On appeal, Richards argued that National City failed to provide a proper notice of default to Richards in compliance with the terms of the note and mortgage, which was a condition precedent to acceleration of the note and commencing the foreclosure action. National City responded with two arguments. First, National City argued that Richards was required to assert that National City had failed to properly accelerate the note as an affirmative defense in her original Answer, and therefore waived this argument by not timely raising it. Second, National City argued that it had complied with the terms of the acceleration by providing notice of the default and intent to accelerate via certified mail. The Court of Appeals rejected both of these arguments.

The Court recognized that National City's foreclosure action was contingent upon the satisfaction of a condition precedent, meaning that National City had to allege in its Complaint that it had satisfied the notice requirements by providing Richards with a copy of its notice of default and intent to accelerate. However, National City in its Complaint failed to allege, even generally, that this "condition precedent" in the foreclosure action had been satisfied. Therefore, since National City failed to allege this in its Complaint, the Defendant was not required to raise this as an affirmative defense. As the Court of Appeals recognized, even a general allegation stating that all conditions precedent have been met pursuant to the terms of the note and mortgage would have satisfied this requirement.

National City also argued that the notice of default and intent to accelerate which it sent via certified mail, even though it was not received by Richards, satisfied the notice requirement under the note and mortgage. The specific terms of the mortgage stated:

... Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.

The Court of Appeals held that by sending the notice of default via certified mail, combined with the fact that it was not received by Richards meant that National City had failed to comply with the notice requirements outlined in the mortgage and promissory note. The Court stated that "had National City mailed its notice of default via ordinary, first class mail, it not only would have been entitled to a rebuttable presumption of delivery based on the mailbox rule, but would have satisfied the express requirements of the note and mortgage." Thus, the Court "punished" National City for sending the notices of default via certified mail, arguably a better way than required by the promissory note.

There are two important lessons to take away from the *National City* decision. First, when dealing with causes of action which have conditions precedent, like a foreclosure action, those conditions precedent should be identified in the Complaint and alleged to have been satisfied. Second, notices provided under a promissory note or mortgage should be issued strictly pursuant to the terms of the note or mortgage. While these requirements are not overly difficult to address, they can be overlooked, and, as is evidenced by the Court of Appeals opinion in *National City v. Richards*, can be costly. If you would like a full copy of the opinion or if you have other questions related to finance and creditors' rights, feel free to call upon one of our Practice Area Lawyers.

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