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FORECLOSURE

A Vital Act: Service Of Process

Employ The Right Provision To Flush Out The Borrower

BY BRUCE J. BERGMAN, ©1999

Service of process is a rather mundane, mechanical subject - vital obviously to the litigation process in judicial foreclosure states but somewhat uninspiring, at least from this vantage point.

Adding to the somnolence the topic produces in some quarters, it is also an area of portentous problems. Lenders are painfully aware that in a New York foreclosure case, for example, a significant portion of the time expended is consumed by process service. Even when a person's whereabouts are known, should they be served by other than in-hand delivery [pursuant to CPLR 308(1)] they then have at least 40 days to respond to the complaint.

Of course, a more severe time killer is the defendant who cannot so readily be found - hardly an uncommon circumstance.

One way mortgagees might intend to exacerbate the missing borrower dilemma is to rely upon the standard mortgage provision to the effect that any notice to be given to the borrower will be by delivery or mail to a stated address, most often (but not always) the mortgaged premises. A further provision is that the notice will go to a different address only if the borrower has given the lender notice of that other address.

Finding the borrower

It would, of course, be comforting for lenders and servicers to know that if a borrower silently departs the mortgaged premises (or wherever else he lives) and never provides notice of a new address, service of process in the event of a foreclosure action could be made at the premises.

Is such comfort available? Regrettably, it is not, in New York at least - absent providing a false address or engaging in conduct designed to prevent the mortgage holder from ascertaining the borrower's correct address.¹

Why this is so is readily understood by a few quick words about service of process rules in the Empire State, which is similar to those in many other jurisdictions. If a prospective defendant is never home, the process server can "nail and mail," which means mail the summons and complaint to the last known address (and the mortgage clause discussed helps there), but nail (that is, affixed to the door) at the usual place of abode. Thus, there is a clear distinction between last

known address and usual place of abode.²

A like distinction applies if some person of suitable age and discretion is home other than the party to be served. The summons and complaint can be handed to such a person at the dwelling place/usual place of abode. But going to the last known residence is not a proper substitute.³

In the end, service of process cannot be made at the last known address, and the mortgage agreement to receive notices is not equivalent to an agreement to accept service of process.⁴

That being so, a suggested remedy is to employ a mortgage provision which specifically authorizes service of process at the last known residence. It would surely save considerable time in many a foreclosure case.

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¹Citibank, N.A. v. Robinson, N.Y.L.J., July 17, 1996, at 24, col. 5 (Sup. Ct., Kings Co., Belen, J.), citing Cuomo v. Cuomo, 144 A.D.2d 331 (2d Dept. 1988); Sherrill v. Pettiford, 172 A.D.2d 512 (2d Dept. 1991).

²Citibank, N.A. v. Robinson, N.Y.L.J., July 17, 1996, at 24, col. 5 (Sup. Ct., Kings Co., Belen, J.), citing Feinstein v. Bergner, 48 N.Y.2d 234 (1979).

³Citibank, N.A. v. Robinson, N.Y.L.J., July 17, 1996, at 24, col. 5 (Sup. Ct., Kings Co., Belen, J.), citing Cuomo v. Cuomo, 144 A.D.2d 331 (2d Dept. 1988).

⁴Citibank, N.A. v. Robinson, N.Y.L.J., July 17, 1996, at 24, col. 5 (Sup. Ct., Kings Co., Belen, J.).



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