BERGMAN ON MORTGAGE FORECLOSURES: Process Service and the Statute of Limitations

By Bruce J. Bergman

That process service is one of the major bugaboos in the mortgage foreclosure case is a topic well recognized by practitioners. And there is hardly a mortgage lender or servicer who has not been on the receiving end of an eve of sale order to show cause brought by a chagrined borrower vociferously outraged that service of process was never effected upon him. Editorially, we observe that it doesn't seem to matter that the borrower was hiding, or would never come to the door, or euchered his cousin at the house to lie and assert that the borrower moved away, or that he *did* move to other parts, conveniently neglecting to leave a forwarding address for the mortgage holder.

When a borrower swears that service was never made, courts are understandably reluctant to put a person's property—particularly a home—in jeopardy without a hearing, and so too often mortgage holders are forced to a traverse hearing. Whether service was proper is sometimes less a matter of law than one of credibility of witnesses, a judge's sympathy and in the end, whatever the court says it is. So it becomes somewhat philosophical. Of course, it is also conspicuously practical because if the court chooses to rule in favor of the parties claiming lack of service, the case is over as to them. They must then be served anew or, a separate action may have to begin against them, later to be consolidated back into the foreclosure.

All this is a mess, but one with which the initiated are familiar. It *happens* and is one of the particular perils in a judicial foreclosure state like New York. But it can be worse—as in the instance where deficient process service intersects with the statute of limitations.

The statute of limitations to sue upon a mortgage is six years. So, from the moment the mortgage balance may have been accelerated, or when the mortgage balance would have matured, the six years begins to run and any action brought later than the six years would be barred by the statute of limitations. That should hardly be a commonplace difficulty because lenders would not readily wait six years to begin an action. Nevertheless, it does happen that way under sometimes extreme circumstances and here is where the mortgage holder can be whipsawed. A foreclosure is begun. For whatever reason, the case is litigated, delayed and/or neglected and by the time it nears a conclusion, the issue of jurisdiction somehow first arises. If service is successfully challenged (as happened in *Rols Capital Co. v. Beeten*[1]) jurisdiction over the protesting parties would not have been acquired. Therefore, either service anew with court permission must be made on those parties, or, a new action must be begun. However, if it is now six years since the accrual of the action, it is barred by the statute of limitations—precisely what occurred in the cited case.

While it would be helpful to say that the lesson of all of this is to be careful with process service, care is already a watchword. Sometimes despite best efforts, a court can conclude that service was no good and if such a finding intersects with the statute of limitations in an odd case, the result could be a disaster.

Endnote

1. 264 A.D.2d 724, 696 N.Y.S.2d 48 (2d Dep't 1999).

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2004), is a partner with Certilman Balin in East Meadow, New York, an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.