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BERGMAN ON MORTGAGE FORECLOSURES . . .

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Publishing the Summons*

Will some grousing be entertained? Although judicial foreclosure in New York is always prone to offering frustration, one of the particularly irksome aspects is publication of the summons. Why publication exists at all, what happens when a lender is forced into this odious pursuit and what it means in the end will be the focus here.

Except in heavily litigated matters where motions, discovery or a trial are the reasons for delay (which in residential foreclosures are a minority anyway), a significant portion of the foreclosure case is consumed at the initial stage—service of process. This is one of the boring parts, but stay with us to make the point. If a borrower (or any necessary party) in the foreclosure is served with the summons and complaint by in-hand delivery to that person, the time to answer is, of course, 20 days. That is not bad. *But*, if the person is not home (or, if service is attempted at the place of business and the person is not there either), then the pleadings can be left with a person of suitable age and discretion. That, too, is fine, except that for this type of service, there must also be a mailing of the pleadings. Service is not complete until ten days after an affidavit of the delivery and the mailing is filed with the court.

As litigators know, there is yet more. When this method is used, the time to answer does not expire until *30 days* after service was completed, which, as mentioned, wasn't until 10 days after the affidavit was filed. So, 40 days is a virtual minimum time, and that doesn't account for whatever time it took to deliver the papers to the process server, however long it took the process server to go to the house or business and how many times the server had to visit before he or she found someone fitting the definition of suitable age and discretion.

The preliminaries are still not over. What if no one is ever home—which definitely can happen. Then the process server must attempt service at least three times before the fourth occasion, when the papers can be affixed to the door and then posted. This approach likewise suffers from the detainment of 30 days plus 10 days. Worse, when there are multiple defendants, one may be served on Monday—first triggering the seemingly interminable time periods—while another might not be served until Friday, with others served the week after.

Although not every case is a process-serving nightmare, the potential should be obvious. Dismayingly, this whole discussion was just an appetizer for the main course, the need to publish the summons—which leads to a proverbial catch-22. Because service by publication is so unwelcome (to be addressed in a moment), special efforts to avoid it are made. That means ever more diligent efforts to ferret out elusive defendants: seeking other or different addresses from the lender's files; employing a skip trace; "running" the social security number; inquiring of neighbors; and pursuing a forwarding address from the post office. The ironic result is that if the lender must ultimately publish after all, still more time was used up trying to avoid the delay publication imposes!

What, then, is so terrible about publication of the summons? Because setting the stage for this narrative was itself time consuming, let's shorten the verbiage here by presenting the points more tersely. Publication of the summons is unwanted because (in no particular order):

(1) It adds considerable time to the case.

(2) Counsel must prepare an order for publication, an affirmation in support and present evidence of all the efforts made to find the defendant(s) against whom publication is sought. That order must be submitted for signature, and even waiting for that could take many weeks at best.

(3) Once the order is signed—and received—publication ensues once a week for four successive weeks in *two* newspapers, thus creating still more delay.

(4) The publication order, proceeding on the theory that the party who couldn't be located might be dead, appoints a guardian *ad litem*. The guardian is entitled to a fee, and counsel must prepare a host of papers for that guardian (i.e., an answer, consent, affidavit, waiver; still more effort and expense).

(5) A part of this whole process is preparation of a supplemental summons, amended *lis pendens* and amended complaint, all because the caption of the case changes with all variety of unknown parties added. (This is called the omnibus clause.)

(6) Still another aspect is the naming of the state (and sometimes the United States of America) as a new party to the foreclosure for any estate taxes which may be due as against the missing party—not so surprising because that person might be dead!

(7) Remember those two newspapers that publish the summons for a month each? The court selects those. Counsel has nothing to say about it. But legal advertising in some papers is very expensive, sometimes $3,000 to $5,000 or *much* more.

(8) If counsel did all this work, *some* additional fee is required.

(9) And then there is the final insult. Service by publication in New York is *not* personal service. So, if the missing person was an obligor or guarantor, no deficiency judgment can be pursued against that person.

The mess is really somewhat more convoluted than we have noted here, but further emphasis should not be needed to make the point. Neither lenders/servicers nor their counsel want to encounter a need to publish the summons. Sometimes, though, it is just unavoidable.

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