BERGMAN ON MORTGAGE FORECLOSURES . . .

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Service by Publication vs. Filing Mandates*

The title of this column is seemingly redolent with fodder for obscure law review case notes. Maybe so, but perhaps surprisingly, this is very practical, real, everyday meaningful material. In brief, (to be explored later) CPLR §306-b mandates filing proof of service within one hundred twenty days of filing the summons and complaint, which filing, since January 1, 1993, must be at, and becomes, the inception of the action. But, by the time the need to publish becomes apparent, it may mechanically be too late to complete service against wayward defendants. And, unfortunately, some courts from time to time have not been as warm to joining in ready remedies to this dilemma as might be preferred. How incongruous all this becomes is apparent even upon a cursory walk through of the circumstances.

It should not belittle other types of litigation to observe that speed in the mortgage foreclosure case is a special imperative. With interest mounting daily on the obligation, mortgage lenders can be voracious in their appetite for nothing less than the most rapid progress in the foreclosure case. Not surprisingly, anything which impedes the progression is most unwelcome — the need to publish the summons being conspicuous in that category. (What is perhaps startling is that some courts seem to treat publication as a device relished by plaintiffs and somehow foisted upon everyone else.) The point is that publication is itself distasteful enough, and elevating the problem by compounding it in a war with filing time limits makes it still worse.

Just to guild the lily, because it underscores the concept, publication adds unwanted expense to the case. It means a motion and order are necessary. The actual publication engenders a disbursement — sometimes substantial. A guardian is appointed and plaintiff's counsel typically prepares the guardian's answer and waivers — assuming the appointee even agrees to waive notice. Of course, the guardian is entitled to a fee and all this consequently elevates plaintiff's legal expense in the case.

The final indignity is that service by publication does not afford jurisdiction sufficient to pursue deficiency liability. Thus, while service by publication confers jurisdiction effective to divest title, if the owner is also an obligor (which most often is the case), a post-foreclosure deficiency cannot be sought.

Because publication is usually so odious, foreclosing plaintiffs strive to avoid it. In turn, that only increases the incentive to assure personal service, be it by in hand delivery, suitable age service or nail and mail [respectively, CPLR §308(1), (2) and (4)]. In the zeal to achieve the goal of personal service, the effort is likely to be at least somewhat time-consuming. The process server will be repeatedly sent to the premises where the person is believed to reside or work. Time may be consumed by some investigation or the engagement of a skip trace service. Perhaps the social security number will be run to see if a new address is revealed. If some other address appears, service may be attempted there and on occasion that turns up still another move, with the process server following to the other, newer location. When finally the stage is reached where it may be apparent that publication will be essential, a decision from the lender to cease the personal service efforts may be required and that in itself could add still further time.

It is hardly unlikely that all of the noted efforts would have consumed two months or more. Now the plaintiff must prepare and submit the order of amendment and publication. Two further thorny problems then arise. How long will it take until the court addresses the order and signs it — with the concurrent inquiry as to how long it will take the order to wend its serpentine way through clerks' drawers and offices until a copy can physically be obtained by plaintiff's counsel? Nowadays, volume being what it is, it is not unknown for orders to languish in the court system for a month or two, or more.

Assuming though that the order is received back by counsel in three weeks (a blessedly optimistic scenario in many counties), pursuant to CPLR §316(c), service by publication is not complete until the twenty-eighth day after the first date of publication. Certainly an imponderable here is how often the selected newspapers are published. A smaller local paper which appears only infrequently adds still further time to this process. In sum, there is a very

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distinct possibility — if not a likelihood — that the ability to publish and file proof of service prior to expiration of the apparently sacred 120-day period is remote or threatened.

The outcome of that is the necessity to purchase another index number, start a separate action against the defendant or defendants who had to be served by publication and then move to consolidate the second action with the first in order to create anything approaching a coherent mortgage foreclosure case. All told, this is a burden which a foreclosing plaintiff ought not to bear, especially where the problem is not of its doing and where the offending statute was designed as a revenue-enhancer — not as protection for some hapless defendant.

Having observed the extraordinary mischief the clash of publication and filing requirements creates, there ought to be a solution, and one to be encouraged by the courts. If plaintiff's counsel is vigilant, it urges that the prospective order of amendment and publication should contain a decretal paragraph extending the 120 days for some period designed to accommodate the completion of publication.

Although statute may prohibit reviving an action which must be deemed dismissed where service occurs after the 120 days, the courts should — and we believe do — have the authority to extend the 120 days if the order issues **prior** to the duration of that period. So, if that paragraph would be inserted in the order of amendment and publication, and if the courts would sign it that way, a reasonable modicum of care can solve this problem. Most courts are in agreement and the few that may not be should certainly be invited to explore the issue and reach the appropriate and ineluctable conclusion.

How truly insidious all this can become is evident from this actual event. Counsel to the foreclosing plaintiff expends every effort possible to secure service personally but is thwarted. Eight weeks after filing, the order of amendment and publication is duly and properly submitted to the court. The order reposes in the court for six weeks, at which time it is returned to plaintiff's counsel with a notation that by the time the order would be signed and publication would ensue, the 120 days would have expired. Regrettably, this ignores the existence of the extension paragraph, assumes that contemplating the order would be futile and thereupon banishes the already suffering plaintiff to unusual (and unwarranted) time and expense.[1]

The ultimate result is to the benefit of no one (save an additional $170.00 for the State of New York) and could easily have been avoided. May it be suggested that we really should refrain from the irrational and work still harder to make this system more efficient. Sometimes it's not so difficult to do that although one can occasionally wonder who is paying attention.

Endnotes

1. This particular problem has been solved, but it doesn't render the dilemma immune to repetition somewhere else.

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