

Sometimes, The Court Makes An Error

For Example, In Cases Of Evictions After A Foreclosure ...

BY BRUCE J. BERGMAN

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The unwelcome foreclosure case becomes closer to a nightmare if, when the action is finally over, it is difficult or impossible to evict some tenants who may be languishing in your property.

But this really shouldn't be a problem, except that some frightening cases have emerged (in New York) over the last few years, threatening, it seems, well established principles.

So how is this for a lender/servicer's bad dream?

Your worst nightmare

Your counsel is meticulous. Just as important, so, too, is your lawyer's process server. The pleasing result is that all tenants at the premises in fore-

closure are carefully served (along with all other necessary parties). The foreclosure sale is ultimately conducted and with no bidders present, the lucky lender inherits another REO property.

Eager to speed a resale to recoup the investment, the servicer inspects the premises. (Let's say it's a two-family house, although the example could apply to a 10-family dwelling or a substantial commercial property as well. The concept will be the same.)

Interestingly, the two families relaxing in residence say they had signed a lease with the owner (your defaulting borrower) just a few weeks before. So they claim to be puzzled as to who the servicer is and why questions are being asked. They know nothing about any foreclosure action and have no intention of leaving. After all, they just moved in!

This is an old story and does not present a hurdle, unless a court falls down

in interpreting accepted law and practice. The reason the tenant's claim in the cited scenario can't be a roadblock is a handy document technically called in New York a "notice of pendency," generally referred to as a *lis pendens*.

A like paper, with a similar effect, is fairly uniform throughout the states.

The lis pendens

As it is in New York (for example), the *lis pendens* is a paper filed (with the county clerk) in an action affecting title to real estate (such as a mortgage foreclosure) which serves to give notice (even if not actually seen) that the action has begun.

The result of that notice - which is the key - is that one who obtains an interest in the property after filing of the *lis pendens* is bound to the action as if he had been made a party. So, any purchaser or encumbrancer subsequent to *lis pendens* filing is cut off by the foreclosure sale.

Thinking about it highlights just how important this idea truly is.

Before a foreclosure is begun, a search is obtained so the mortgage holder can be apprised of all junior interests. In that way, all subordinate parties (mortgagees, judgment creditors, mechanics lienors, tenants, etc.) can be named and served in the action, with their interests then extinguished by the foreclosure sale, which is the ultimate goal of a foreclosure.

But what if someone acquires an interest in the property after the search is completed?

Post-search maneuvers

Suppose, for example, the borrower convinces someone to give him a mortgage - or more likely arranges for a "friendly" mortgage to be recorded. Or, assume the borrower sells the property, perhaps to a speculator or to a relative.

Is the new mortgagee or the new



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owner free of the foreclosure, untouched by the sale because they weren't named in the case?

(Remember, the plaintiff couldn't know about them because their interests arose after the search was done.)

The answer is "no," because the lis pendens takes care of the dilemma. And if it didn't, foreclosures would never end. It would be too easy for a shifty borrower to frustrate a foreclosing lender by successive "sales" of the premises to an unending stream of compliant family members, friends and strawmen.

So, too, does the lis pendens take care of all the tenants who may descend on the property during foreclosure, except that two courts in New York missed the point.

Missing the point

For whatever reason (and we needn't burden you here with the twisted logic), in two separate eviction after foreclosure cases (in 1991 and 1994 - both reported on the front page of the widely read *New York Law Journal*) the courts held that tenants who came in after the foreclosure (and the lis pendens) could not be evicted, unless they just didn't pay rent!

[*Green Point Sav. Bank v. De-Four*, N.Y.L.J., Aug. 31, 1994, at 23, col. 3 (Sup. Ct., Kings Co., Aronin,

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A lis pendens takes care of tenants who may descend on the property during foreclosure.

J.); *Green Point Sav. Bank v. Leselrod*, N.Y.L.J., Jul. 31, 1991, at 25, Col. 3 (Sup. Ct. Suff. Co., Oshrin, J.)]

One of the courts agreed that a lis pendens is supposed to bind all subsequent interests, but opined that since no prior case law dealt specifically with tenants, the principles did not apply.

Well, in New York there are at least two earlier cases which did particularly address the rule that tenants are bound by a lis pendens - just like the holders of any other interest.

[*Flushing Sav. Bank v. CCN Realty Corp.*, 82 A.D. 2d 907, 440 N.Y.S.2d 699 (2d Dept. 1981); *Holly Realty Co. v. Wortmann*, 121 N.Y.S. 572 (N.Y.C. Mun. Ct. 1910)]

So what does this mean for the already unpleasant and sometimes cumbersome eviction-after-foreclosure arena?

The simple but disquieting answer is that sometimes courts become confused. They will make mistakes like this on occasion.

What renders it more insidious, though, is that these erroneous decisions were so widely publicized (at least in New York) tending, therefore, to lead others astray.

But the folly of these legal miscues will eventually be exposed. Then, what should always have been clear will emerge even more apparent.

In the meanwhile, when next you must proceed with an eviction after foreclosure, do so knowing your position is correct - even if not every court recognizes that! SM

PERSONNEL

FIRST INTERSTATE BANK

Larry A. Padilla, manager of the residential mortgage division loan servicing department of First Interstate Bank, Los Angeles, has been promoted to senior vice president. As mortgage manager, Padilla oversees the day-to-day operations of the mortgage loan servicing staff of 125, who are responsible for customer service, payment processing and collections. A 20-year mortgage loan management veteran, Padilla joined First Interstate Bank in May 1994. Prior, he worked in the real estate division of Greater Western Bank and First Nationwide Bank. He has also held management positions with Weyerhaeuser Mortgage and Crocker Mortgage Company.

FIRST AMERICAN TITLE INSURANCE COMPANY

Phillip A. Poitevin has been named vice president-state manager of Mississippi for First American Title Insurance Company, Santa Ana, Calif. As state manager, Poitevin is responsible for all title insurance and abstracting matters in Mississippi. He joined the company in 1990, serving first as underwriting counsel and later becoming president of First American Abstract Company in Jackson, Miss. Also, **Renee Walter** has been named escrow manager and **Mike Doting**, title manager, as part of the company's affiliation with Lenders Advantage and its expansion into California. The two work in the Oakland office. The Pleasanton, Calif. office has added **Chuck Avila** as a trustee sales guarantee manager and **Ron Shepler** as a TSG representative for Northern California.

PHILIP IRWIN AARON, P.C.

Claudia Reisch has joined the Syoset, N.Y. law firm of Philip Irwin Aaron, SM

P.C., a member of the U.S. Foreclosure Network. She will concentrate her law practice in areas of foreclosure, bankruptcy and related matters.

CIGNA PROPERTY & CASUALTY

Jay Baird has been named national sales director for the Financial Institutions Services unit of CIGNA Property & Casualty, Philadelphia. Baird is the primary contact for all non mass-marketed products and services including force-placed mortgage hazard insurance, flood insurance, mortgage errors & omissions and impairment, and bank insurance packages. Baird was formerly with Transamerica Specialty Insurance and Transamerica Real Estate Tax Group. He is a member of the Mortgage Bankers Association of America and the California MBA.

BANKERS INSURANCE SERVICE CORPORATION

Noreen Ryan Donovan has been promoted to executive vice president and chief operating officer of Bankers Insurance Service Corp. of Chicago. **Ronald Levitt** has been promoted to second vice president. In the Concord, Calif. office, **Maria R. Heller** has been promoted to second vice president.

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