

**RELATIONSHIP OF SPEEDY SERVICE
TO FORECLOSURE JUDGMENT – A POSSIBLE TRAP FOR MORTGAGEES***

**** by Bruce J. Bergman**

New York has some quirky rules which can quietly create serious problems for mortgage lenders, all highlighted by a recent case holding in substance that if the borrower is not served within thirty days of initiation of the action (and absent a good excuse for that failure) a later judgment of foreclosure and sale can be successfully attacked. This then is one of those silent time bombs which explode on a foreclosure at the end, sending it all the way back to the beginning. Where does this all come from?

It tends to be a bit obscure, but can be readily understood. Here are some bullet points to explain the dilemma.

- A foreclosure in New York begins when the pleadings are filed with the court: the summons and complaint and almost invariably, a notice of pendency (in common parlance, the lis pendens).
- Filing a lis pendens at the inception is highly recommended and almost always done because it means that anyone who thereafter obtains an interest in the mortgaged property (a new mortgagee or a new owner, for example) is bound by the foreclosure action as if they were a party. The foreclosing plaintiff need not know about them, search for them or serve them with process.

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- But if a lis pendens is filed at the inception of the action, then the borrower must be served within 30 days. If not, and even though service is made later, the lis pendens is ineffective.
- A judgment of foreclosure cannot be awarded unless a valid lis pendens is on file for at least 20 days.

Readers can see the problem coming, all sadly highlighted by the noted recent case. [Bank of New York v. Vandermeulen, 10 A.D.3d 624, 782 N.Y.S.2d 465 (2d Dept. 2004)].

The summons, complaint and lis pendens are filed. Plaintiff's counsel attempts to serve borrower within 30 days but fails. They tried again almost two months later and succeeded. No one attacked the lis pendens so it was on file, apparently fine. All appeared in order and so eventually a foreclosure judgment issued.

Some time after the judgment the borrower emerged, moving to dismiss on the ground that the failure to timely serve (way back at the beginning) nullified the lis pendens and therefore voided the judgment. In response, plaintiff argued that defendant had been in hiding and should not be allowed to argue about the failure to serve – a good legal position to take. The problem was that plaintiff was unable to back up the charge that the borrower couldn't be found and so the judgment was vacated.

There is both a lesson and a legal principle here.

The lesson: The borrower must be served in 30 days. If it cannot be done – presumably for a good reason – be able to document why this was the borrower's doing, not a failure by plaintiff.

The legal principle: If there is no excuse for failure to serve within 30 days, even though everything looks good, the judgment in that case can be successfully assaulted – not an encouraging principle for mortgagees.