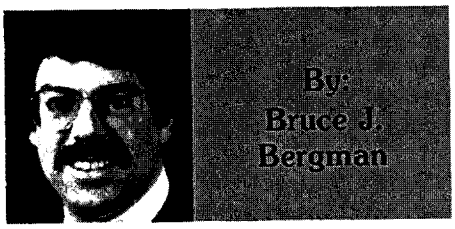
SETTLING THE FORECLOSURE CASE IN NEW YORK – A CHANGE IN STRATEGY



INTRODUCTION

Settling a foreclosure — which generally means allowing a reinstatement, often over some period of time — is almost always a good idea from a lender's point of view. And it usually did not matter whether this happened early or late in the foreclosure case. All this was just as true in New York as it was in any other state. But in New York now, halting the case before process service is complete could be an expensive mistake for a lender.

Because the consequences of stumbling here could be costly — and certainly will impede case progress — let us reconfirm the point immediately and then explain it more expansively. If settlement of a foreclosure in New York is contemplated (near the beginning of the action), the case should nevertheless proceed through service of process before any halt is imposed. To the extent that such an approach is at variance with what some lenders or servicers now do, a new look is recommended. The reason is because new statute [CPLR 306-b] provides that proof of service of the summons and complaint must be filed within 120 days after filing the summons and complaint. Absent compliance, the action (for our purposes the foreclosure action) is *deemed dismissed* as to the party against whom the proof of service has not been filed (all assuming that this party did not appear in the case.) It may be helpful to observe that a case is now initiated in New York not by serving any one defendant, but by filing the pleadings (summons, complaint and in the foreclosure case, the lis pendens) with the court.

How this then relates to settlement methods suggests that broader discussion mentioned a moment ago.

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SOME THOUGHTS ON SETTLEMENT

Just as settlement itself is the generally desired approach, so too is achieving the goal early in a case. The sooner funds are in hand the better.

Pleased though lenders may be to pursue favorable settlements, many know that the resolution is not so likely to be forthcoming unless the pressure of foreclosure is maintained. So, while settlement overtures are emerging, the directive is for the case to continue apace. If settlement does come, the borrower should pay the cost of the case progress achieved. If such a conclusion is not reached, the lender suffered no delay. While the dynamics of each case can alter the inherent suggestion, there remains much wisdom in resolute prosecution of the foreclosure case.

On the other hand, motivated by any number of considerations — usually of a business nature — some lenders impose a stop upon the foreclosure case the moment settlement becomes a possibility. It may be that the borrower is believed unable to pay the disbursements and legal fees which would be incurred as the case went forward during the settlement discussions. Or, the lender might conclude that pushing the case in the face of an apparently serious effort to settle is just too aggressive. Other lenders choose to assume full control of settlement possibilities, handling them in house, while directing outside counsel to place the case on hold.

If the "hold in place" procedure is chosen, its consequences should be considered in light of the new practice requirements.

THE NEW FILING STATUTE

There has been a flood of daunting literature in New York attempting to explain the new filing law, calling attention to the plethora of uncertainties the statutory sections portend. Our focus here, however, is confined to the obligation to serve all defendants within 120 days of starting the case — which includes the need to file the affidavits of service during the mandated period.

Especially in foreclosures with multiple defendants, a lengthy period of time may be needed to locate the defendants and serve them. Where a party cannot be found, publication of the summons is required and that extends the procedure still further. Special process server's affidavits are needed. Amended pleadings, an order of publication and an attorney's affirmation must be prepared and signing of the order must eventuate to authorize publication. Then there must actually be publication of the summons with an affidavit from the newspaper to be filed with the court — something only rarely garnered with speed. Thus, the possibilities for service to take more than 120 days are not so remote.

It may be possible to move for an extension of this service period. But this adds another cost factor via legal expense. And if the time limit *does* pass, the case is deemed dismissed against the person or persons not served! The cure is that a new, separate action must then be begun against thos other defendants. A new index number must be purchased for $170.00 — a sum which has risen over time and which will doubtless be increased in the future.

How to prosecute a foreclosure action with some separate case against some defendants is an exquisite anomaly and a procedural nightmare. So, the two actions would have to be consolidated!

CONCLUSION

Need more be said? Failing to serve within 120 days creates a mess — and an expensive one at that. From time to time, it may be inevitable that a foreclosure will run afoul of this problem. But a lender should not contribute to the predicament by stopping the case before service is complete. If there is a compelling need to hold the foreclosure in place — for settlement purposes or otherwise — while at the same time there is any possibility that ultimately the case may need to proceed, don't stop the case until *after* service of process is complete. Only then can a lender perhaps enjoy the luxury of time.