Summons Process Takes Heavy Toll

The time to find a borrower in a foreclosure action after publication of the notice can quickly stretch from a matter of weeks to months.

BY BRUCE J. BERGMAN

Defendants who can't be found but who must be served are all too commonplace in mortgage foreclosure actions. And when defendants are unavailable for process service, publication of the summons [illegible] path to follow.

Perhaps inherent in [illegible] situations, borrowers [illegible] marital strife and then one spouse disappears. When a borrower bought a rental property and it went sour, he may decide to skip town. Sometimes when a borrower dies no one in the family bothers with probate or administration, and then beneficiaries or heirs cannot be located. Then too, in judicial foreclosure states, everyone with a subordinate interest in the property needs to be a party defendant—junior mortgage holders, judgment creditors and a host of others.

The older the interests of those parties, the more difficult those parties can be to find. In sum, the need to publish the summons in a mortgage foreclosure case arises too often.

Although judicial foreclosure is always prone to offering frustration, particularly in some states, one of the especially irksome aspects is publication of the summons. Why publication exists at all, what happens when a lender or servicer is forced into this odious pursuit and what it means is worth exploring.

Except in heavily litigated matters where motions or discovery or a trial are the reasons for delay, which in residential foreclosures are a minority anyway, a significant portion of many foreclosures is consumed at the initial stage: service of process.

Although the technicalities for service of process will vary throughout the states, New York is a good example. In the main, 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 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—the summons and complaint—can be left with a person of suitable age and discretion.

Time-consuming process

That too is fine except that for this type of service there must also be a mailing of the pleadings. Service is then not complete until 10 days after an affidavit of the delivery and the mailing is filed with the court.

There is yet more. When this method is used, the time to answer does not expire until *30* days after service was complete (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 the 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 found someone fitting the definition of suitable age and discretion.

The preliminaries are not yet over. What if nobody is ever home, which unfortunately can happen? Then the process server must attempt service at least three times and on the fourth occasion the papers can be affixed to the door and then posted by mail.

This approach likewise suffers from the detriment of 30 days plus 10 days (again using New York as an example). Worse, when there is a multiplicity of defendants, one [illegible] may be served on Monday [illegible] the seemingly interminable time periods, another might not be served until Friday, with others the week after [illegible]

Catch-22

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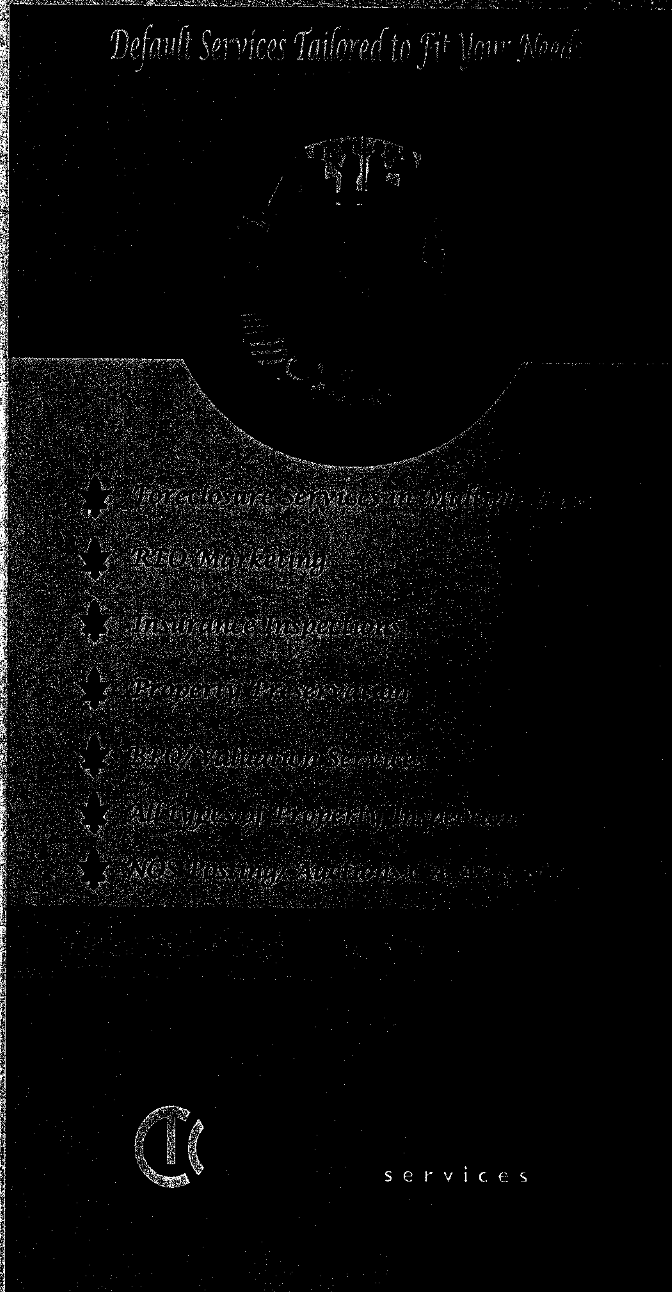
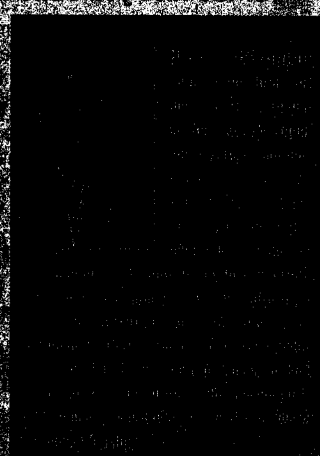




publish the summons, which leads to a proverbial catch-22.

Because service by publication is so unwelcome, 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, pursuing a forwarding address from the post office.

The ironic result is that if the mortgage holder must ultimately publish after all, still more time was consumed trying to avoid the delay publication imposes.

What then is so terrible about publication of the summons? Publication as constituted in New York and similar elsewhere is unwanted because:

■ It adds considerable time to the case.

■ Counsel must prepare an order for publication, an affirmation in support and present evidence of all the efforts made to find the defendant or defendants — for those against whom publication is sought.

■ That order must be submitted for signature, and even waiting for that could take many weeks or, in some counties, much longer. (And then some clerks reject the proposed order for reasons no one ever heard before. That of course occasions still further delay.)

■ Once the order is signed and received, publication ensues once a week for four successive weeks in two newspapers, thus creating yet more delay.

■ The publication order, proceeding on the theory that the party who couldn't be located might theoretically be dead, appoints a *guardian ad litem*. The guardian is entitled to a fee, and servicer's counsel must prepare a host of papers for that guardian — an answer, consent, affidavit, waiver — that entail still more effort and expense.

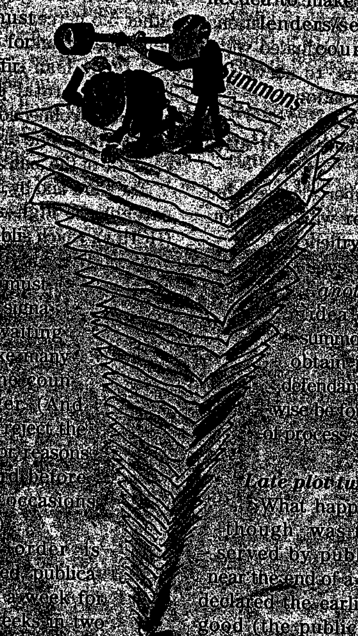
■ A part of this whole process is preparation of a supplemental summons, amended lis pendens and amended complaint (whew!), all because the caption of the case changes with all variety of unknown parties added. This is called the omnibus clause.

■ Still another aspect is the naming of the state in those jurisdictions with an estate tax, and sometimes the United States as well, as a new party to the foreclosure for any estate taxes that may be due against the missing party, which is not so surprising because that person might be dead.

■ 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 can be expensive.

■ If counsel did all this work, *some* additional fee is required.

■ 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 because deficiency liability requires personal service.



The mess is really somewhat more convoluted than 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.

Indeed, a case of recent vintage (Countrywide Funding Corp. vs. Hill) exposes yet *another* problem. The idea of publishing the summons, of course, is to obtain jurisdiction over a defendant who cannot otherwise be found for the purpose of process service.

Late plot twist

What happened in this case, though, was that a defendant served by publication surfaced near the end of a case and the court declared the earlier publication no good (the publication it ordered!) and the whole case went back to the beginning — time consuming, expensive and disconcerting.

The particular circumstances of the case were somewhat unusual, but they still serve to underscore how truly unfortunate the whole issue of having to publish a summons can be. But it also presents a salutary lesson to servicers about the care needed in reviewing a file and presenting the information to counsel.

As briefly as possible, here are the salient facts: Borrower applies for a mortgage and lists her address in Brooklyn, N.Y. On some separate loan application (why that existed was not clear), the prospective borrower indicated that she lived at the premises to be mortgaged in Queens County. Default ensued, foreclosure was instituted and the process server was unable to find the borrower at the mortgaged premises in Queens.

So the servicer applied for an order to publish the summons, setting forth the required due diligence explaining why this particular defendant could not be found. Recall one of the particulars involving publication of the summons is that the court appoints a *guardian ad litem* to protect the rights of the defendant who cannot be found. Here, the guardian asked for the servicer's file to see what information it might reveal.

Missing person

The guardian reviewed that, found the Brooklyn address and advised servicer's counsel that the person really could be found. The process server went to the address in Brooklyn but the borrower stated that she didn't own and had no interest in the Queens mortgaged premises. The process server believed this lie, and the action proceeded.

Undaunted, the guardian asked for further papers from the servicer and became persuaded that the borrower really did live in Brooklyn, by that time the foreclosure was nearing its end and a motion for judgment of foreclosure and sale was made. Convinced that the borrower had never been validly served, the guardian cross-moved to dismiss the case. The court agreed.

The concept relied upon by the court was that a prerequisite to service by publication is a certain level of due diligence. Because the servicer's own file should have revealed the actual address of the borrower, the court believed, the necessary due diligence was not achieved and, therefore, the court's own order of publication was ruled to be invalid. In turn, that meant there was no jurisdiction over the borrower and, therefore, the case against her was dismissed.

Even though the facts of this case were a little odd, this is not an unheard of situation. Sometimes defendants who can't be found suddenly come out of the woodwork, which places the validity of orders of publication in jeopardy. So after the extensive pain and suffering that publication causes a lender or servicer, even all that may turn out to be in vain.

The only constructive lesson that emerges from this new decision is that whatever help a lender or servicer can provide to counsel by way of revealing information concerning a borrower's whereabouts will be helpful for all concerned. Of course, even such help doesn't answer all the questions in this disconcerting arena of serving by publication. SM