REPRINTED FROM

SERVICING MANAGEMENT

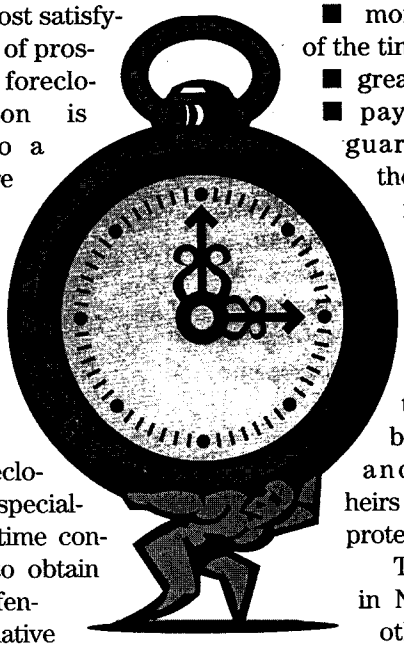
THE MAGAZINE FOR LOAN SERVICING ADMINISTRATORS ■ VOL. 8, NO. 6 FEBRUARY 1997

FORECLOSURE

Ticktock, Ticktock, Ticktock

Publishing The Summons Nibbles Away At Time Frames, Boosts Costs

BY BRUCE J. BERGMAN, © 1997



One of the most satisfying aspects of prosecuting the foreclosure action is moving it quickly to a conclusion. The more rapidly the action proceeds, the sooner the borrower is compelled to confront the situation. The accelerated pace, in turn, diminishes accrual of interest.

One aspect of foreclosure which remains especially disconcerting and time consuming is the need to obtain jurisdiction over a defendant by some alternative means. In other words, if a party or parties cannot be found (perhaps they are successfully hiding or have just quietly moved away) they cannot be served in the foreclosure in the more usual and familiar ways.

In New York, for example, this alternative means is accomplished through publication of the summons. This is a practice-intensive issue and varies among states, but in judicial foreclosure arenas it is probably safe to say that the need to publish clearly adds delay to the case, usually measured in a number of months. Then, too, there is the additional expense in the form of:

- more interest (because of the time element),
- greater legal fees, and
- payment of a fee to a guardian appointed by the court to protect the interests of unknowns.

(This guardian is appointed in certain states, such as New York, on the basis that the unlocated borrower may be dead and have unknown heirs whose rights must be protected).

The practice statute in New York, as it is in other states, specifies the different methods of effecting service, which thus confers jurisdiction, an obvious necessity in any litigation. The nuances here are virtually unending, testament to which are the literally thousands of case law decisions construing process service issues. Those obscurities need not be discussed here. Suffice it to say that when process service cannot be made by one of the prescribed methods, then publication becomes necessary.

What is worse, or maybe just as bad, is that in New York, service by publication is not personal service. In order to obtain a deficiency judgment, it must be founded upon personal service (unless it can be proven that the people really were hiding, not an easy burden). So not only does publication cost time and money, it effectively precludes the ability (in New York) to secure a deficiency judgment.

Why, then, must we sometimes arrive at this odious pursuit?

Again using New York as an example, publishing the summons is authorized only when the court says it can be done. In turn, that requires serious effort to serve in the usual ways, failing in which the court needs to be persuaded upon motion as to the sufficiency of those efforts. The resultant order of publication, which itself can take some time to issue, then allows preparation of a supplemental summons, an amended complaint and an amended lis pendens, all requiring more time and expense. Then there is the actual publication with sundry time constraints and not inconsiderable costs to publish.

There is much more detail, but you get the idea: This is something we all wish we could avoid.

Here is why, sometimes, publication is truly unavoidable: The process server goes to the mortgage premises and it appears to be empty. No lights are ever on, no one ever answers the door and the neighbors say, "Oh, yes, Mr. and Mrs. Jones moved out months ago."

Lenders, servicers and their counsel can and should be guardedly skeptical of claims that a prospective defendant is not at a place where all evidence indicates he should be.

Another scenario: Mrs. Jones reluctantly comes to the door and is served. Giving the complaint to Mrs. Jones in behalf of Mr. Jones (and then mailing it to Mr. Jones) would be good service if Mr. Jones actually lives in the house. But the spouse says Mr. Jones abandoned her six months ago, departing to places unknown. The neighbors confirm that they have not seen the husband for some time and think he moved out.

Here's the dilemma. If in either instance the mortgage holder chooses to reject the neighbors' confirmation of the missing defendants, electing to serve at the premises anyway, there may never be a problem. But, if the neighbors were correct that the defendants were gone and the defendants surface to challenge service later in the case, or even after the sale, they will typically be successful.

If a defendant can demonstrate that he or she did not reside at the place of service (or did not work at the place of business, if that is where service was made), then jurisdiction is likely to fail. That means the foreclosure must return to the beginning, with all the unpalatable consequences that suggests.

Lenders, servicers and their counsel can and should be guardedly skeptical of claims that a prospective defendant is not at a place where all evidence indicates he should be. But if there is genuine doubt, the paramount goal is to preserve the underlying integrity of the foreclosure with proper jurisdiction. Thus, distasteful though it is, sometimes publication is essential. SM

Bruce J. Bergman

Bruce J. Bergman, a partner with Certilman Balin Adler & Hyman in East Meadow, N.Y., is outside counsel to a number of major lenders and servicers and author of the two-volume treatise, ***Bergman on New York Mortgage Foreclosures, Mathew Bender & Co. Inc. (Rev. 1995).*** *He is a member of the National Foreclosure Professionals, the American College of Real Estate Lawyers, an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course, and on the faculty of the MBA's School of Mortgage Banking.*