

Tips On 'Process Service'

Servicers Must Decide Who Should Be Notified of The Action

BY BRUCE J. BERGMAN

To the understandable chagrin and wonderment of many servicers - and their counsel, as well - service of process in judicial foreclosure states tends often to consume undue time in the already protracted foreclosure process.

Because of the cautious requirements of many states' practice acts, the time it takes to serve the summons and complaint before the case is ready for a referee's appointment can easily be two months, and sometimes considerably more. And that presupposes that vari-

ous defendants are not especially difficult to locate.

Unfortunately, there really is not very much that servicers and their attorneys can do to solve this dilemma. In other words, vigilance and meticulous attention to detail can only help to a degree.

But one area of remedial action is the careful evaluation of who should be served.

Who gets notice?

As true servicers are aware of the

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concept of "necessary parties."

Anyone having an interest in the mortgaged property junior to the mortgage in foreclosure is such a necessary party and should generally be named and served in the action. The word "generally," though, suggests that exceptions exist - and they do.

The critical distinction to be understood is that between "necessary" and "indispensable."

Examples will underscore the practical ramifications of the difference. Although presented in the commercial arena to make a point, one conspicuous example is the case of a particularly desirable tenant.

A tenant is clearly a necessary party. But consider a typical shopping center with a major anchor tenant on a long-term lease containing generous rental overage provisions in the lease. The relevant query is, would the shopping center be more or less valuable devolving through the foreclosure sale with that anchor lease intact? Because in most instances the ready response would be "more valuable," it could well be prudent not to name that otherwise "necessary" anchor tenant as a defendant.

This is a business decision to be addressed on a case by case basis, but it should be understood that while the tenant in this scenario is necessary, it is not indispensable.

A case in point

The concept is especially apt when

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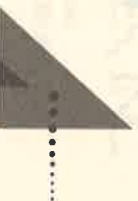
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faced with mortgaged property that has been sold, whether or not there has been an assumption of the mortgage.

Assume these facts:

■ In 1985, X borrows \$150,000 to purchase a house and a mortgage is executed.

■ In 1989, X sells the house to Y and the lender allows Y to assume the mortgage, although X is not released from liability on the debt.

■ In early 1993, there is a default on the mortgage and a mortgage foreclosure is begun.

As the owner of the property, Y is, of course, a necessary party and will be named as a defendant in the foreclosure. X, however, is no longer a necessary party, but is a permissible party, for the purpose of being held answerable for the debt.

Presume further that it is believed that after X sold the house he moved somewhere in Florida (or if you are in Florida, he moved to Oregon), but his precise whereabouts are unknown.

Should the servicer expend the time and cost necessary to find X and serve him?

Perhaps not; it depends upon the circumstances.

Here are the points to consider:

■ If the foreclosure will not yield a deficiency, X is not needed at all. There is nothing to pursue him for.

■ If a deficiency is expected, if Y has sufficient assets, X still is not needed as a practical matter.

■ Even if X is needed, if he does not have (or if you do not know about) assets readily reachable upon execution, the value of his liability for a deficiency may be illusory at best.

■ If the deficiency will not be very great in any event, the time incurred and the money expended in finding and servicing X - translated into the accrual of interest - may make pursuing him counterproductive.

Judgment creditors

There is still more on this subject.

This time let us look at judgment creditors.

Suppose your \$150,000 mortgage dates back to 1984. Shortly after the mortgage was recorded, Widget Associates in California (or if you are in California, assume Widget was in Maine) obtained a judgment against your borrower for \$200. The 1993 foreclosure search reveals Widget as a necessary party. The attempt to serve them at the address in California (or Maine) discloses that they departed four years ago with no forwarding address. A sage call to the local attorneys who obtained the judgment for them unearth's the response that Widget has not been heard from since 1985.

Is there any point in consuming time serving this defendant? Clearly not, and here is why:

■ Burdening this property at the foreclosure sale with a \$200 encumbrance - even with years of interest - does not make the parcel appreciably less valuable.

Anyone who will buy at the sale will not be dissuaded because of this small judgment.

■ A judgment attaches to real property for a finite period, in some states, for example, 10 years, unless renewed. Renewal is extremely unlikely here.

Therefore, this judgment in many jurisdictions will disappear anyway, perhaps even before the foreclosure ends.

None of this is to suggest that the problems of time-consuming process service will evaporate merely because a knowledgeable analysis is available. Servicers are not so often faced with choices like this. But it does happen, and in some cases servicers can avoid exacerbating the process service conundrum by making judicious decisions based upon their own insights.

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