WHEN THE COURT WON'T STRIKE "JOHN DOE" DEFENDANTS

By: Bruce J. Bergman*

Well this sounds like a hopelessly obscure topic. Arcane it may be, lacking in meaning it is not. And if the courts get it wrong, it is yet another dismaying time waster imposed upon the foreclosure process – precisely why the problem (it does exist) is highlighted here.

"John Does" (or "Jane Does" or any other way these can be styled) are fictitious defendants in foreclosure actions. They are assuredly required in the caption (why to be noted in a moment), later in the case to be removed if shown to be unnecessary. That courts have on occasion recently declined to strike "John Does" when it was needed, which then necessitated reversal on appeal, confirms that this seemingly recondite issue can be troublesome in foreclosure real life. [See *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 943 N.Y.S.2d 551 (2d Dept. 2012); *U.S. Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (2d Dept. 2012).]

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WHY JOHN DOES?

One essential goal of a foreclosure action is to have the mortgaged premises sold free and clear of all (or most) interests subsequent, later and subordinate to the mortgage. In that way, the equity cushion, the integrity of the investment, can be preserved.[1] To achieve this end, all those junior parties need to be named in the action – their names are to be in the caption – and they are served with process.

It is the foreclosure search obtained by plaintiff's counsel which reveals these inferior interests. However, events between the reading of the search and the filing of the *lis pendens* with the summons and complaint expose the mortgaged premises to further interests or encumbrances which will be unknown, at least for some weeks or months. And this is readily apparent if the mechanics of the process are examined.

If a foreclosure search is ordered on a Monday, it may be typed and emailed to counsel on Friday[2]. This perforce means that the record was read on that Wednesday or Thursday. If the pleadings are filed a week or two or three after the search was received, that time period, together with the days after the record was actually read offer a hiatus during which the property could in theory

– and in actuality – be sold, or mortgaged anew or subjected to judgments and liens.

Because these new interests will have been unknown to the drafter of the complaint, the group of prospective defendants will not have been named in the action. Nor will the *lis pendens* dispose of them because it will be filed subsequent to those interests being recorded.[3] One partial solution is to order a continuation search to cover the period from the reading of the record to the filing of the *lis pendens.* Nonetheless, even this follow up search will not often list tenants of the premises who the plaintiff may wish to serve with process.[4]

All this means that sometimes there are unknown defendants who will ultimately be discovered who need to be named and served and over whom jurisdiction is to be obtained. That goal is readily accomplished by a standard delineation in a foreclosure caption of various numbers of fictitious defendants designed to accommodate the possibility: hence “John Doe #1” through “John Doe # 12” (or however many possibilities may suit the nature of the case or the property).

The hitherto unknown defendants can then simply be served as “John Does”. Had there been no fictitious names available in the caption, the plaintiff would be relegated to the cumbersome and usually time consuming obligation to move to amend the caption of the action.

All this works because as to non-governmental defendants, a boilerplate allegation in the complaint that all defendants are subordinate to the mortgage is all the particularity needed. Governmental defendants, however, require a specific delineation in the complaint of the nature of the interest.[5] So, if defendants in this category are revealed, amendment of the complaint will in any event be required.

STRIKING THE "JOHN DOES"

In a New York foreclosure, the next stage after process service is complete is application for appointment of a referee to compute or, if an answer is interposed, a motion for summary judgment, which will also seek the referee's appointment. (This presupposes the common situation where neither discovery nor a trial is needed.)

Either of these approaches also then addresses "John Does". If unknown defendants *are* found (and served), their names are then sought to be substituted in the caption for the equivalent number of "John Does". All remaining "John Does", who have become unnecessary parties, and thus irrelevant, are asked upon the motion or order (referee's appointment or motion for summary judgment) to be stricken.

AND IF THE COURT DECLINES?

If the motion is granted, the aspect of striking the "John Does" should be granted in the normal course as an inherent incident of the procedure. Fictitious defendants are not to be retained in a case. Even if for some reason a court rejects the main thrust of the motion, so long as "John Does" are shown not to be necessary, at least that item of relief should be granted. Similarly, where new parties are to be added in the stead of various "John Does", that too should be awarded in the normal course.

It is impossible to reconcile a refusal to eliminate unnecessary defendants. But it has happened. Should it? The clear answer is "no", as the two recent Appellate Division rulings have firmly asserted.[6] The principle is as elemental as this. Where it is demonstrated upon the application for an order of reference (or upon a motion for summary judgment) that there are no "John Does", for example not as tenants, amendment of the caption to delete such defendants should be granted. Not incidentally, the concept is well recognized in the Federal Courts. There, the accepted principle has been expressed that "A plaintiff may amend its caption, with leave of court, to discontinue the action against unnecessary Doe defendants."[7]

While appropriately this is well understood by New York courts at the appellate level, trial courts have stumbled on the point and may yet do so in the future. (Unreported cases confirm these as not the only incidents.) The problem this imposes upon foreclosure is a need to either reargue the motion, appeal it, or devote special attention to it at a later stage. All these paths tend to add both further delay and expense to what is already a far too protracted pursuit in the Empire State.

1. There is a bit more to this and for an in depth exploration see 1 *Bergman on New York Mortgage Foreclosures* §2.02, LexisNexis Matthew Bender (rev. 2012).

2. The actual duration of receiving a foreclosure search can readily vary depending upon a number of circumstances. How long that may be is not as important as the actuality that some time is consumed.

3. One of the critical functions of a *lis pendens* is to bind subsequent encumbrancers to the action as if they had been named and served. See 1 *Bergman on New York Mortgage Foreclosures* §15.02, LexisNexis Matthew Bender (rev. 2012) for a detailed examination of this point.

4. Serving tenants – or not – is typically a choice for the plaintiff to make as opposed to a mandate. See 1 *Bergman on New York Mortgage Foreclosures* §12.03[1], LexisNexis Matthew Bender (rev. 2012).

5. See 1 *Bergman on New York Mortgage Foreclosures* §16.02[2][b], LexisNexis Matthew Bender (rev. 2012) for further review of this subject.

6. See *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 943 N.Y.S.2d 551 (2d Dept. 2012); *U.S. Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (2d Dept. 2012).]

7. *United Central Bank v. Shree Ganesh Properties, LLC*, 2012 WL 5992803 (S.D.N.Y.), citing, *Regency Sav. Bank, F.S.B. v. Merritt Park Lands Assocs.*, 139 F. Supp.2d 462, 465 (S.D.N.Y. 2001); *FGH Realty Credit Corp. v. RD Realty Corp*., 231 A.D.2d 489, 490, 647 N.Y.S.2d 229 (2d Dept. 1996).