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 this problem 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. [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).] 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. But the search will not often list tenants, nor, obviously, can it recite those whose interests arise after the record has been read but before the foreclosure pleadings (including the *lis pendens*) are filed with the court.

All this means that sometimes there are unknown defendants who need to be named and served. This is readily accomplished by a standard delineation in a foreclosure caption of various numbers of fictitious defendants: hence "John

Doe #1" through "John Doe # 12" (or however many possibilities may suit the nature of the case or the property).

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.

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.

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 appeal level rulings have firmly asserted. 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.

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 such paths tend to add both

further delay and expense to what is already a far too protracted pursuit in the Empire State.