Bergman on Mortgage Foreclosures

When the Borrower's Lack of Service Claim Is Waived

By Bruce J. Bergman

In assessing the state of mortgage foreclosure action in New York we are wont to observe on more than a few occasions that the most fertile arena for borrower protests is lack of service of process. (Without an empirical study we cannot say for sure that standing is not the most common defense nowadays, but at the very least, service of process is up there.)

It is always facile for a borrower (or other defendant) to allege lack of service and the nuances here are extraordinary. Indeed, New York's leading treatise on civil practice devotes no less than two full volumes to process service alone! This is assuredly, then, a place for mischief and mishap so that mortgage lenders and servicers must be especially meticulous in pursuing process service. To be sure, service can be defective—all the more reason for care in pursuing it—but borrowers and other defendants often seize upon this as a solid place to oppose just because it tends to be a ready forum for a quarrel.

Dangerous though this aspect assuredly is, the protesting borrower can nonetheless be hoisted on his own petard for want of his own (perhaps more accurately his lawyer's) attention to detail. Of two major principles applicable here (of course, there are others) one is addressed by a recent case and merits mention. [*Wilmington Savings Fund Society, FSB v. Zimmerman*, 157 A.D.3d 46, 69 N.Y.S.3d 654 (2d Dep't 2018)].

One place the borrower can be tripped up is neglecting to make a motion to dismiss for supposed lack of service. This is a matter of the practice statute in New York [CPLR 3211(e)] providing that if a pleading asserts lack of service, such as in an answer, that defense is waived *unless* the objecting party moves for judgment on that ground within 60 days after servicing the pleading. So the borrower who neglects to make such a motion, even having inserted the defense in the answer, loses the ability to pursue it.

In the new case, the defendant had appeared in the action via notice of appearance, only much later trying to argue that he wasn't served. In rejecting that defense, the court ruled that the borrower had waived the defense of lack of personal jurisdiction by appearing in the action but without asserting an objection to jurisdiction by way of motion or in an answer. That is the compelling principle.

Underscoring how overarching is this rule, in another case which had reached the settlement conference stage long after the 60 days had expired, a court *sua sponte* dismissed the action for what it found to be lack of jurisdiction. But this was reversed for the very reason that the homeowner-borrower had not moved within 60 days of serving his answer to dismiss the complaint on the ground of defective service. [*Wells Fargo Bank, N.A. v. Cajas*, 159 A.D.3d 977, 733 N.Y.S.3d 223 (2d Dep't 2018)].

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Process service will remain an area of concern for foreclosing lenders, but there are, as noted, ways that borrowers objecting to service can undermine their own claim.

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