

DEFECT IN SUMMONS VOIDS FORECLOSURE

The Appellate Court of Illinois, Second District, recently held that a foreclosure judgment was void, where the foreclosing first mortgagee did not properly name a second mortgagee in its summons.

A copy of the opinion is available at: [Link to Opinion](#).

In 1997, the defendant borrowers executed a mortgage and note against their rental property. The mortgage conveyed a lien interest in the property as security for the note to the first mortgagee. This first mortgage was recorded.

On Jan. 28, 2005, the defendant-borrowers executed a second mortgage and note against the property. The mortgagee was Mortgage Electronic Systems, Inc. (MERS). The second mortgage was recorded.

On June 9, 2006, the defendant-borrowers executed a third mortgage and note against the property. This mortgage conveyed a lien interest to the first mortgagee. The third mortgage was recorded.

In January 2009, the first mortgagee filed a foreclosure complaint and issued summons on the registered agent of a non-existent entity, but apparently intending to name the second mortgagee. The trial court entered a default judgment in favor of the first mortgagee in the foreclosure action.

Meanwhile, MERS assigned the second mortgage, and recorded the assignment.

On Nov. 5, 2009, the trial court entered a consent judgment in the foreclosure action as to the first mortgage. A few months later, the first mortgagee sold the property to a third party buyer

On June 9, 2014, the second mortgagee filed a new foreclosure complaint. The borrowers filed a motion to dismiss the second mortgagee's foreclosure action, alleging the complaint was barred by res judicata, based on the consent judgment entered in the first foreclosure action. The buyer of the property from the foreclosure sale of the first mortgage also filed a motion to dismiss based on res judicata.

The trial court granted both the borrowers' and the buyer's motions to dismiss based on res judicata. The second mortgagee appealed.

As you may recall, the doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. Three requirements must be satisfied for res judicata to apply: (1) a final judgment on the merits has been reached by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions.

The second mortgagee argued that the defendants failed to establish the first element of res judicata, contending the service of process in the first foreclosure action did not confer personal jurisdiction over the second mortgagee.

Also, to enter a valid judgment, a court must have personal jurisdiction over the parties. Personal jurisdiction can be established by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. Generally, in Illinois, a judgment rendered without service of process, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings.

The Appellate Court noted that effective service of process vests jurisdiction in the court over the person whose rights are to be affected by the litigation. Therefore, a failure to effect service as required by law deprives a court of jurisdiction over the person, and any default judgment based on defective service is void.

Section 2-201(a) of the Illinois Code of Civil Procedure provides for the issuance of summons in civil cases, stating: "Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint. The form and substance of the summons, and of all other process, and the issuance of alias process, and the service of copies of pleadings shall be according to rules." 735 ILCS 5/2-201(a).

Illinois Supreme Court Rule 101(a) provides for the form of the summons, stating: "The summons shall be issued under the seal of the court, tested in the name of the clerk, and signed with his name. It shall be dated on the date it is issued, shall be directed to each defendant, and shall bear the address and telephone number of the plaintiff or his attorney."

The second mortgagee argued that its name did not appear on the face of the summonses in the first foreclosure action.

The Appellate Court agreed, holding that the trial court lacked personal jurisdiction to enter judgment against the second mortgagee in the first foreclosure action. Therefore, the Appellate Court held, the defendants failed to establish the first requirement of res judicata – i.e., that a final judgment on the merits had been reached by a court of competent jurisdiction. In light of this, the Appellate Court held that the trial court erred by granting the defendants’ motions to dismiss the second mortgagee’s foreclosure action.

The foreclosure buyer argued that the trial court properly determined that the second mortgagee was estopped from disputing issues related to its identity because the second mortgagee was an undisclosed principal.

However, the Appellate Court disagreed, holding that the foreclosure buyer failed to establish that the plaintiff in the first foreclosure action could not have served the second mortgagee. For example, the Appellate Court noted that the public record indicated that MERS could have been served on behalf of the second mortgagee.

The foreclosure buyer also argued that the misnomer doctrine applied. However, the Appellate Court found that misnomer and mistaken identity are different.

The Appellate Court noted that misnomer occurs when a plaintiff files an action against the correct party under an incorrect name. Mistaken identity occurs when the plaintiff names the wrong party. The effect of misnomer is that the court acquires personal jurisdiction over the party who is called by an incorrect name but receives notice of the lawsuit. The effect of mistaken identity is that the court does not acquire personal jurisdiction over the party wrongly named but served.

Here, the Appellate Court found, nothing in the record indicates that the defendant named in the first foreclosure action exists, and thus the judgment entered in the first foreclosure action was void.

Lastly, the foreclosure buyer argued that he was a bona fide purchaser. The Appellate Court confirmed that a bona fide purchaser of an interest in property takes that interest free and clear from all claims except those of which he has notice. However, a purchaser cannot be a bona fide purchaser if he has actual or constructive notice of the outstanding rights of other parties to the property.

The Court also confirmed that actual notice is knowledge that the purchaser had at the time of the conveyance, and constructive notice is knowledge that the law imputes to the purchaser. There are two types of constructive notice: record notice

and inquiry notice. Record notice is what is shown in the records of the office of the recorder of deeds, whereas inquiry notice is that which appears in the records of the courts in the county where the property is located.

In this case, the Appellate Court found that the MERS mortgage and its assignment had been recorded when the foreclosure buyer purchased the property. The Appellate Court also noted that the court records indicated that the first mortgagee failed to name MERS in the first foreclosure action. Thus, whether the foreclosure buyer was a bona fide purchaser was a disputed question of fact and not a basis for dismissal of the current foreclosure action as to the second mortgage.

Accordingly, the Appellate Court reversed the trial court's order dismissing the plaintiff's complaint as barred by res judicata.