

FORECLOSURE DEADLINE TO CHALLENGE SERVICE TOLLED WHILE ACTION DISMISSED

Reversing the rulings of both the appellate and the trial courts, the Supreme Court of the State of Illinois recently held that the deadline to file a motion to quash service under the Illinois Mortgage Foreclosure Law (IMFL) did not run while the foreclosure action was dismissed for want of prosecution.

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

The plaintiff mortgagee filed a residential mortgage foreclosure complaint against, among others, the borrower and a limited liability company. The mortgagee filed an affidavit of service by publication indicating that, after a due diligence search, it was unable to locate or serve the company. Thereafter, the company was served by publication.

After the company failed to appear, the trial court entered an order of default and judgment of foreclosure. In February 2013, the subject property was sold at a sheriff's sale, and the mortgagee filed a motion to approve the sale in April 2013.

The motion was noticed up for April 18, 2013, on which date the company's attorney showed up for the first time and filed an appearance. However, because counsel for the mortgagee failed to appear, the trial court on its own motion dismissed the case for want of prosecution ("DWP").

The mortgagee subsequently filed a motion to reinstate the case, which was granted on May 30, 2013.

On July 18, 2013, the company filed a motion to quash service of process, arguing that it was a foreign LLC registered in New Mexico and that it did not have a registered agent in Illinois. The company argued that this meant that service by publication was improper.

The trial court denied the company's motion, finding that it was untimely under the 735 ILCS 5/15-1505.6(a) because it was filed more than 60 days after it filed its appearance in the case, and because even if it was timely, service by publication was proper.

The company appealed, and a divided appellate court determined that the motion to quash was untimely, and therefore affirmed the ruling of the trial

court. Because it affirmed the trial court's finding that the company's motion was untimely, the appellate court did not reach the issue of whether service by publication was proper.

The matter was then appealed to the Illinois Supreme Court, which first addressed the issue of timeliness of the motion to quash.

In addressing the issue, the Court first looked to the language of the IMFL. As you may recall, the IMFL provides as follows in relevant part: "In any residential foreclosure action, the deadline for filing a motion to *** quash service of process *** unless extended by the court for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance." 735 ILCS 5/15-1505.6(a).

It was undisputed that the company filed its motion to quash service on July 18, 2013, which was approximately 90 days after it filed its appearance. However, the question before the Illinois Supreme Court was "whether the 60-day statutory clock continued to run while" the mortgagee's action was dismissed for want of prosecution.

The company argued that it did not, because as long as the case was DWP, there was neither reason nor opportunity for it to file a motion to quash service. The mortgagee disagreed, arguing that based on the clear and unambiguous language of section 15-1505.6(a), unless extended by the court for good cause, the deadline for filing a motion to quash service in a residential foreclosure action is 60 days after the moving party files its appearance. The mortgagee argued that because the trial court did not extend the 60-day deadline, the company's motion to quash was untimely.

In siding with the company, the Illinois Supreme Court determined that "the plain language of section 15-1505.6(a) supports the conclusion that the 60-day clock is tolled while the underlying case is DWP." The Court noted that "[t]he key phrase here is '[i]n any residential foreclosure action,' because that phrase expressly defines the setting in which the passage of time will be measured."

Further, "60 days cannot pass in a residential foreclosure action if no such action is pending. Nor can a party comply with the statutory filing deadline in the absence of an active case, even if it wanted to."

“Accordingly, we hold that the time that elapses between the DWP of a residential mortgage foreclosure action and its subsequent reinstatement is not to be counted in determining whether a motion to quash service is timely under section 15-1505.6(a).”

The Court noted that an additional reason for its ruling was that the “courts will presume that the legislature did not intend absurd, inconvenient, or unjust results.” The Court stated that the mortgagee’s “reading of section 15-1505.6(a) yields results that are at once absurd, inconvenient, and unjust.”

Having determined the proper way to apply section 1505.6(a), the Court next addressed whether the company’s motion to quash was timely. The company filed its appearance on April 18, 2013, the same day the court dismissed the case for want of prosecution, which meant that “once the DWP was vacated and the [mortgagee’s] case reinstated, [the company] had 60 days to file its motion to quash service.”

The case was reinstated on May 30, 2013, and the company filed its motion to quash 49 days later on July 18, 2013. Thus, the Illinois Supreme Court held that the company’s “motion to quash service was timely.”

As the appellate court did not reach the question of whether service by publication was proper, the matter was remanded to the appellate court for consideration of that issue.