

## **JURISDICTION AS THE FOUNDATION OF THE FORECLOSURE ACTION**

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September, 2001<sup>©</sup>

Jurisdiction is the power of the court to act in a matter against a person(s) and/or thing. Any order entered by a court that does not have jurisdiction is void. This concept forms the foundation of all legal actions and specifically, the actions of the foreclosure attorney, and it is important that the court have proper jurisdiction in order to transfer title from the debtor to the creditor, and ultimately to a third party.

Our discussion will center on obtaining jurisdiction over those parties who must be named as defendants and given notice of the foreclosure action. The legislature has set down what is necessary to obtain jurisdiction. These statutes are found at 735 ILCS 5/2-203 through 2-205-1.

Jurisdiction can be obtained by serving a defendant with a summons and complaint. A summons can be served either personally upon an individual defendant or upon someone who is the age of 13 years or upwards who normally resides at that premises. A summons can be served on a corporation by servicing its registered agent or any officer of the corporation.

If these requirements are met pursuant to the terms of the statute, the court then has jurisdiction over that particular party. At first blush, this seems to be quite an easy threshold to meet. Unfortunately, clients are not totally aware of the whereabouts of their borrowers, including knowledge as to any whereabouts of junior lienholders. It is therefore very important to review the note and mortgage to ascertain where the borrowers might have been living at the time of the execution of the documents. Occasionally we will find an address different from that of the property which would allow us to investigate further.

Once a foreclosure summons is issued, it is only good for thirty days and must be served on a defendant within that thirty day period. Once the summons is served, the defendant then has a thirty day period to file an Appearance and/or an Answer with the Clerk of the Court. We cannot move forward with the foreclosure action until this time period has expired. If we do not have a good address the first time we issue summons, this will create not only delays in obtaining jurisdiction over all defendants, but will lengthen the redemption period and cause an additional delay in moving a file to a foreclosure sale. The redemption period is tied into the date of service 735 ILCS 5/15-

1603(b)(1). The redemption period expires seven months from the date of service, or three months from the date that a Judgment of Foreclosure is entered, whichever is later.

Since we know that service is the foundation of the foreclosure action, it is important to use all resources to serve the debtor, including any internet skip tracing tools. Two web sites that our firm uses for skip tracing (and which charge a fee) are [www.atxp.dbt-online.com](http://www.atxp.dbt-online.com) and [www.wp.superpages.com](http://www.wp.superpages.com). We also use the white pages of the telephone book and reverse phone directory searches which can be found at [www.reversephonedirectory.com](http://www.reversephonedirectory.com).

Why do we engage in this skip tracing exercise? Our office wishes to assure that we have undertaken a well directed effort to locate the debtor. We do not want any judgment sale overturned because we failed to uncover a defendant. If we have made a well directed effort to locate the debtor, yet have been unable to serve the debtor in any of the above mentioned manners, we can then serve a defendant by publication.

The Illinois legislature has stated that publication is available under 735 ILCS 5/2-206. The legislature stated that whenever there is an action affecting property, the attorney shall file an affidavit showing that the defendant has resided, gone out of the state or on due inquiry cannot be found or is concealed within the state so process cannot be served upon them (emphasis added). Note that exercising this option of service (publication) removes the ability to collect a deficiency judgment against the individual as you are proceeding solely against the real estate.

There are a significant number of cases dealing with what is necessary as a prelude to publication service. One of those cases, Household Finance v. Volpert, 227Ill.App.3d 453 (1st Dist. 1992) dealt specifically with the issue of due inquiry in attempting to personally serve the defendant prior to serving the defendant by publication. The court clearly indicated that the plaintiff must produce evidence establishing that a due inquiry had been met prior to asking for the publication notice to issue. The court held that over a four month period, the plaintiff had made repeated attempts to serve the defendant at the defendant's address and that the process server had returned the summons as not found. Household Finance attempted to locate the employment of the defendant and was unable to do so. The court held that the plaintiff did make a diligent inquiry to ascertain the defendant's place of residence as required by the statute and held the publication to be valid.

In addition to the aforesaid statutory rule, there is a local court rule in the Circuit Court of Cook County which is known as Circuit Court Rule 7.3. This rule states as follows:

Pursuant to 735 ILCS 5/2-206(a), due inquiry should be made to find the defendants prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such “due inquiry” setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication.

This author thinks that Rule 7.3 is unnecessary in light of the publication statute 2-206(a), however it is a local Rule and requires the attorney to demonstrate to the court what actions were taken to locate the defendant. This affidavit is required in order to enter a judgment where there has been publication service. It is not sufficient for any attorney to sign an Affidavit stating he has made a due and diligent inquiry, that the specific actions to locate the defendants must be enumerated in order to move forward with the case where service has been by publication.

The above discussion is not limited to just the debtors who are liable under the terms of the Note or the Mortgagors who signed the mortgage documents. If there are junior lienholders or other claimants, it is necessary to use the same due diligence to ascertain their whereabouts and to issue summons and have them served. Attorneys need to get copies of the documents from the title company to ascertain what addresses might appear thereon. A quick check with the Secretary of State’s Office at [www.sos.state.il.us](http://www.sos.state.il.us) or at 312-793-3380 is also helpful.

Sometimes, there are other lienholders that need to be named that are located out of the State of Illinois. Another resource tool which we use to locate these lienholders is the Lane Guide which can be accessed at [www.laneguide.net](http://www.laneguide.net).

It is of utmost importance that the foreclosure action be immune from collateral attack and that jurisdiction be proper. It takes hard work and clients have to be aware of the ramifications that result from a lack of jurisdiction. The jurisdictional issues should be reviewed at the initial filing of the complaint and once again, just prior to the entry of judgment to insure the integrity of the proceeding.