MORTGAGE FORECLOSURE CASELAW UPDATE-2013

lsba solo & small firm conference
october 4, 2013
3:50pm – 5:00pm
lakeshore ballroom
Westin Northwest
Itasca, Illinois

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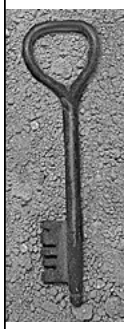
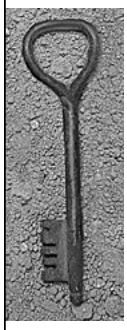


APPEALS

1. APPELLATE JURISDICTION IN FORECLOSURES; FINAL ORDERS, WHAT, AND WHEN TO APPEAL:

- **EMC Mortgage Corporation v. Barbara J. Kemp, (December 28, 2012), 2012 IL 113419**



DUE INQUIRY NOTICE

2. LIS PENDENS, MORTGAGE LIEN PRIORITY AND INQUIRY NOTICE:

- **The Bank of New York v. Vincent Langman, 2013 IL App (2d) 120609.**

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3. WAIVER OF DEFENSE AND JURISDICTION IN FORBEARANCE AGREEMENTS:

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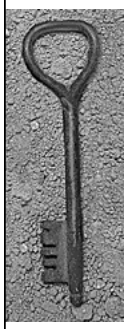
4. LOAN MODIFICATIONS; REFUSAL AS A CAUSE OF ACTION:

- **Wigod v. Wells Fargo Bank, N.A., (7th Cir. March 7, 2012), No. 11-1423), 673 F.3d 547**
- **Avevdo v. Citimortgage, Inc., (July 25, 2012, U.S. Dist. Ct., N.D. Il.), Case No. 11 C 4877,**



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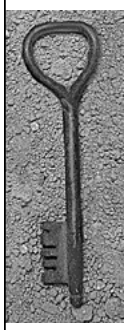

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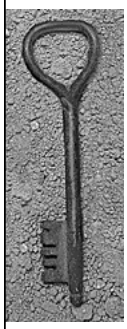

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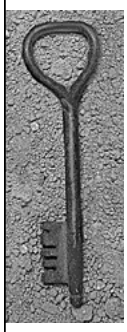

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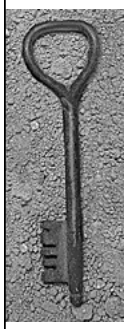

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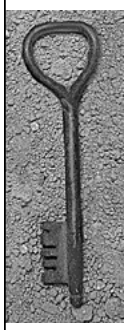

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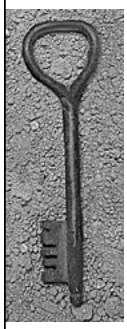

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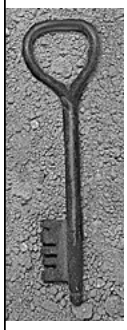

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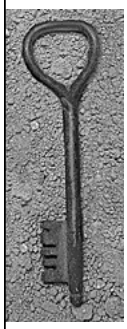

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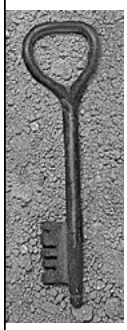

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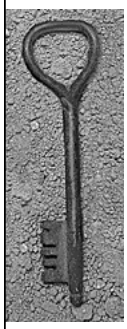

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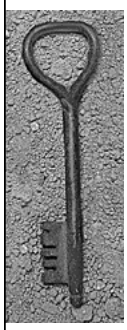

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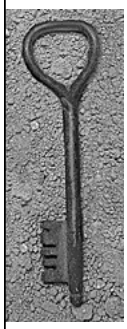

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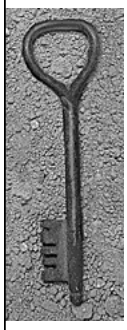

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ILLINOIS STATE BAR ASSOCIATION
SOLO and SMALL FIRM CONFERENCE

Westin Northwest Hotel & Conference Center, Itasca, Illinois
October 4, 2013 - 3:50pm - 5:00pm
Lakeshore Ballroom

MORTGAGE FORECLOSURE CASE LAW UPDATE - 2013

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APPEALS

1. APPELLATE JURISDICTION IN FORECLOSURES; FINAL ORDERS, WHAT, AND WHEN TO APPEAL

The issue of when one can and when to appeal in foreclosure cases confuses many lawyers - understandably so. The Illinois Supreme Court tackled the issue in EMC Mortgage Corporation v. Barbara J. Kemp, (December 28, 2012), 2012 IL 113419. EMC filed a foreclosure complaint in July 2006 based on a 2005 mortgage and default. Over the next two years, Kemp filed a series of counterclaims, all of which the trial court dismissed, granted Summary Judgment in April, 2009, and entered a Judgment of Foreclosure shortly thereafter on June 2, 2009. Kemp filed a motion to reconsider, and then stayed the sale by filing a bankruptcy. The bankruptcy stay was modified, and when thereafter the sale was scheduled again for October 5, 2010, Kemp filed an emergency motion to vacate the judgment entered a year and a half earlier in April, 2009, pursuant to 735 ILCS 5/2-1401. At a hearing on the date of sale, the trial court denied the motion to vacate the judgment, included Supreme Court Rule 304 language in the Order, but stayed the sale for 45 days as requested by Kemp and not objected to by EMC. Then

Kemp filed a second motion to reconsider, which was also denied on November 16, 2010, with the trial court again allowing Rule 304 language to be included in the Order, Kemp then filed a notice of appeal of the October 5, 2010 denial of her motion to vacate the judgment and the November 16, 2010 denial of her motion to reconsider.

Although both Orders contained Rule 304 language, the Supreme Court's majority decision dismissed the appeal for lack of appellate jurisdiction. Jurisdiction to appeal is provided for all *final judgments* by virtue of the provision in the Illinois Constitution, Artl. VI, Section 6, providing that appeals "from final judgments of a Circuit Court are a matter of right". Additionally, appeals based on Illinois Supreme Court rules are also provided for the by Constitution provision stating that the court can "provide by rule for appeals...for other than final judgments" in the same Article. It is firmly established by case law, however, that a judgment in a mortgage foreclosure case is not final, and therefore not appealable, until the trial court enters an order confirming the foreclosure sale that follows the judgment. (See In re Marriage of Verdung, (1989), 126 Ill.2d 542, 555-56, Deutsch Bank National Trust Co. v. Snick , (2011 3rd Dist.), 2011 IL App (3d) 100436.) Accordingly, until the report of sale and distribution are confirmed; the judgment is not final and can not be appealed. There is an exception that allows appeal if the judgment itself contains Supreme Court Rule 304 language specifically finding that there is no just cause for delay of enforcement or appeal, (JP Morgan Chase Bank v. Fankhauser (2nd Dist, 2008), 383 Ill. App. 3d 254, 260). That, according to the majority decision, did not occur here. The Orders of October 5 and November 6, 2010 did contain Rule 304 language, but the judgment which was the focus of those two orders, and which Kemp was appealing, did not *itself* contain a Rule 304 finding, making both Kemp's 2-1401 motion to vacate and the appeal "premature". Noting that Kemp's initial motion was incorrectly brought pursuant to 735 ILCS 5/2-1401, against a judgment was not yet final, the appeal of that judgment, regardless of the Rule 304 language in the reconsideration Order, was not appealable. (See Fankhauser above for a very similar fact pattern of using the wrong section to attempt to vacate a judgment of foreclosure.) This fact was seized upon by the Court in finding that "Rule 304(b) is, of course inapplicable here, because Kemp's motion to vacate was premature under Section 2-1401. The fact that the trial court's orders on October 5 and November 16 contained Rule 304 language was not sufficient to save Kemp's effort; "the inclusion of the special finding in the trial court's order cannot confer appellate court jurisdiction if the order is in fact not final."

Justice Karmeier dissented from the majority decision. In his dissenting opinion, the Justice sets forth his understanding of the facts from the record at length, noting that the "series of counterclaims" by Kemp which were dismissed by the trial court raised significant issues surrounding EMC's standing to bring this suit as the holder of the note and mortgage at the time of the filing of the complaint. Although agreeing with the majority on the law that a judgment of foreclosure is not a final and appealable order, Justice Karmeier states "Contrary to the majority, however, I believe that the rules of our court do permit review under the circumstances present in this cause." Noting that a foreclosure judgment may nonetheless be appealed if it contains Rule 304 language, the Justice states "In this case, the circuit court made such a finding not once, but twice", and attributes the majority reasoning to its determination that the trial court's inclusion of

Rule 304 language was "ineffective because that motion invoked sections 2-619 and 2-1401". The result, the dissenter notes, is that it was by virtue of the "particular procedural mechanisms Kemp invoked to challenge the judgment of foreclosure rather than the substance of the relief she was requesting" that there was no appellate jurisdiction. Arguing that in other, similar cases the Court has ruled that it is the "character of the pleadings" not it "label" that should be considered, Justice Karmeier here notes that an interlocutory order can be reviewed, modified or vacated at any time before the final order in the trial court, and "Kemp had the right to ask the circuit court to revisit the judgment and set it aside...That is precisely what she sought to do when she filed her motion to vacate and dismiss. Whatever procedural problems may attend that motion...the objective of the motion was clear and unambiguous to all concerned: to have the court reconsider and reject its prior ruling on the foreclosure judgment. Citing cases in which appellate courts, and the Supreme Court itself, held that a Rule 304 finding with respect to a motion to reconsider was treated as having been sufficient as though it was included in the original order, the dissent believes that the Court erred when it held that it lacked jurisdiction to consider the merits of the case, and that "the majority fails...elevating form over substance and to no good purpose." The majority, Karmeier argues is simply delaying the inevitable because "As soon as the mandate issues in this case and the matter returns to the circuit court, Kemp will be free to file another motion to reconsider the judgment...[eventually] Kemp will be free to proceed immediately back to the appellate court. The case will thus be in precisely the same posture it would be in if we simply acknowledged Kemp's motion to vacate and dismiss and her motion to reconsider that denial for what they were intended to be: a request for the circuit court to reconsider and set aside the underlying foreclosure judgment. The only difference will be that additional time will have passed..."

DUE INQUIRY NOTICE

2. **LIS PENDENS, MORTGAGE LIEN PRIORITY AND INQUIRY NOTICE:**

In The Bank of New York v. Vincent Langman, 2013 IL App (2d) 120609, the issue of mortgage priority in a litigation context was presented in a fact pattern not unfamiliar in today's rapid servicing transfer environment.

There were two separate foreclosure cases filed during the same period of time against the same property, each alleging to be foreclosing first liens in favor of two different mortgagees. In the underlying action, Bank of New York sought to foreclose a mortgage made in 1999 by Langman to GN Mortgage Corp. On August 16, 2000, a forged release of the GN Mortgage was recorded; although Langman continued to make payments on the loan. On December 4, 2001, Langman obtained a new mortgage through Matrix Financial Services which was the subject of a foreclosure by Deutsch Bank, as its successor, filed on December 9, 2002. Deutsch Bank did not name GN or Bank of New York in its foreclosure because of the forged release, a judgment of foreclosure and sale was entered, and a sale occurred resulting in the property being sold to a third party bidder, Abdul Hamidani. During this time, Langman continued to pay on the GN

Mortgage. When he eventually defaulted, Bank of America filed its foreclosure on July 10, 2006. Incident to the filing, it also recorded a Lis Pendens notice. In the interim, the third party bidder, Hamidani, obtained a mortgage on the title he obtained in the Deutsch Bank foreclosure, and defaulted on that loan, resulting in a JPMorgan foreclosure against Hamidani being filed on March 10, 2008, while the Bank of New York foreclosure was pending and its Lis Pendens of record. JPMorgan did not name GN or Bank of New York as a defendant in that foreclosure, again, relying on the forged release of their interest. When JPMorgan learned of the foreclosure by Bank of America, it intervened in the underlying case, asserting that its mortgage had a priority and could not be foreclosed by Bank of America. The trial court found the Bank of America lien unaffected by the forged release, and that its mortgage was a priority. JPMorgan appealed claiming that it relied on the forged release and therefore should be the priority position mortgage. The Second District affirmed the trial court.

First, Bank of New York's Lis Pendens relating to the foreclosure case filed on July 10, 2006, put JPMorgan Chase on constructive notice of an interest Bank of America claimed in the real estate when the JPMorgan Chase mortgage attached to the property thereafter, regardless of the forged release in 2000. JPMorgan could not rely on the forged release when the lis pendens of Bank of New York indicated it had an interest in the property it was seeking to foreclose' "If BONY had recorded nothing, subsequent purchasers would have had no reason to inquire about its unknown lien. By recording its Lis Pendens relating to foreclosure, BONY took the necessary steps to place subsequent purchasers on notice." The Lis Pendens put JP Morgan on due inquiry notice, and it could not simply rely upon the forged release.

LOSS MITIGATION ISSUES

3. WAIVER OF DEFENSE AND JURISDICTION IN FORBEARANCE AGREEMENTS:

As the mortgage industry continues to attempt to resolve the "foreclosure crisis", and turns to loss mitigation tools to do so, the potential for the circumstance that gave rise to the issues in Eastern Savings Bank v. Flores, (1st Dist., August 24, 2012), 2012 IL App (1st) 112979, become more pronounced. In July, 2009, Eastern Savings Bank filed a foreclosure in Cook County against Susan and Edward Flores's home. Service of process was purportedly upon "John Flores, Brother, a member of household." Thereafter a default judgment was entered when Flores failed to appear or answer in November, 2009. In December, 2009, Susan allegedly sent a facsimile letter to the clerk of the court referencing "Notice of Default Judgment", stating she was seeking a loan modification from the Plaintiff and enclosing her medical records. (The opinion suggests that Susan did not actually send this communication, but that it was sent by "Carolyn Allen, who was purportedly helping her with the loan modification...Allen could not be found to confirm..."). In February, 2010, Susan Flores and Eastern Savings entered in to a forbearance agreement whereby Susan paid an initial payment of $10,000 to be followed by six monthly payments of $1,620, to culminate in a loan modification. Edward Flores was inexplicably not a party to this forbearance

agreement. The agreement included a waiver of "all defenses, set-offs or counter claims to any foreclosure proceeding", acknowledged "that the borrower was properly served in the foreclosure action", and that she "consents to the entry of foreclosure judgment and any foreclosure sale that may be conducted by lender in the event that Borrower defaults under the terms herein."

Of course, Flores defaulted under the agreement, Easter Savings directed its attorneys to proceed with foreclosure and a sale was held in August, 2010. At the confirmation of sale in October, Susan and Edward Flores were granted leave to file a special appearance and motion to quash the member of household service of process. The trial court granted the motion as to Edward, but denied the motion as to Susan based on the waiver of service in her forbearance agreement. The appeal followed the denial of Susan's motion to quash.

Susan's argument on appeal was fourfold: (1) Jurisdictional service or process can not be waived by private contract, (2) the waiver of all defenses in the forbearance agreement violated public policy, (3) a waiver, if permissible, should not apply in cases where consumers waive defenses against "a sophisticated commercial entity", and (4) the waiver here was retroactive rather than prospective, and could not serve to validate the invalid service that occurred in the case prior to the forbearance agreement waiving that jurisdictional issue. The Court dispatched each of these positions and affirmed the trial court.

While Section 2-213 of the Code of Civil Procedure provides for the statutory method of obtaining jurisdiction, it does not prohibit, and Illinois courts have upheld, acknowledgment of service of process in a private contract. "It is well-settled that a party may not only agree to submit to the jurisdiction of a particular court that would not otherwise have authority over him, *but also to the manner and method of service* exercised upon him." Although Susan propounded State Bank of Lake Zurich v. Thill, (a seminal case on jurisdiction in foreclosures), in support of her position, the First District opinion here interprets Thill as not holding that a person could not waive objections to personal jurisdiction or service of process, but that "Indeed it strongly implied that such waivers are valid."

Turning to Susan's second contention, the Court relies on a case reported in last year's update, (RBS Citizens National v. RTG-Oak Lawn, noted for its resolution of the 360/365 interest calculation issue), for the law that "Illinois permits a party to contractually waive all defenses. ...and since there was a strong public policy in Illinois that favors the enforcement of contracts, the trial judge correctly found that the claims have been waived."

The public policy favoring enforcement of contracts was also the basis for rejection Susan's third theory on appeal that a consumer's waiver in favor of a sophisticated commercial entity should not be permitted. Here, the forbearance by the lender constituted valuable consideration for the waiver of the manner and method of service as well as defenses and claims, and to hold these types of waivers in such an agreement would "diminish the inventive for lenders to enter into forbearance agreements"; which the Court clearly believes is in the best interest of Illinois public policy.

Finally the "retroactive" verses "prospective" waiver of the service of process argument was rejected. While Section 2-301 of the Code of Civil Procedure had been

interpreted by the Supreme Court, In re Marriage of Verdung, (1989), 126 Ill.2d 542, 547, as only permitting prospective waivers or consents to jurisdiction, that section was amended in 2000, and then reviewed in GMB Financial Group, Inc. v. Marzano, (2008), 385 Ill.App.3d 978, finding that there are no "temporal restrictions on the waiver; it works prospectively and retroactively." under the amendment.
Accordingly, the acknowledgment of jurisdiction, even though retroactive and occurring after the default judgment, was valid. The waiver of "all defenses, set-offs or counter claims to any foreclosure proceeding", was also valid, and the provisions in the forbearance agreement acknowledging jurisdiction and consenting to the judgment and sale were upheld as in accord with, rather than contrary to, public policy. Borrowers will certainly be seeing these provisions in forbearance and loan modification agreements as a result.

4. **LOAN MODIFICATIONS; REFUSAL AS A CAUSE OF ACTION:**

In the case of Wigod v. Wells Fargo Bank, N.A., (7th Cir. March 7, 2012), No. 11-1423), 673 F.3d 547, Lori Wigod filed a complaint in Federal District Court under Illinois law against her mortgage servicer for refusing to modify her residential loan pursuant to HAMP (Home Affordable Home Mortgage Program). After a four month "trial loan modification", Wells Fargo refused to grant a permanent modification, and Wigod sued, essentially under contract law, (with come consumer fraud and deceptive practices counts thrown in for good measure), alleging a breach in the failure to modify her loan after she had qualified and performed. The Northern District Court dismissed the case on Wells Fargo's motion asserting that HAMP does not confer a private cause of action. The Federal District Court, however, reversed the dismissal of certain counts finding that her allegations "support garden-variety claims for breach of contract or promissory estoppel", which were not preempted by the federal law, and therefore Ms. Wigod could state a cause of action and proceed on breach of contract. It was noteworthy that here, Wells Fargo's "trial loan modification" was written in language clear and precise enough to support a holding that it created a contract, rather than an "offer to consider after performance". The trial court's dismissal of Ms. Wigod's other counts for promissory estoppel, fraud, and under the Illinois Consumer Fraud Act was also reversed, but the dismissal of the counts for negligent misrepresentation, negligent and fraudulent concealment, and negligent hiring and supervision was affirmed.
Although lauded by many defense attorneys, it is noteworthy that the reversal remanded the case for trial on specific counts, and there is certainly much more to come.

For recently developing law in this area see also Avevdo v. Citimortgage, Inc., (July 25, 2012, U.S. Dist. Ct., N.D. Il.), Case No. 11 C 4877, where the mortgagor's complaint that Citimortgage breached a HAMP Trial Period Plan agreement and failed to provide a loan modification was dismissed HAMP does not provide a borrower with a private right of action against a lender and the Temporary Trial Payment plan here was not actually signed by Citimortgage, and therefore did not create a binding and enforceable contract to modify. Moreover, in Charles Thul v. Onewest Bank FSB. (January 18, 2013, U.S. Dist. Ct., N.D. Il.), Case No. 12 C 6380, counsel for the defendant bank were ordered to show cause why they should not be sanctioned for failing to bring the decision in Wigod to the

Court's attention in their brief supporting the motion to dismiss Thul's Complaint. And, in Vangsness v. Deutsch Bank National Trust Co., (June 17, 2013, U.S. Dist. Ct., N.D. Il.) Case No. 12 C 50003, Judge Reinhard's trial court opinion discussed the practice of "dual tracking", (i.e., proceeding with foreclosure while negotiating a loan modification simultaneously), in the context of a motion to dismiss the borrower's complaint alleging consumer fraud and deceptive practices violations. See McGann v. PNC Bank National Association, (March 29, 2013, U.S. Dist. Ct., N.D. Il.) Case No. 2011 CV 06894, and Baginski v. JP Morgan Chase Bank N.A. , (November 29, 2012, U.S. Dist. Ct., N.D. Il.) Case No. 2011 CV 6999.

JURISDICTION

5. **SUBSTITUTED SERVICE "MEMBER OF HOUSEHOLD" CLARIFIED:**

In Central Mortgage Company v. Levan Kamarauli, (November 5, 2012), 2012 IL App (1st) 112353, the mortgagor defendant filed an appeal of the trial court's denial of a motion to quash summons. The Defendants argued that the private process service in this case was ineffective to confer jurisdiction for two reasons: (1) the summons was served upon the Defendant's mother-in-law who did not reside in the premises, but lived elsewhere, and (2) it did not appear that two separate mailings of the summons was accomplished by the process server from his return.

The recitation facts set forth by the Appellate Court included the filing of supplemental affidavits by the process server that the mother-in-law signed the process servicer's field notes indicating that she received the summons and complaint, and confirmed that she resided in the Defendants' property; (although she actually lived elsewhere with her husband). Additionally, in an "amended supplemental affidavit" of the process server, stated that he did actually mail a copy of the summons and complaint to each defendant separately, despite the fact that the language in the original return and original supplemental affidavit could be read in a manner suggesting that only one copy of the pleadings was sent in a single envelope addressed to both defendants.

The Court first rejected Plaintiff's contention that Defendants waived the jurisdictional challenge by participating in the case after the initial denial of the motion to quash. The Defendant's subsequent pleadings were always in the nature of renewing or for reconsideration of the motion to quash; even the pleading relating to the confirmation of sale was a "Response to Motion to Confirm in the Nature of a Motion to Quash".

Then the Court turned to determine whether the language in 735 ILCS 5/2-203(a) requires that a "family member" must reside in the defendant's household in order to properly accept service. Section 2-203(a) provides "Service of summons upon an individual defendant shall be made...by leaving a copy at the defendant's usual place of abode, *with some person of the family or a person residing there*, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode...(emphasis added by the Court) The statute as it exists today was amended in 1994 to add the phrase "or a person residing there", whereas the prior statute only

provided for service upon "some person of the family, of the age of 13 years or upwards." Noting that the new language included a "disjunctive conjunction" "or" between "with some person of the family" and "a person residing there", the Court concludes "Thus, the process server can leave the summons with *either* a family member *or* a person who lives in the household. There is no requirement that the family member reside in the defendant's household to accept the summons". There are two separate categories: (1) a member of the defendant's family, and (2) people who reside in the defendant's household. Here, the mother-in-law was a member of the family, and did not need to reside in the defendant's abode. The defendant's citation to three cases holding that the person accepting the summons must live in the abode were "unpersuasive as they were all decided prior to the amendment of the statute."

6. **SPECIAL PROCESS SERVER'S AFFIDAVIT:**

"Jurisdiction is everything in a mortgage foreclosure", Harold Levine was fond of saying, and so it goes today in the Courts dealing with the surge of foreclosures created by the real estate recession. Defense attorneys properly turn a focus on the jurisdictional issues in foreclosures and look for 'strict construction' to aid them. In Deutsch Bank v. Akbulut , (1st Dist., October 18, 2012), 2012 Il.App. (1st) 112978, the construction was not strict enough to help, however. The Defendant Akbulut was served with summons by a special process by the name of Terry Ryan. A default judgment was entered and a sale held. It was at the confirmation of sale that Akbulut's attorney filed a motion to quash that service of process because the affidavit filed with the Clerk's office at the time did not state specifically that Terry Ryan was an employee of one of the appointed private detective agencies. The affidavit stating that Akbulut was personally served with summons at the residence which is the subject of the foreclosure "bore a signature line with Ryan's name and 'License(s): Agency: 117-001101.' The bottom left corner of the affidavit lists United Processing Incorporated, along with its address and phone number. United Processing was one of the three detective agencies appointed to serve process..." In response to the Defendant's Motion to Quash for failure to state specifically that Ryan was an employee of the agency, the Plaintiff filed an amended affidavit of service by Terry Ryan stating that he was an employee of United Processing. Based on the amended affidavit and no counter affidavit being filed by Akbulut, the trial court denied the Motion to Quash and confirmed the sale.

On appeal, the First District begins by citing State Bank of Lake Zurich v. Thill , (1986), 113 Ill.2d 294, for the proposition that a judgment entered by a court lacking jurisdiction is void and may be attacked at any time, (including confirmation of sale). Without proper service to confer jurisdiction, the judgment obtained is void. Here, however, "The circuit court was entitled to rely upon the amended affidavit "to cure any defect in the return of process.", and the denial of the Motion to Quash was affirmed.

7. AFFIDAVITS FOR SERVICE BY PUBLICATION REQUIREMENTS AND VALIDATION BY SECTION 15-1509

Publication jurisdiction in mortgage foreclosure cases is always problematic. The decision in Deutsche Bank National Trust Company v. Denise Brewer, (1st Dist., July 18, 2012) 1-11-1213, makes this clear, and sets a "high bar" for the affidavits allowing service by publication under Section 2-206 of the Code of Civil Procedure, and Cook County Circuit Court Rule 7.3.

Following the entry of a judgment of foreclosure and confirmation of sale, Denise Brewer moved to quash service of process by publication and to vacate the foreclosure judgment and sale. The Plaintiff's attorneys sought to resolve the matter entirely and quickly by asserting 735 ICLS 5/15-1509, "Claims Barred", in which the legislature provided that "Any person seeking relief from any judgment or order entered in a foreclosure in accordance with subsection (g) of Section 2-1301...may claim only an interest in the proceeds of sale." The First District rebuked this theory by holding that "A judgment entered without jurisdiction over the parties is void ab initio and lacks legal effect...Even if the legislature had the power to make a void judgment effective, nothing in section 15-1509 indicates that the legislature sought to make foreclosures judgments take effect and deprive owners of their properties when the trial court lacked personal jurisdiction over the owners...Therefore, we hold that section 15-1509 applies only to valid judgments entered with jurisdiction over the parties and subject matter."

Then, turning to the publication jurisdiction issue the Court rules that "Because Deutsch Bank presented no affidavits in which the affiant swore that he personally took the steps necessary for attempting to service process on Brewer and for due inquiry into her whereabouts, we find that Deutsch Bank did not meet the requirements for service by publication. Therefore, we reverse the judgment of the trial court and remand for further proceedings consistent with this order."

The affidavits filed by Deutsche Bank in support of publication jurisdiction were made by employees of Excel Innovations, a detective agency appointed to serve process on Brewer. Don Eskra listed 19 different times when he claimed someone attempted to serve process on Brewer at her residential condominium without success. Another Excel employee, Dennis McMaster, listed the same claimed attempts at service and then stated "we attempted to locate the defendant by searching public, online and confidential databases...[and] calling Directory Assistance". Neither affidavit identified the person that allegedly attempted to serve process 19 times, (only that "attempts were made" to serve Brewer), or who performed the various searches, (only that "we...search[ed] the public, online and confidential databases"). This is not sufficient under the combination of Section 2-206 of the Code of Civil Procedure and local court rule 7.3. The Code requires strict compliance under the case law cited, and the Cook County local rule 7.3 "elaborates on the requirement" by mandating 'setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendants by inquiry as full as circumstances permit prior to placing of service of summons by publication.' The affidavits here were neither specific nor particular about who did what to meet the requirements, and this was clear from the language in the affidavits indicating

"attempts were made" and "we searched". The Court noted that "Use of the passive voice implies someone else made the discovery and reported it... does not show that the affiant has personal knowledge of an attempt to serve the defendant at home...[and] do not serve the rule's purpose of ensuring that the court relies only on sworn statements of persons who actually attempt to find and serve the defendant before permitting service of process by publication...an affidavit must show the affiant bases his assertions on personal knowledge, and the affiant could competently testify to the facts asserted."

Finalizing the opinion, the Court dealt with the fact that Brewer contacted the Bank's attorneys requesting reinstatement figures by faxes to their office, noting that "we see nothing in either fax that shows she knew that Deutsche Bank had sued to foreclose the mortgage", and remanded the case for an evidentiary hearing: "Because we are in this opinion clarifying the requirements of section 2-206 and Rule 7.3, we direct the trial court on remand to hold an evidentiary hearing to hear evidence - from the individuals who actually took such steps-

8. **DUE DILIGENCE, SERVICE OF PROCESS, PUBLICATION AND EVIDENTIARY HEARINGS:**

Ernest J. Cotton appealed the trial court's denial of his motion to vacate a judgment of foreclosure, judicial sale, and quash service by publication in Citimortgage, Inc. v. Cotton, (1st Dist., August 28, 2012), 2012 IL App (1st) 102438. The trial court denied Cotton's motion, and the First District reversed and remanding for further proceedings, finding that the circuit court lacked personal jurisdiction, and therefore the judgment of foreclosure was void.

Noting that a judgment that is entered without personal jurisdiction over a party can be attacked either directly or collaterally at any time, the Court found that while it was questionable as to whether the process servers here were improperly appointed in the trial court because the certificate/registration of their employing private detective agency had lapsed, (although there was a suggestion in the pleadings that one agency had merged or changed its name, there was nothing of record to support that transition), "Strict compliance with statutes governing service of process is required." The record was unclear about whether the detective agency had authority to serve Cotton, but the Court concentrated on whether the Plaintiff failed to comply with the "due inquiry" requirement of the Code of Civil Procedure, 735 ILCS 5/2-206. That "due inquiry" relates to both (1) ascertaining the defendant's residence, and (2) ascertaining the defendants whereabouts to support an affidavit that the defendant can not be found upon due inquiry. To overcome the Plaintiff's due inquiry affidavit, the Defendant must present evidence that he could have been located and, if he presents "a significant issue with respect to the truthfulness of the [plaintiff's] affidavit...then the trial court should hold an evidentiary hearing on the issue with the burden of proof being upon the plaintiff to establish that due inquiry was made to locate the defendant." therefore their unsuccessful attempts at service could not support the publication service.

There was no evidentiary hearing granted in the trial court here. "[A]n honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances can permit" is the test to be applied. The fact that Citimortgage made 19 services attempts at his main residence as well as an alternative residence was contrasted by Cotton's affidavit. Cotton's affidavit stated that he was amendable to service, was a Chicago Firefighter, whose place of employment was known to Plaintiff, had a power of attorney filed with Plaintiff setting forth an attorney to be contacted on behalf of Defendant that Plaintiff never attempted to contact, and photographic evidence that his name appeared on the doorbell contrary to the process servicer's allegations, which also inaccurately described the property. The Cotton affidavit "called into question" the accuracy of the process server's affidavit, and an evidentiary hearing was warranted; "These facts point to significant questions which were sufficient to alert the trial court that an evidentiary hearing was warranted when coupled with Ernest's request for an evidentiary hearing." One other area that was addressed was Cotton's assertion that Citimortgage could have found him at his work, whereas Citimortgage claimed that it was not permitted to do so under the Fair Debt Collection Practices Act, (15 U.S. C. Section 1692). Holding that the FDCPA did not prevent Citimortgage from contacting Cotton at work, the Court notes that the Act specifically excepts "attempting to serve legal process" as conduct of a debt collector, and contact at work is prohibited only if the debt collector knows or has reason to know that the employer prohibits receipt of such communications at the workplace.
"Ernest has clearly presented a significant amount of factual inconsistencies between his affidavit and Citimortgage's to warrant an evidentiary hearing. An evidentiary hearing will shed light upon the propriety of service by publication under the facts and circumstances of this case. We express no opinion on the outcome of such a hearing."

9. **2-1401 MOTIONS TO QUASH SERVICE POST SALE; SERVICE OF NOTICE OF SECTION 1401 MOTION:**

The Defendant's Motion to Quash service, stating that they were not properly served with summons, came months after their home had been sold and the sale confirmed in Onewest Bank FSB v. Topor, (March, 2013), 2013 IL App (1st) 120010. Although the Motion had the affidavits of defendants and a number of other people attesting to the Defendant's whereabouts at the time of the service, indicating they could not have been served, the Plaintiff objected to the trial court's jurisdiction to hear the motion filed more than 30 days after the confirmation of sale, (a final order), based on the fact that the notice and motion were served on the Plaintiff's attorney rather than the Plaintiff itself as required under Section 2-1401 and Supreme Court Rule 105.
While there is an exception to the personal service rule in 2-1401 motions where the attorney to whom a petition is mailed is still actively representing the Plaintiff in ancillary matters before the court in the same case, that exception did not apply here, and the court did not have jurisdiction to consider the defendant's motion where the service was not on the bank directly.
The Appellate Court's opinion saw this case as an "opportunity to clarify the relationship between petitions to vacate final judgments pursuant to section 2-1401 of the Code of Civil Procedure and motions to quash service of process." A motion to quash service of

process filed more than 30 days after a final order, (here the confirmation of sale), is properly brought pursuant to Section 2-1401, but recognizing that a judgment void for lack of jurisdiction is distinct, the general requirements of 2-1401 requiring a meritorious defense and due diligence do not apply, and the motion may be brought after two years. However, because a 2-1401 motion is a "new proceeding", the service requirement is still in place, and the plaintiff here would have to be served personally, not through its attorney. Although the record on appeal was a bit confusing and incomplete, it appeared that the trial court denied the motion to quash and granted defendants "21 days to file a 2-1401 petition and serve plaintiff ." By this order, the trial "invited a refiling and thus retained jurisdiction. Accordingly, there was no final order to appeal, and the Appellate Court, lacking jurisdiction, dismissed the appeal

10. **"STANDING" IN A FORECLOSURE SUIT:**

During the last six years of the "Mortgage Foreclosure Crisis", the changing landscape of the mortgage industry and the lawsuits filed by the various attorneys general and consumer litigation against lenders, it has become the norm that loans in foreclosure have been sold, placed into mortgage backed securities, trusts, and serving-transferred prior to the filing of a Complaint to Foreclose. As a result, there is one legal issue that continues to receive attention in the trial courts, and it is now the subject of a significant, recently developing body of appellate decisions; the "standing" of a Plaintiff to file and prosecute a suit to foreclose a mortgage, and when and how a Defendant can attempt to vacate a judgment and sale.

The first modern case that began the "standing" debate was Bayview Loan Servicing, L.L.C. v. Nelson, (5th Dist., June 16, 2008), 382 Ill. App. 3d 1184; 890 N.E.2d 940. The Court held that the mere allegation of a legal conclusion of standing under the Illinois Mortgage Foreclosure Law, (where there is no assignment(s) from original lender to the Plaintiff, and where the note attached to Complaint is not endorsed to the named Plaintiff), was insufficient as a matter of law to support Plaintiff's standing to foreclose in the context of summary judgment. In the realm of 'when to bring standing up', Nelson appears to stand for the proposition that a judgment entered by summary judgment can be attacked after the fact if the Plaintiff lacked standing.
When Defendants attorneys adopted and began making the "standing" argument attacking foreclosure complaints pleadings for failure to properly allege "standing" in the trial courts as a result of this decision, the Plaintiff's bar argued that Bayview is not applicable at the pleading stage of a foreclosure, and the mere allegation of standing is sufficient under IMFL if the lender plead the statutory form complaint, citing the Second District opinion in U.S. National Bank v. Sauer, (2nd Dist., July, 2009), 392 Ill.App.3d 942, 913 N.E.2d 70, 332 Ill.Dec. 475. The Sauer Court held that "Under Illinois Law, a plaintiff need not allege facts establishing standing…Rather, it is the defendant's burden to plead and prove lack of standing…Where standing is challenged by way of a motion to dismiss, a court must accept as true all well-pleaded facts in the plaintiff's complaint…[under Section 2-615". Harkening back a little in time, lender's counsel also cited Greer v. Illinois Housing Development Authority, (1988), 122 Ill.2d 462, holding that a lack of standing in a civil case is an affirmative defense, (not a basis for a motion to

dismiss under 2-615), which the defendant must plead and had the burden of proving. Accordingly, although many Defendant's attorneys still attack foreclosure complaints under the "standing" theory, the argument is made pursuant to Section 2-619 rather than 2-615.

The Plaintiff's position on the "standing" issue appeared to gain momentum with MERS v. Barnes, (1st Dist., 2010), 406 Ill.App.3d 1, 940 N.E.2d 118, and Deutsche Bank National Trust Company v. Snick , (3rd Dist., 2011), 2011 IL App (3d) 100436, 957 N.E.2d 1273, both of which held that "standing" is (a) an affirmative defense which is waived if not asserted, and (b) must be raised prior to the confirmation of sale when the Court's review is limited to the four elements set forth in IMFL Section 1508. The case of Standard Bank and Trust Co. v. Madonia, (1st Dist., 12/27/2011), 2011 IL App (1st) 103516, deals with "standing" from the point of view of foreclosure of a mortgage loan that was acquired by the Plaintiff by virtue of a series of mergers rather than assignment of the mortgage or endorsement and transfer of the Note. Standard Bank argued that the Illinois Banking Act, (205 ILCS 5/28), provision for the transfer of all liabilities and interest to the resulting Bank when banks "merge" provides "standing". Both the reasoning in Bayview, as well as the statutory requirements of 735 ILCS 5/2-403(a), were distinguished even though there was no "assignment" of the loan to the Plaintiff, because the Plaintiff acquired the loan through merger. Citing Barnes and holding that a foreclosure complaint is sufficient if it contains the averments required by IMFL under Section 5/15-1504(a), the Court held that since Standard Bank employed the statutory form complaint, plead that it was the mortgagee, and attached a copy of the mortgage and note, as well as the merger documents, its complaint was legally and factually sufficient relative to "standing".

Deutsch Bank v. Gilbert, (2nd Dist., 9/25/12), 2012 IL App (2d) 120164, however, is a "standing" case in which the Defendant prevailed. Gilbert raised "standing" as an affirmative defense, noting that *at the time the complaint was filed*, (March 10, 2008), the Assignment of the mortgage to Deutsch Bank had not yet been executed. The Assignment was signed on August 25, 2008, and the Bank contended that the August execution was "simply memorializing an earlier transfer of interest" that had occurred on November 1, 2005. The Court clearly states that "Lack of standing to bring an action is an affirmative defense, and the burden of proving the defense in on the party asserting it." There, however, where the documents in evidence indicated on their face that the assignment did not occur until several months after the foreclosure action was filed, the Defendant's burden of proof of a prima facie case that the Bank lacked standing was met. The evidence of an "earlier transfer of interest" was not considered because the affidavit did not have a proper foundation and therefore not admissible. "[S]tanding must exist when the suit is filed."

Although not directly a case between mortgagor and mortgagee on "standing", the decision in Patrick L. Cogswell v. Citifinancial Mortgage Company, (7th Cir., October 5, 2010), 624 F.3d 395, points out a further distinction; holding that under Illinois law only the holder of a note may foreclose on property. Transferring a mortgage is not enough by itself to confer the right to foreclose upon property. The Patrick Group could not proved it was a note holder in a foreclosure because it never received the note it purchased from CitiFinancial or otherwise possessed it, and therefore was not entitled to foreclose.

Even more focused is the Second District ruling in Bank of America v. Bassman EBT, LLC, (2nd Dist, June 18, 2012), 2012 IL App (2d) 110729., holding that a defendant is can not attack the "sufficiency" of an assignment, but limited to asserting that an assignment is void, to succeed on the "standing" issue, and also cannot assert failure to comply with the terms of a pooling and servicing agreement to which it is neither a party nor a third party beneficiary of as a defense to foreclosure based on "standing".

11. **"MISNOMER" vs "STANDING" IN CORRECTLY NAMING PLAINTIFF**

As if Jean Prabhakanan's late tenacity in her foreclosure did not contribute enough to our developing case law this year, (see "POST SALE MOTIONS TO VACATE UNDER SECTION 2-1401 AND SECTION 15-1509", U.S. Bank National Association v. Prabhakaran, (February, 2013, 1st Dist.) 2013 IL App. (1st) 111224, below), her attorney and tenants give us more to ponder in U.S. Bank National Association v. Luckett, (March 4, 2013, 1st Dist.) 2013 IL App (1st) 113678. Michael Luckett and Ruby Wilson were purportedly Jean Prabhakanan's tenants in her property in Maywood, Illinois, during the foreclosure which was the subject of the appeal in U.S. Bank National Association v. Prabhakaran, (February, 2013, 1st Dist.) 2013 IL App. (1st) 111224. (The Complaint to foreclose mortgage was filed on August 8, 2007, was originally filed by America's Servicing Company, and later amended to name U.S. Bank as trustee for Credit Suisse as the Plaintiff, the judgment by summary entered on June 10, 2008, and the sale confirmed on January 5, 2010; months after which Prabhakaran launched her unsuccessful motions to stay eviction and 2-1401 motion to vacate the judgment, which were denied based on the Foreclosure Law Section 1509 provision making the vesting of title a bar to claims of all parties to the proceedings.) During the appeal of the foreclosure case, the Plaintiff discovered that Luckett was in possession and filed a forcible entry proceeding against them. Luckett's attorney in this forcible entry and detainer action was one of the same that represented Prabhakaran in the later stages of the foreclosure and appeal. Luckett argued here that by incorrectly naming the Plaintiff as "Bank National Association" rather than "U.S. Bank, National Association as Trustee for Credit Suisse" in the forcible case, the "non-existent" Plaintiff did not have "standing", was improperly awarded possession, and the forcible ought be dismissed. The trial court denied the Defendant's motion to dismiss, and then granted the Plaintiff's leave to amend its complaint to correct the naming error, and then ordered the amendment to be so *nunc pro tunc* relative to the previous Order of possession. Defendants appealed and the First District affirmed, but modified the order containing the *nunc pro tunc* language to remove it.

The Appellate Court's opinion begins with a succinct recounting of Prabhakaran's prior proceeding, making it clear the Court was well aware of the interrelatedness of the two matters. The forcible case was filed while the Prabhakaran appeal was pending. The pendency of the appeal in the other proceeding was the basis argued for the request of a stay of possession in the forcible by Luckett. An Order of possession was entered on October 31, 2011, and stayed until November 7, 2011. On November 4, 2011, Luckett's attorney filed a "Motion to Quash Service of Process, Dismiss for Lack of Jurisdiction and Stay Order of Possession" The motion did not reference the basis for the motion, (i.e., Section 2-1301), and did not actually address quashing the service of process, but

primarily argued the "Motion to Dismiss for Lack of Jurisdiction (Wrong Plaintiff)". Dealing with an incomplete record of the trial court proceedings, and noting that the pleadings were "hardly a model of draftsmanship", and even "the notice of appeal is also problematically drafted", the Court begins by noting that Luckett failed to answer the complaint, thereby admitted all of the allegations in the complaint. "It is elementary that once a case has been tried, the judgment order resulting from the trial can not be attacked by a belated motion to dismiss...[inasmuch as] jurisdictional issues such as standing can be waived because the essence of the standing inquiry is not the subject matter per se, but whether a litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a particular dispute." Despite Luckett's characterization of their "wrong name" claim as a "standing" issue, it is actually a "misnomer" issue. "[S]tanding can be forfeited if a defendant fails to challenge the issue in a timely manner. MERS v Barnes.", and the Court suggested that "Had defendants presented their motion to dismiss before trial, they would have been in a better procedural posture to litigate their "wrong name" claim" rather than a post-trial attempt to attack "standing". The use of an incorrect name of a person in a pleading is a "misnomer". The Court stated "We can take judicial notice that courts across the nation are adjudicating a huge number of foreclosure and eviction cases which stem from foreclosure, and that lenders use law firms which litigate these cases in high volume. That high volume, in turn, means that pleadings are generated through 'search and replace' word processing features. While efficient, this practice runs the risk of a single error infecting an entire series of pleadings. Because of the very slight differences between the two names at issue, and the fact that no one has suggested that the difference is attributable to anything but a scrivener's error, we look to the misnomer cases for guidance here." Misnomer is not a grounds for dismissal. The name of any party may be corrected at any time, before or after the judgment, by a motion to conform the pleadings to the proofs, by motion. Citing specific cases where the plaintiff's name was a misnomer, the courts have found that there was no basis to render a suit a nullity or subject to dismissal due to an error in the plaintiff's name. Allowing an amendment under Section 2-401(b) specifically for misnomer situations, however, rather than a *nunc pro tunc* Order was the proper path to follow. "In misnomer cases, the relation-back doctrine automatically applies, so the amended complaint and order would be considered as filed upon the filing date of their original counterparts."

In concluding, the Court refused Defendant's request for sanctions pursuant to Rule 137 stating "the misnomer was the result of carelessness and inattention to detail on the part of plaintiff's attorneys...a minor, nonprejudicial clerical error" not analogous to "the practice of making up imaginary clients and suing people in the name of those clients for no reason whatsoever." And, in an unusual glimpse of the Court viewing the everyday world out side of appeals of issues such as "misnomer" vs "standing" ends by noting: "The loan signed by Prabhakaran has been in default now for about five years. Both Prabhakaran and her tenants, using the same set of attorneys, have used the legal system to delay the inevitable as long as possible, losing at every stage. In the meantime, we can only presume that they are enjoying the use of the property essentially free of charge, and at great cost to the lender and its successors."

JUDGMENTS

12. **VACATING JUDGMENTS OF FORECLOSURE; FAILURE OF NOTICE TO COUNSEL, 'VOID' VERSUS 'VOIDABLE' JUDGMENTS:**

In the continually increasing volume of foreclosure cases, it is not uncommon for a defendant to appear *pro se*, and then later obtain counsel to file an additional appearance in an effort to defend. This occurred in JP Morgan Acquisition v. Joseph L. Strauss, (October 30, 2012), 2012 IL App (1st) 112401. Mr. Strauss initially filed a *pro se* appearance on November 20, 2009, and then on March 16, 2010, Attorney Gertzman filed an additional appearance for Defendant, without leave of court, and purportedly hand delivered a copy to Plaintiff's counsel in the courthouse. Thereafter on May 12, 2010, Plaintiff filed motions for default, summary judgment and judgment of foreclosure set for hearing on May 21, 2010. Defendants received a notice of the motions for May 21, 2010, but their attorney was not included on the notice. Summary Judgment, default orders and a judgment of foreclosure were entered on May 21, 2010. A sale was held on August 24, 2010, and at the hearing to confirm sale, Defendant filed a motion to vacate the judgment of foreclosure as "void" based on the failure to provide notice to their additional appearance attorney Gertzman. The Plaintiff responded that it had not received a copy of Gertzman's Additional Appearance, that the Additional Appearance was filed without leave of court, and therefore the notice of the May 21, 2010 hearing was proper. Defendant argued that Gertzman had certified mailing the Additional Appearance to Plaintiff's counsel and contended a copy of the Appearance was delivered to Plaintiff's counsel, in person by Gertzman, in the courthouse. The facts were further complicated, however, by the "illegible" condition of the defendant's exhibits in support of Gertzman's certificate on the notice of filing the additional appearance and there appears to be no proof of the hand delivery service in the courthouse.

At the trial court hearing, the Defendant's arguments that the judgment was "void" because Gertzman was not provided with notice of the hearing were rejected, and this appeal followed.

The Appellate Court began its opinion by noting that the Defendant's argument that the Judgment was "void" rather "voidable" because of the failure to provide notice to counsel was incorrect. A "void" judgment is one in which the trial court lacks subject matter or personal jurisdiction. Otherwise a judgment where the court has jurisdiction over the subject matter and the defendants is at worst/best "voidable", rather than "void". Here, the trial court had both subject matter and personal jurisdiction, so the judgment could only have been "voidable". Then, noting that Supreme Court Rule 104(d) specifically states that "failure to deliver or serve copies [of pleadings] as required by this rule does not in any way impair the jurisdiction of the court over the person or any party", the Court found "a defect in service [of the judgment pleadings] does not render the court's holding void."

After looking at the matter from the perspective of a "voidable" rather than "void" judgment, the Appellate Court then turned to the standard of review and does not find the denial of the motion to vacate to meet the required "abuse of discretion" standard. The

Defendant's contention was that leave of court to file the additional appearance was not required before filing the appearance "because a party must first appear before it can address the court". This was rejected as illogical: "this leads us to the conclusion that leave of court must be sought prior to filing an appearance after 30 days [after receipt of service of process]. In fact, a basic search of case law reveals that leave of court is regularly sought when an additional appearance is filed whether to replace an attorney or for a pro se defendant who has secured representation." The trial court's determination that the facts showed the Defendant's attorney did not properly appear and did not properly put plaintiff's attorney on notice so he would receive notice was not disturbed by the Appellate Court. The Defendant's failure to provide legible copies of the certificate of service impacted the credibility of the contention, which was also the realm of the trial court and would not be disturbed absent an abuse of discretion. Under these circumstances, mailing the notice and motions to the Defendant, without copies to his attorney, was not a basis to vacate the "voidable" rather than "void" judgment.

13. **MOTIONS TO VACATE JUDGMENTS BROUGHT AT CONFIRMATION OF SALE :**

In addition to the holding on "standing", the Court in Barnes also began the debate about the relationship between and motions to vacate judgment and the confirmation of sale. The Court in Barnes held that the foreclosure law governs the procedure in foreclosure cases to the exclusion of other statutory provisions in the Code of Civil Procedure based on Section 15-1107(a) of the Foreclosure Law. Accordingly, under Barnes, a Section 2-1301(e) Motion to Vacate could not be brought at the time of the confirmation of the sale because Section 1508 limits the trial court's rulings at approval of sale to four specific inquiries; i.e., notice, fraud, unconscionability and unjust result. The Court's horizon is limited to confirmation of the sale unless one of four very specific issues are raised, and often these are phrased by Defendants are jurisdictional or 'standing' issues not within the four areas of inquiry.

This holding by the Barnes Court, however, was specifically rejected by the Second District in Wells Fargo Bank v. McCluskey, (2nd Dist., Nov. 2, 2012), 2012 IL App (2nd) 110961. In that case, the Court specifically held that a motion to vacate could be brought at the time of the confirmation of sale regardless of the limitations of Section 15-1508, and is not limited solely to the criteria in Section 1508. This case followed shortly on the heals of Cavalry Porfolio Services v. Rocha, (1st Dist., Oct. 27, 2012) 2012 Il App (1st) 2012 IL App 111690. In Rocha, the issue of standing arose in the context of a Section 2-1401 motion to vacate a judgment on a credit card or line of credit with Washington Mutual Bank. The Plaintiff was the assignee in a line of a very confusing and less than perfect transfers of Rocha's account by assignment. Almost two years after the judgment was entered, Rocha filed his motion alleging a meritorious defense based on Cavalry's lack of standing. The assignments of the account attached to the complaint failed to meet the requirements of Section 8b of the Collection Agency Act, and this "standing" flaw, together with the mandate that substantial justice be considered in vacating a default judgment, supported the reversal of the trial court's denial of the 1401 petition to vacate the judgment.

The decision in Wells Fargo Bank v. McCluskey, (2nd Dist., Nov. 2, 2012), 2012 IL App (2nd) 110961, (where the Court held that a motion to vacate pursuant to Section 2-1301 can be brought at the time of the confirmation of sale regardless of the limitations of Section 15-1508, contrary to Barnes), has most recently been criticized in another "Bayview" case, Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC, (1st Dist., June 25, 2013), 2013 IL. App. (1st) 12071. There, it was a sale bidder Intervenor who sought to vacate a sale because of a purportedly forged release, errors in a lis pendens, and that the Plaintiff was not registered as a collection agency under the Collections Act. He had bid at a prior foreclosure of the second mortgage, and the confirmation of this second sale would be an "unjust result" to him as an interested party. First, the Court rejected the reasoning in McCluskey, and held that the requirements of Section 1508 are the proper limitation and guide, not Section 1301. Then turning to whether confirmation of sale would be an unjust result, the Court rejected the Intervenor's suggestion that Plaintiff was an unregistered collection agency under the exception for fiduciaries for banks and lending institutions such as servicers of mortgages. The Lis Pendens met all of the standards of Section 1503 of the Foreclosure Law, and there any incorrect listing on the Recorder's website that would have been clearly seen if the document itself were reviewed, also failed to form a basis. The Intervenor failed to show that "justice was otherwise not done" by the confirmation of sale.

The Illinois Supreme Court has agreed to hear McClusky, and will hopefully address the conflict.

SALES

14. NOTICE AND MOTION TO CONFIRM SALE; TIMING THE FILING:

The Illinois Mortgage Foreclosure Law, Section 15-1508(b) provides that "Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm sale." The Defendant, Mark Monroe, in Citibank, N.A. v. Monroe, (February, 2013), 2013 IL App (2d) 120593, was an attorney. The Sheriff's Sale was held on April 19, 2012. The Plaintiff's Attorney mailed a Notice of Motion to confirm the sale on March 26, 2012 for a hearing to take place on April 30, 2013. The Notice did not have a copy of the Motion to Confirm Sale attached. When the Plaintiff appeared to confirm the sale on April 30, 2012. On that same day, Mr. Monroe filed his objection based on the fact that the Notice was mailed prior to the sale, and his contention was that this violated the language in Section 1508 prohibiting making the motion prior to the sale. The trial court denied his objections and confirmed the sale. Mr. Monroe appealed, and the Second District Affirmed.

Holding that "our analysis need go no further than the proper interpretation of section 15-1508(b)...We conclude that the section does not bar giving notice of a confirmation motion before the sale." The language only refers to not making the motion prior to the sale. It does not reference the notice. "Had the legislature intended the requirement 'shall not be made prior to sale' to apply to the notice as well as the motion, it could have said....Instead the legislature placed the word 'motion' in the parenthetical clause, thereby

producing a longer and more complicated sentence. However, by making the more complicated phrasing choice, the legislature clearly showed its intent that the "shall not be made prior to sale" clause should apply to the motion only." Rejecting the reasoning that the motion was "made" when noticed, the Court stated "Plaintiff 'made' its motion for confirmation on April 30, 2012, the day it filed the written motion and made its request to the court; this was, of course after the sale."
[Ed. Note: What appears to not have been raised before the Court, however, was that the Notice, which was clearly "made" before the sale, did not have a Motion attached, and therefore was not a proper motion....?]

15. SURPLUS FUNDS FROM FORECLOSURE SALES, UNCONSCIONABLE AGREEMENTS TO RECOVER AND SUPREME COURT RULE 113:

Following a foreclosure sale, Unclaimed Funds Unit, LLC, sought a turnover of the surplus resulting from the foreclosure sale in Crown Mortgage Company v. Joseph Young, 2013 IL App (1st) 122363. The basis for its claim to the surplus was an assignment from the defendant/owner of residential property, Minnie McLenden. The surplus was $14,000.00. The assignment from McLenden to Unclaimed Funds recited consideration of $50.00. When Unclaimed Funds appeared to petition the trial court for the turnover, the Chief Judge of the Circuit Court of Cook County Chancery Division, (who hears these petitions because of past abuses), stated: "We have rules herein in terms of how much you can charge on a mortgage foreclosure, $1,500. To charge somebody $7,000, (Unclaimed stated it had agreed to give Ms. McLenden half of the surplus it recovered), for something that is not at all difficult or complicated because of the fact that we have a help desk here - anybody can go here. We have people, *pro ses*, and basically they are paying nothing." Ms. McLenden advised the court that she contacted Unclaimed Funds after they sent her a solicitation letter that she had funds which were due to her. A Notary Public came to her home with papers from Unclaimed Funds for her signature. Unclaimed Funds, she said, never told her that she could get the money without their help.
The trial court declared the agreement between McLenden and Unclaimed Funds "unconscionable", denied Unclaimed's petition, and directed her to the help desk to prepare the documents to obtain the entire surplus fund herself
Affirming the trial court on appeal, the First District notes that "unconscionability can be either 'procedural', or ' substantive' or a combination of both". The procedural aspects have to do with the environment in which the transaction takes place; i.e., a party's difficulty in reading or understanding the agreement, and a lack of bargaining power, how the agreement is presented, and whether there is an opportunity to negotiate the terms. Substantive unconscionability occurs when one agrees to pay $7,000 for that which could have been obtained without cost (i.e., from the help desk) otherwise. Here there was both forms of unconsionability to support the trial court's ruling. Justice Delort, who specifically noted his trial court experience "As a judge who heard tens of thousands of foreclosure cases at the trial court level over the course of five years" held that "the issues presented herein are quite important, and they may gain greater relevance once the real estate market improves.". Recently adopted Illinois Supreme Court Rule 113 addresses these issues specifically and provides a process for dealing with surplus in

foreclosure sales. The result here at the trial level "is exactly what the foreclosure section's rules were adopted to achieve."

16. CONFIRMATION OF SALE, UNCONSCIONABLE, UNJUST BID AND CRITICISM OF APPRAISALS:

Although the review of the sale in NAB BANK v. LaSALLE BANK, N.A., 2013 IL APP (1st) 121147, related to approval of a levy sale pursuant to 735 ILCS 5/12-144.5, the congruency with the language for approval of a mortgage foreclosure sale lead the court here to "examine foreclosure case law to help resolve the issues presented here" of what constituted a sale that was "unconscionable" or "unjust" and ought not be confirmed through the application of foreclosure law to levy sale law. The decision of the First District is instructive to both levy and foreclosure sale confirmations.

The issue presented was whether the bid of $20,000 on a parcel of real estate appraised at a fair market value $280,000 was "unconscionable" or "unjust". Interestingly, it was not a complete fee simple that was being offered at the sale, but only a one half interest in the property due to issues surrounding tenancy by the entirety. In construing what is meant by "unconscionability" and "unjust result" in the statutory language, the Court noted that the rules established by precedent were designed to "promote the policies of stability and permanency in judicial sales", and noting that it is the burden of the objecting party to show why the sale should not be confirmed - otherwise the court "shall" confirm the sale. While the trial court has some discretion to determine whether justice is being done by the confirmation, "case law teaches that the court's discretion under the justice clause is extraordinarily narrow...the vast majority of foreclosure sales are confirmed routinely...[and] the justice clause does not give the court the ability to exercise 'untrammeled judicial discretion" Noting that "the rule has become almost universal, that a sale will not be set aside for inadequacy of price alone, unless the inadequacy be so great as to shock the conscience", and recognizing that "It is well recognized that it is unusual for land to bring its full, fair market value and at a forced sale. Inadequacy of sale price is not a sufficient reason, standing alone, to deny confirmation of a judicial sale." Here, the fact that the parcel being sold was only a one half interest, which would require the bidder to follow with an action for partition to obtain a full fee simple, were both significant factors in analysis of the bid amount. With respect to the $280,000 appraisal, the Court noted that "auctions such as a judicial sale rarely yield a 'real price', while 'appraisals are just forecasts...Generally, the price paid for the property at a recent sale is the best evidence of value."

17. POST SALE MOTIONS TO VACATE UNDER SECTION 2-1401 AND SECTION 15-1509 TRANSFER OF TITLE AND TITLE ACQUIRED:

In U.S. Bank National Association v. Prabhakaran, (February, 2013, 1st Dist.) 2013 IL App. (1st) 111224, Jean Prabhakaran brought a motion to vacate a judgment of foreclosure pursuant to Section 2-1401 of the Code of Civil Procedure months after the

confirmation of sale and as a "shield" against losing possession. She alleged that the judgment, sale and confirmation of sale were void because the Plaintiff had accepted payments from her after the judgment was entered and while the foreclosure was pending. Although the Defendant had previously asserted in a response to the Plaintiff's motion for Summary Judgment that the Plaintiff had failed to account for "ongoing mortgage payments made by the Defendant to the Plaintiff" during the pending proceedings, that response was not supported by counter-affidavit, and the trial court entered Summary Judgment. Thereafter the property was sold to the Plaintiff at foreclosure sale, and that sale was confirmed with an in rem deficiency judgment of $100,479.39. More than three months after the confirmation of sale, however, Defendant filed a pro se motion to stay eviction alleging that a modification agreement was in process. Plaintiff responded that there no longer were any negotiations pending for modification. Then, a new attorney for Defendant filed a motion to vacate the judgment pursuant to Section 2-1401, again alleging that Plaintiff continued to accept payments from Defendant after the judgment had been entered, and was "unjustly enriched" and estopped. The Plaintiff asserted that the Defendant "can no longer attack judgment in this case because the judicial deed has been delivered to the successful bidder and as a result, any claim by her is barred as a matter of law pursuant to Section 15-1509(a) of the Foreclosure law. That Section provides that "Any vesting of title by ...deed...shall be an entire bar of all claims of parties to the foreclosure". The trial court denied the Defendant's motion and this appeal followed.

The First District began by noting that Section 2-1401 motions are creatures of the Code of Civil Procedure, and that the foreclosure process is governed by the Illinois Foreclosure Law. Any inconsistency between the Code and the Foreclosure Law are to be governed by the Foreclosure Law, as the Court specifically noted here it had held in MERS v. Barnes, based on the application of 735 ILCS 5/15-1507, While by Section 2-1401 the Code of Civil Procedure provides for relief from final orders and judgments after 30 days from entry thereof, providing the defendant pleads a meritorious defense and due diligence in presenting the defense as well as the petition, here, the motion was seeking to attack the confirmation of sale as the final order because the judgment was not a final order, and defendant had waived any errors relating to the summary judgment. The Illinois Mortgage Foreclosure Law, however, only provides four basis upon which confirmation of sale can be challenged under Section 1508, and Defendant's motion did not come within those limitations. Because of the governing position of the Foreclosure Law, any appeal of the case had to be limited to the confirmation of sale as the final order, and the grounds would be limited to those the Court may consider under Section 1508; not 2-1401.

Turning then to the Mortgage Foreclosure Law, the Court noted that Section 1509 further supported the denial of the Defendant's 2-1401 Motion: "The defendant did not provide this court with any persuasive authority suggesting that we can apply section 2-1401 petitions to the relevant portions of section 15-1509(a) of the Foreclosure Law...There is simply no Illinois authority to support the defendant's argument that she can utilize section 2-1401 to circumvent section 15-1509(a) or 1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property." The rationale of the Court was: (1) If there is no relief available to the defendant under section 2-1301(e) [based on Barnes], it follows logically that there can be no relief under section 2-1401, (2) It is undisputed that

the defendant was a party to the foreclosure fro its inception and cannot rely upon section 2-1401 as an alternative remedy once the circuit court confirmed the sale, (3) The clear and unambiguous language of section 15-1509(c) of the Foreclosure Law bars the defendant's claims in her section 2-1401 petition and is dispositive in its provision that "Any vesting of title by ...deed...shall be an entire bar of all claims of arties to the foreclosure.

18. **POST FORECLOSURE ENTRY AND DETAINER COLLATERAL ATTACK OF RIGHT OF POSSESSION FROM FORECLOSURE:**

The sheer volume of foreclosure cases and the intricacies of obtaining possession in a sea of foreclosed properties and displaced tenants/owners has produced a predictable vortex that is present in Wells Fargo Bank, N.A. v. Cecil Watson, (3rd Dist., July 9, 2012), 2012 IL App (3d) 110930. The case was a forcible entry and detainer action brought by Wells Fargo against Cecil Watson for possession of a residential property in Will County. Cecil had owned the property, but sold it to his cousin, Darrell Coburn, and Darrell made a mortgage to finance that purchase with Franklin American Mortgage Company, naming MERS as its nominee. Perhaps tellingly, Cecil remained in possession after the sale to Darrell. (The references to "defendant" in the opinion here require some concentration in reading to determine if the Court is speaking of Cecil or Darrell.) When the payments fell behind, Wells Fargo filed a foreclosure action in Will County on September 1, 2009, as Case No. 2009 CH 3901, naming Darrell as a defendant/mortgagor, but not naming Cecil as a tenant or one having any other interest in the premises. Wells Fargo proceeded with summary judgment against Darrell, (whose only response was that he was attempting cure his default; i.e., Darrell did not challenge Wells Fargo's "standing" to bring the foreclosure action at that time), the property was sold, and the sale confirmed on March 11, 2011. On September 19, 2011, Wells Fargo filed the forcible entry and detain action against Cecil seeking possession of the foreclosed property. The forcible complaint attached a copy of the judgment of foreclosure, together with a written demand for possession addressed to Darrell and 'unknown occupants', proofs of service on Cecil and Darrell, and an affidavit of posting of the demand for possession. On November 4, 2011, Darrell filed a motion to vacate the foreclosure judgment in Case No. 2009 CH 3901, alleging that Wells Fargo lacked standing in that case. (The attack on the standing essentially was that while Wells Fargo filed its complaint on September 1, 2009, the assignment of the mortgage to it was not signed until September 25, 2009, and not recorded until October 14, 2009, more than a month after the foreclosure case was initiated.) A hearing on the motion to vacate the foreclosure judgment resulted in a denial of that motion on November 15, 2011. (Darrell filed an appeal that was pending before the Third District as Appeal No. 3-11-0847 at the time the Court's opinion in the forcible case appeal, Appeal No. 3-11-0930, was filed; a matter of which the Court specifically took judicial notice in a footnote to this opinion.) On November 16, 2011, the day following the denial of the motion to vacate the foreclosure judgment, the trial court in the forcible entry and detainer case

entered summary judgment in Wells Fargo's favor and this appeal followed the Court's denial of an emergency motion to stay the eviction.

Cecil argued on appeal in the forcible case that summary judgment was improper because there was a material issue of fact relating to Wells Fargo's "standing'" in the foreclosure case pending appeal of that matter. Arguing that Wells Fargo "obtained the judgment of foreclosure by committing a fraud on the court.", Cecil asserted that Plaintiff's title to the property was still at issue, and could not support title necessary for a summary judgment order of possession. The Appellate Court affirmed the summary judgment.

"The purpose of the Forcible Entry and Detainer Act is to provide a speedy remedy to allow a person who is entitled to the possession of certain real property to be restored to possession. (Citation omitted) A forcible entry and detainer action, therefore is a limited and distinct proceeding that determines who is entitled to immediate possession of real property...matters that are not germane to the issue of possession may not be raised...[T]he issue of possession generally fall into one of four categories: (1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; or (4) claims questing the plaintiff's motivation for bring the action. (Citation omitted) *Serious title disputes, however, may not be determined in a forcible entry and detainer action.*" (Emphasis added) Because the issues raised by Cecil in response to Wells Fargo's motion for summary judgment related to the underlying title emanating from the foreclosure case, the appeal here was actually not germane to the issues of who was entitled to possession, but constituted a collateral attack on the foreclosure judgment. This put that issue outside of the scope of a forcible entry and detainer as a limited and distinct proceeding that determines who is entitled to possession only. Accordingly, there was no material issue of fact relating to title that could be asserted in the forcible entry and detainer action.