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Mortgage foreclosures: In rem or quasi in rem? The distinction that makes a difference

By

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***ABN AMRO Mortgage Group, Inc., et al v McGahan, et al*, 237 Ill. 2d 526 (June 4, 2010)**

Facts

In 2005, Nona McGahan executed a Note secured by a mortgage on a Chicago property. The mortgage was given in favor of ABN AMRO Mortgage Group (ABN). On May 1, 2006, McGahan defaulted and ABN filed a Complaint for Foreclosure. However, unbeknownst to ABN, McGahan died before the Complaint was filed.

Although the Court granted ABN leave to file a petition to name a personal representative, it chose not to do so. The trial court dismissed ABN's complaint finding that "generally, a Circuit Court lacks subject matter jurisdiction when a lawsuit is filed against a deceased person because such suit is a nullity," unless plaintiff, under 735 ILCS 5/13-209(c), names a personnel representative. However, ABN took the position that because foreclosure proceedings are *in rem* actions there is no need for a "human defendant."

The circuit court did acknowledge that there are Illinois cases dating back to 1835 which hold that foreclosure proceedings are *in rem* actions. However, the court concluded that true *in rem* proceedings are proceedings against the property itself (i.e., where the property is the defendant). Therefore, the trial court concluded that foreclosure actions are *quasi in rem* and dismissed ABN's complaint.

On appeal, the appellate court reversed and remanded. The appellate court found that Illinois had "consistently" labeled foreclosures as *in rem* actions and that it was bound by these determinations. 388 Ill. App. 3d 900, 902. Because foreclosure proceedings determine rights as against the "whole world" and not merely against certain individuals, they are logically *in rem* actions, even though the appellate court acknowledged that several Illinois Supreme Court cases had stated that foreclosure proceedings are *quasi in rem*.

Illinois Supreme Court analysis

The Illinois Supreme Court began its analysis by reviewing 735 ILCS 5/15-01(a)(i) and concluded that a mortgagor is a "necessary party." However, noting appellant's contention that

foreclosure proceedings are *in rem* actions and therefore neither a deceased mortgagor's estate nor a personal representative need be named, the court began its analysis of *in rem* jurisdiction.

The Court stated as follows:

1. *In rem* jurisdiction is “a Court’s power to adjudicate the rights to a given piece or property including the power to seize and hold it.”
2. A proceeding *quasi in rem* is “characterized as an *in rem* proceeding which affects only the interests of particular persons in a certain thing” and as “brought against the defendant personally,” with jurisdiction based on an interest in the property and “operates only as between the parties to the proceedings.”

Acknowledging that the Illinois Supreme Court has previously characterized foreclosure proceedings as both *in rem* and *quasi in rem* in past cases, and analyzing the cases and rationale, the Court came to the conclusion that “a mortgage foreclosure proceeding must be deemed a *quasi in rem* action” because the mortgagor is a necessary party defendant and must be named. The Court also noted that the property is not the instrumentality of the wrong. Additionally, because the mortgagor is a necessary party, it is necessary that there be personal service.

Based on this conclusion that a foreclosure proceeding is *quasi in rem*, the Illinois Supreme Court reversed the appellate court and affirmed the circuit court thereby dismissing the foreclosure action filed by ABN AMRO Mortgage Group.

For a discussion of how this case might or could affect already issued foreclosures, see: *The Impact of ABN AMRO v. McGahan on Already Issued Foreclosures*, by Kevin M. Hudspeth, 98 *Ill. Bar Journal* 520 (October, 2010). ■