

## Calling Out From The Grave

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The recent case of ABN AMRO Mortgage Group v. McGahan, 237 Ill. 2d 528 (2010) is an important case regarding the jurisdiction of the court to enter a judgment of foreclosure where the mortgagor is deceased. In McGahan, the Illinois Supreme Court, affirming the trial court, held that a mortgage foreclosure action is a quasi in rem proceeding. The court distinguished between an action quasi in rem, which is brought against a defendant personally with jurisdiction based on an interest in property and an action in rem, in which one is brought against the property. The court held that since a mortgage foreclosure is an action quasi in rem, a mortgagee is required to name a personal representative for a deceased mortgagor in order for the court to obtain subject matter jurisdiction. The case has far reaching implications for lenders, borrowers, third party purchasers and title insurers in Illinois as well as other judicial foreclosure states.

In McGahan, the court found that prior Illinois decisions have inconsistently characterized a foreclosure as both in rem and quasi in rem. In fact, the appellate court in McGahan concluded that a foreclosure proceeding is an in rem action. Further complicating the issue, the court explained that there are two types of quasi in rem actions. In one, the plaintiff is seeking to apply what he concedes to be the property of the defendant to the satisfaction of the claim against him. However, the one relevant to the court was the type where the plaintiff seeks “to secure a pre-existing [sic] claim in the subject property and to extinguish or establish the non existence of similar interests of particular persons.” Hanson v. Denckla, 357 U.S. 235, 246 p. 12 (1958).

In arriving at its conclusion, the court relied on an older United States Supreme Court case, Freeman v. Alderson, 119 U.S. 185, 7 S.Ct. 165, where the court characterized a mortgage foreclosure as a quasi in rem proceeding. The case involved an action in trespass. The court discussed in rem and quasi in rem proceedings and their distinguishing characteristics. The court observed that although actions such as enforcement of mortgages and other liens deal with property and seek its sale, they are not strictly in rem because they are against the named parties and actions not personal in nature.

The importance of the McGahan case is the necessity of proper jurisdiction of the court over the deceased mortgagor. The law is well settled in Illinois that the court lacks subject matter jurisdiction where a party files suit against a deceased person. Keller v. Walker, 319 Ill. App. 3d 67 (3<sup>rd</sup> Dist 2001). In Illinois, as in other judicial foreclosure states, a mortgagor is a necessary party who has a right to defend against the action. 735 ILCS 5/1501(a). The court found that there was nothing in Illinois law to indicate foreclosure actions were exempt from the general rule that a lawsuit against a deceased person is a nullity. Subject matter jurisdiction cannot be waived. Keller v. Walker, supra. Therefore, the court held that because ABN AMRO failed to name a personal representative as a substitute for McGahan, it lacked subject matter jurisdiction and dismissed the complaint.

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The decision has far reaching consequences for mortgagees, decedent's estates, third party purchasers and title companies. In Illinois, a judgment of foreclosure in the absence of jurisdiction is void and can be attacked directly or indirectly at any time. Based on McGahan, estates of the decedents may intervene in existing cases or attempt to vacate judgments of foreclosure at any time, even after a subsequent sale to a third party. The validity of sale pursuant to a judgment of foreclosure may be questioned. Ultimately, the title of a third party purchaser may be called into question.

In Illinois, bona fide purchasers may be entitled to protection under the Illinois Code of Civil Procedure which protects bona fide purchasers of property from the effects of an order setting aside a judgment affecting title to property if the purchasers were not parties to the original action and a lack of jurisdiction does not appear from the record. 735 ILCS 5/2-1401(e); Bank of New York v. Hatch, 369 Ill. App. 3d. 472 (1<sup>st</sup> Dist 2006). In determining whether a lack of jurisdiction is apparent from the record, the reviewing courts look to the whole record, which includes the pleadings, the return of process and the court's judgment. If the record is sufficient to put a prospective purchaser on notice that jurisdiction is improper, a purchaser is not a bona fide purchaser. The Hatch case concerned personal jurisdiction rather than subject matter jurisdiction. The same analysis would apply to subject matter jurisdiction.

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