

## **Beware of Defective Service! A Lesson in relying on the court to catch invalid service.**

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Many servicers and trustees often ignore complaints until they are properly served. While there are several reasons such a policy makes sense, there is also significant risk associated with this approach. Former servicer, Homeward Residential fka American Home Mortgage Servicing (AHMSI), learned its lesson the hard way.

In *Ramos v. Homeward Residential, Inc.*, the borrower obtained a default judgment in a wrongful foreclosure action against AHMSI. Service was invalid, but the Court Clerk failed to catch it and entered a judgment against AHMSI for \$254,000. AHMSI first learned of the lawsuit and \$254,000.00 judgment, when the local sheriff levied the judgment award against its bank account. AHMSI, through its counsel, Wright, Finlay & Zak, LLP, immediately moved to set aside the default judgment, which the trial court granted. However, the borrower or his counsel had already spent most of the money collected. This article examines the Appellate Court's ruling and the risk of default judgments in the corporate world.

On June 23, 2011, Ramos filed a standard wrongful foreclosure case against the foreclosing servicer, AHMSI. As is customary in California and most states, defendants in litigation are not required to respond to a complaint and, no judgment cannot be entered against them, until the complaint has been properly served in accordance with California law.<sup>1</sup> Until the matter is served, the court does not have jurisdiction over the defendant to enter any relief. "Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void."<sup>2</sup>

Servicing a corporation can be particularly tricky. Under California *Code of Civil Procedure* section 416.10, service on a corporation can only be effected by service on an individual or entity designated as its agent for service of process<sup>3</sup>, service on one of eleven officers or managers of the corporation specified by code<sup>4</sup>, service on a person authorized by the corporation to receive service<sup>5</sup>, or service in a manner authorized by the California Corporations Code<sup>6</sup>. Substitute service on a person to be served under Section 416.10 can also be effected by leaving the Summons and Complaint "in his or her office...with the person who is apparently in charge thereof."<sup>7</sup>

In the *Ramos* matter, opposing counsel hired his son to serve AHMSI. On September 27, 2011, Ramos filed a Proof of Service (POS-1) claiming that AHMSI was served at its Irvine location on July 14, 2011. The Court Clerk, who screens all proofs of service, correctly rejected POS-1 because it did not provide the name of the individual served, but only stated it was an "Authorized Representative/Person In Charge".

On July 21, 2011, Ramos' counsel received a letter from AHMSI directing counsel to serve AHSMI through its registered agent for service of process at an address in Texas. Ramos did not attempt service at that address. Instead, Ramos' counsel filed a second Proof of Service on March 23, 2012 (POS-2). Like POS-1, POS-2 failed to identify who Plaintiff serviced at AHMSI. In addition, POS-2 represented that AHMSI was served the Summons and Complaint on July 4, 2011. Not only does this date differ from the prior representation that service occurred on July 14<sup>th</sup>, but the 4<sup>th</sup> is also a state and federal holiday. Unfortunately, the Court Clerk did not catch the defect this time and entered AHMSI's default. Shortly thereafter, the Court entered a Default Judgment against AHMSI for \$254,000. Ignoring the defective service that lead to the judgment, Ramos and his counsel immediately levied AHMSI's bank accounts. This was the first AHMSI had learned about the Default Judgment.

AHMSI's counsel immediately filed a Motion to Set Aside Default and Default Judgment. In granting AHMSI's Motion, the Trial Court found that service on AHMSI/Homeward was defective and ordered Ramos to return the levied funds. Ramos appealed the ruling.

On appeal, the Court of Appeals affirmed the trial court's ruling setting aside the default judgment. Despite the Appellate ruling, the damage to AHMSI was done.

### *The Lesson to be Learned*

With the barrage of litigation against loan servicers and foreclosure trustees, many of these entities take the position that it will not respond to a complaint until it is properly served. There are several reasons that this is a good policy. First, responding to an unserved complaint can unnecessarily subject a defendant to the jurisdiction of the court. Second, responding to every complaint, especially those that may never end up properly served, can subject a company to unnecessary attorneys' fees and costs. But, AHMSI's experience in the *Ramos* matter may overshadow the benefits of holding out for proper service.

The partners at Wright, Finlay & Zak have been representing servicers and trustees for over 20 years. More than ever, we are seeing pro per plaintiffs and represented plaintiffs filing invalid proofs of service against our trustee and servicing clients. The only hurdle preventing these proofs of service from being accepted and a default entered, is an over-burdened and under-budgeted court clerk's office. This is not the kind of back stop that servicers and trustees need to protect their interests. Moreover, the County Recorder's Office does not confirm service before recording a Lis Pendens, which will cloud the servicer and investor's interest in the property. For these reasons, servicers and trustees should learn from AHMSI's experience and consult with counsel any time that they receive notice, even if improper notice, of a lawsuit. Counsel can track the complaint and routinely check for service to avoid the type of judgment that was entered in the *Ramos* matter.

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<sup>1</sup> Cal. Code Civ. Proc. §§585(a)-(c).

<sup>2</sup> *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4<sup>th</sup> 1426, 1444.

<sup>3</sup> Cal. Code Civ. Proc. §416.10(a).

<sup>4</sup> Cal. Code Civ. Proc. §416.10(b).

<sup>5</sup> Cal. Code Civ. Proc. §416.10(c).

<sup>6</sup> Cal. Code Civ. Proc. §416.10(d).

<sup>7</sup> Cal. Code Civ. Proc. §415.20(a).

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