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A CAUTIONARY DNMS TALE: *BAE V. T.D. SERVICE COMPANY*

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Many times, a borrower will drag a foreclosure trustee into his wrongful foreclosure lawsuit only because it happened to be the trustee named on the various recorded notices. While a Declaration of Non-Monetary Status (DNMS) under California *Civil Code*, section 2924I (Section 2924I) provides trustees with a useful tool to avoid liability for damages or attorney's fees in connection with a nonjudicial foreclosure, filing one does not mean that a trustee can simply forget about the lawsuit. As the trustee in *Bae v. T.D. Service Company* discovered, only the due diligence of the trustee and its counsel can ensure its continuing non-monetary status in the action.

In November 2010, the borrower, James Bae (Bae) filed a wrongful foreclosure lawsuit, alleging several theories of liability, including failure to provide the Notice of Default, emotional distress, and violation of the automatic bankruptcy stay when the lender, Center Bank, foreclosed on the subject property.

On January 27, 2011, TD Service Company of Arizona (TD Service) filed its DNMS under Section 2924I. Under the DNMS, TD Service disclaimed any financial interest in the loan or property, and asserted that it reasonably believed it was named as a defendant solely because "it was the trustee...on the subject [d]eed of [t]rust." Bae did not object within the statutory 15 days following the filing of the DNMS.

Bae subsequently filed a First Amended Complaint (FAC) in March 2011. Believing that it was no longer required to participate in the lawsuit because of the January 2011 DNMS, TD Service did not respond to the FAC.

In July 2011, Bae filed two requests for entry of TD Service's default, which the clerk entered. Bae's counsel mailed copies of the Requests for Entry of Default directly to TD Service, but none to TD Service's attorney of record. In August 2012, Bae requested a default judgment for damages of \$3,000,000.00. In the request for default judgment, Bae's counsel declared falsely

that TD Service never appeared in the lawsuit, despite knowing that TD Service filed its DNMS in January 2011. The Court subsequently entered default judgment, awarding Plaintiff \$3,000,000.00 in damages against TD Service. The judgment did not appear to be served on TD Service or its counsel.

On November 20, 2014, more than two years after judgment was entered, TD Service filed a Motion to Set Aside the Default and Default Judgment. Counsel for TD Service provided a declaration wherein he asserted that he never received any pleadings after the DNMS was filed and that he only learned of the default judgment after Bae began levying TD Service's bank accounts. At a hearing on January 23, 2015, the court set aside the default and default judgment. Bae boldly appealed.

The Court of Appeals went through an extensive analysis of the grounds for obtaining relief from default and default judgment, and it reviewed the trial court's order from the perspective of a court's inherent authority to vacate a default and default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake under *Rappleyea v. Campbell* (1994) 8 Cal.4th 975. Specifically, the appellate court considered extrinsic mistake, available here when the clerk or trial court erred in entering default and default judgment. Under *Rappleyea*, the appellate court examined whether the circumstances met a "stringent three-part formula": 1) was there a

meritorious defense, 2) was there a satisfactory excuse for not presenting its defense, and 3) was TD Service diligent in seeking to set aside default and default judgment. The appellate court resoundingly agreed that the facts met all three factors.

- First, a meritorious defense existed because TD Service, in its DNMS, effectively denied any alleged improper conduct regarding the foreclosure and required notices. In addition, Bae's failure to object to the DNMS established a defense to the relief sought of \$3,000,000.00. Further, TD Service submitted evidence that the sale actually took place *after* Plaintiff's bankruptcy was dismissed.
- Second, the unchallenged DNMS absolved TD Service of

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any further obligation to answer or file any other responsive pleading, and as such, TD Service had a satisfactory excuse for not presenting its defense. Further, the clerk erroneously entered default, despite the fact that a DNMS was filed.

- Third, the appellate court held that TD Service did act diligently in seeking to set aside the default and default judgment. Bae's failure to serve TD Service's attorney of record denied TD Service or its counsel of notice that it needed to seek relief two years earlier. Moreover, TD Service was entitled to rely on its DNMS to shield it from the default. Thus, the trial court's order setting aside the default and default judgment was upheld.

Even then, the appellate court had other grounds to find the trial court's ruling valid on the basis of extrinsic fraud. The court mentioned in passing that extrinsic fraud "usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.'" Here, Bae still sought to take TD Service's default and obtain a \$3,000,000.00 judgment despite knowing of the DNMS and failing to serve TD Service, in contravention of the procedural requirement that he do so. By not serving TD Service's counsel with the Request for Entry of Default or the Judgment, Bae kept TD Service in the dark of his erstwhile intentions. Moreover, there was no record that Bae's counsel even served the actual Judgment, once she obtained it, further keeping TD Service in the dark as to its need to set aside the default and default judgment.

Although all ended well for the trustee, it still required years of litigation and thousands of dollars in attorneys' fees. As a result, all trustees can learn from this cautionary tale. While the appellate court affirmatively ruled that an unchallenged DNMS will prevent a wrongful foreclosure plaintiff from ultimately obtaining a money judgment against it, trustees and counsel must remain vigilant and periodically check the docket to ensure that an unwitting clerk has not been lulled into rubber-stamping a default or default judgment and to prevent plaintiffs' counsel from doing an end-run past the DNMS to obtain judgment. This risk is even greater with pro per plaintiffs and unscrupulous or uneducated borrower's counsel.



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