



The Docket: Latent Service Defects Can Negate Bona Fide Purchaser Status

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The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee, which reviews significant court rulings and other legal developments, and explains the relevance to the title insurance industry.

Lance Pomerantz, New York sole practitioner who provides litigation consultation, strategy and expert testimony in land title disputes, reviews a recent Illinois case imposing a substantial burden on the underwriting process. He can be reached at Lance@LandTitleLaw.com.

Citation: *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, (Ill. App. 2nd Dist., June 30, 2015).

Facts: A senior lender judicially foreclosed its mortgage. A junior lender was a corporation, named in the foreclosure action but dissolved before the action commenced. By statute, service on a dissolved corporation was required to be made on the agent registered with the secretary of state. The senior lender's process server had attempted service on the junior lender at a private residence and failed. The senior lender then moved for permission from the trial court for service by publication. Although the affidavit in support of the motion was completely true, it did not explicitly recite that the failed service was attempted on the wrong person. The court granted the motion.

The property was sold at auction following foreclosure. The auction buyer sold to a third party who obtained a title report showing that junior lender's interest had been extinguished. The third party then resold to a *fourth party*, the defendant Malarz. The junior lender then commenced a foreclosure action against Malarz. Claiming the trial court lacked personal jurisdiction due to defective service, the junior lender asserted that the foreclosure decree did not extinguish its lien.

Holding: The foreclosure did not cut off the junior lender's mortgage and the subsequent purchasers were not *bona fide* purchasers. The affidavit submitted with the motion for publication was held to put the downstream purchasers on inquiry notice that the senior lender had not undertaken a diligent inquiry. Due diligence (on the part of the later buyers) required further inquiry into what the court characterized as "patently apparent discrepancies."

Relevance to the Title Industry: Underwriting best practice typically calls for scrutiny of affidavits of personal or substitute service. Service by publication, which must be authorized by court order, is commonly given greater deference. This case requires that *every* downstream insurer make a complex legal determination, even if the trial court fails to do so. Contrary to the court's characterization, the discrepancy was "latent," not "patent," because its existence could not be determined without reference to the corporate dissolution and registered agent statutes. Underwriting staff, particularly non-attorney underwriters, will need to be trained to identify and analyze these situations.

Read the full opinion [here](#).

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