

BOONE CIRCUIT/DISTRICT COURT  
AUG 30 2004  
BY: PAT GUTZEIT, CLERK DC

MEMO

TO: All Counsel Practicing Foreclosure and Lien Enforcement in Boone and Gallatin Counties, Kentucky

FROM: Office of the Master Commissioner of Boone/Gallatin Circuit Court

Hon. Larry B. Dillon, Boone County Master Commissioner  
Hon. Gregory W. McDowell, Deputy Master Commissioner

Hon. Rhonda W. Huddleston, Gallatin County Master Commissioner

DATE: August 26, 2004

In no particular order the following reminders are frequent errors or omissions in foreclosure and lien enforcement pleadings. Also, where indicated, changes in procedure are noted. This Memorandum substantially conforms to that Memorandum issued by the Kenton Circuit Court dated June 10, 2004; however, it differs in certain material respects and counsel should review it carefully. Beginning October 1, 2004, pleadings will be required to conform to the changes in procedure:

1. The Foreclosure Complaint should be clear that the Plaintiff is exercising its option to accelerate the debt as set forth in the contract document. The Complaint needs to make an allegation that the loan documents are in default, including the date of default. The Complaint must also state the property is indivisible.

2. All parties who have liens or an interest in the subject real estate must be named as parties to the suit.

3. An estate is a non-entity for purposes of litigation. The Administrator or Executor of the Estate of \_\_\_\_\_ is the proper party.

4. If the Plaintiff to be named in the Complaint and the mortgagee/payee in the documents filed in the County Clerk's real estate records are not the same, Mortgage Assignments must be filed in the County Clerk's office, and file-stamped copies of the Assignments must be attached to the Complaint as Exhibits.

5. Change in Procedure: If attorney's fees are included in the Judgment, they must be demanded in the Complaint and supported by the contract documents. When filing a Motion for Default Judgment/Summary Judgment, attach the page of the Note/Mortgage and highlight the paragraph allowing attorney fees to the Attorney's Affidavit for Attorney Fees. The Affidavit for Attorney Fees should also include a statement that the loan documents provide for payment of attorney fees in the event the loan becomes in default and is referred to an attorney for collection. The Affidavit should also include a statement that the attorney is not a regularly salaried employee of the lender and the amount of the agreed to attorney fees in the case should be stated.

6. If a Defendant is a Judgment Lien holder, it is not proper service to serve the attorney who signed and filed the Judgment Lien.

The attorney is not the agent for service of process just by virtue of filing a Judgment Lien.

7. Plaintiffs must file a Lis Pendens, which includes a back reference or source of title, in the County Clerk's real estate records at the time the foreclosure Complaint is filed. All parties to the action should be listed separately in the Lis Pendens. The use of "et al" or "those parties listed in the complaint" is not sufficient.

8. The Commonwealth of Kentucky takes the position that Rule 55.04 precludes taking a default judgment against the Commonwealth. The Commonwealth will file its Answer and Disclaimer, if requested. The point of contact is Mr. Don Guier, Director, Division of Collections, Kentucky Revenue Cabinet, Division of Collections, P. O. Box 5222, Frankfort, Kentucky 40602. Tel.:1-502-564-4921.

9. A Waiver of Conflict must be filed in the action if counsel or the same firm represents two or more parties in an action with conflicting interests.

10. Change in Procedure: When moving for a Judgment and Order of Sale, either by Summary Judgment, Default Judgment, or a combination of both, state the date and method of service of process on each defendant, in both the beginning paragraph of the Motion and the beginning paragraph of the Judgment and Order of Sale.

11. 50 U.S.C. Section 520 requires that counsel file a military affidavit for individual defendants in default. This statute requires a definitive statement that the defendants are not in the military. Stating "to the best of my belief", "to the best of my knowledge", "to the best information and belief" or "upon investigation it is believed" are not statutorily authorized statements. If counsel is reluctant to file the Affidavit, 50 U.S.C. 520 provides an alternative.

12. An Affidavit of Status of Account should accompany every Motion for Default Judgment/Summary Judgment. At the very least it should include the following: (a) default of borrowers, (b) current amounts due including principal, interest, late charges, attorney fees, property protection, taxes/insurance paid, etc., (c) a statement that the property is indivisible and should be sold as a whole.

13. When drafting an Affidavit for a Warning Order attorney in compliance with CR 4.06 for one of the categories of the parties as set out in CR 4.05, use the same language that is used in CR 4.05. Referring to a party's "address" when CR 4.05 requires "residence" renders the Affidavit defective and therefore the Warning Order appointment is a nullity.

14. If a Warning Order Affidavit is made by one other than the Plaintiff, stating any grounds mentioned in CR 4.05, the Affidavit must state the affiant's connection with the Plaintiff and the affiant's belief that the Plaintiff is ignorant of such facts as are unknown to the affiant.

15. Warning Order Reports often omit a statement that "no defense can be made", or erroneously state that "no affirmative defense

can be made". The Report should state that the Warning Order Attorney is "unable to make a defense".

16. The Judgment and Order of Sale shall clearly state whether the Judgment is in personam or in rem as to each defendant.

17. The Judgment and Order of Sale should state it is a final and appealable Order. It should also state the action is reserved on the Court's docket for future appropriate Orders.

18. The post judgment interest rate is the same as the note rate.

19. Every Judgment and Order of Sale must contain at least four (4) items the property is sold subject to:

- A. Current year ad valorem taxes, and thereafter.
- B. Easements, restrictions, and matters of record.
- C. Assessments for public improvements.
- D. Facts which an inspection or survey of property would reveal.

20. The Judgment and Order of Sale must contain the legal description and it must match exactly the one in the mortgage. If there is an error in the mortgage legal description, the Complaint should plead for reformation of it. It cannot be "corrected" at the time of Judgment without first reforming the mortgage. CR 5.01 states a Defendant in default be given notice of anew or additional claim by summons so an amended complaint would need to be filed and the Defendant would need to be served with it.

21. Change in Procedure: Counsel for the Plaintiff shall prepare and tender to the Circuit Judge for signature AOC form 141 on any matter referred to the Master Commissioner for sale, hearing, or otherwise. AOC form 141 shall be tendered to the Court by Plaintiff's counsel along with each Judgment and Order of Sale, Order of Referral to the Master Commissioner for Hearing, etc.

22. A paragraph in the Judgment and Order of Sale must declare the priority of distribution of sale proceeds. The Commissioner's fees and costs are first, ad valorem taxes including tax certificates purchased by non-taxing authorities (such as Ironwood or an individual) are next, and then to the parties according to their priority.

23. Whether the Judgment is in personam or in rem is an obvious point of focus. KRS 454.165 prohibits an in personam Judgment against a constructively served defendant. If there has been a bankruptcy but an in personam Judgment is sought, copies of the bankruptcy orders must be filed in the foreclosure action along with the Motion for Judgment. If moving for an in personam Judgment against both spouses, make sure both signed the note. Frequently they do not.

24. In the case of Bankruptcy filing prior to the filing of a foreclosure, the Complaint should include a paragraph providing the following information:

- (1) Names of the Debtors
- (2) Date of filing Case Number and Judicial forum for the Bankruptcy

- (3) Date of entry of the Bankruptcy Court's Order lifting the Automatic Stay and Abandonment with an entered/file-stamped copy of same attached; or
- (4) Date of entry of the Discharge Order and Abandonment with an entered/file-stamped copy of same attached; or
- (5) Date of entry of Final Decree (case closed) with an entered/file-stamped copy of same attached

In the case of a bankruptcy filing during the course of a foreclosure, a copy of the Bankruptcy Notice should be filed in the case by the attorney for the Plaintiff, and thereafter an entered/file stamped copy of the Order Lifting Stay and Abandonment or Discharge Order should also be filed by Plaintiff's counsel. A BANKRUPTCY PACER DOCKET SHEET WILL NOT BE ACCEPTED IN LIEU OF THE FILING OF THE DOCUMENTS REQUIRED HEREIN. Actions taken in the foreclosure case between the Bankruptcy filing and the Lift of Stay Order or Discharge are void.

25. In the case of a bankruptcy filing stopping a scheduled sale, the procedure in par. 23 and par. 24 above should be followed, and in addition the attorney for the Plaintiff should obtain an Order from the Court re-directing the Commissioner to sell the real estate in accordance with the Judgment and Order of Sale entered on \_\_\_\_\_ (date).

26. In the event the Plaintiff accepts payments on the account after a Judgment and Order of Sale has been entered (reinstatement, Chapter 13, etc.) the Plaintiff must file for an Amended Judgment and Order of Sale which properly reflects the amounts then due.

27. If there is a federal tax lien in the foreclosure, the Judgment and Order of Sale must include a paragraph that the sale is subject to the United States' right of redemption under 28 U.S.C. Sec. 2410.

28. The Order of Sale in the Judgment and Order of Sale shall include the following sentence: The Master Commissioner, the Court and the Plaintiff shall not be deemed to warrant title of the real estate to the Purchaser.

29. Plaintiff's counsel must make sure that the Judgment in the Judgment and Order of Sale adjudges the interest of each defendant named in the Complaint. For example: If a junior lien holder defendant is in default of Answer, include a paragraph in the Judgment and Order of Sale that the defendant is in default of Answer, and it is determined that said defendant has no interest in and to the subject real estate. If a defendant junior lien holder Answers and sets up its claim, include a paragraph in the Judgment and Order of Sale that it is determined said defendant has a lien against the real estate, inferior to that of the Plaintiff.

30. When the Judgment and Order of Sale references "Exhibit A" for the legal description, counsel must make sure that the "Exhibit A" legal description is attached. Many times the Judgment and Order of Sale is tendered to the Court without the "Exhibit A" legal description attached.

31. Every Order and Judgment and Order of Sale submitted to the Court must include the name and address of the Master Commissioner and the name and address of each attorney/party for distribution of the Order by the Circuit Clerk.

32. Change in Procedure: When Motions are filed with the Court; the original Motion should be filed with the Clerk with a courtesy copy to the Master Commissioner. The original of the Judgment and Order of Sale should be tendered to the Master Commissioner for review and should not be submitted directly to the Court. A "have seen" line should be incorporated into the Judgment and Order of Sale for the use of the Master Commissioner. All correspondence, Pleadings and payments will be mailed to the following address for the corresponding Courts:

Hon. Larry B. Dillon  
Master Commissioner, Boone Circuit Court  
6025 Rogers Lane, Suite 447  
Burlington, Kentucky 41005

The Master Commissioner for the Boone Circuit Court may be reached by phone at (859) 334-3916, by fax at (859) 334-3295 and by email at [bcmc@insightbb.com](mailto:bcmc@insightbb.com)

Hon. Rhonda W. Huddleston  
Master Commissioner, Gallatin Circuit Court  
307 W. Main Street P.O. Box 807  
Warsaw, Kentucky 41095

The Master Commissioner for the Gallatin Circuit Court may be reached by phone at (859) 567-2818, by fax at (859) 567-2404 and by email at [r.huddleston@insightbb.com](mailto:r.huddleston@insightbb.com)

33. Change in Procedure: Sales of real estate shall no longer be made on bond of 4, 8, and 12 months' time. The Judgment and Order of Sale should provide sale terms as follows for real estate:

The sale shall be made to the highest and best bidder(s). At the time of sale, the successful bidder(s) shall pay cash or 10% cash, with the balance payable within thirty (30) days, except that the deposit shall be waived if the first lien holder is the successful bidder. Any other purchaser who does not pay cash in full, shall be required to execute a bond, with surety thereon acceptable to the Master Commissioner and pre-approved by the Master Commissioner at least by noon, two (2) business days before the sale date, to secure the unpaid balance of the purchase price, and said bond shall bear interest at the rate of 12% per annum from the date of sale until paid, and shall have the same force and effect as a Judgment and shall remain and be a lien on the property until paid. The purchaser(s) shall have the privilege of paying all of the balance of the purchase price prior to the expiration of the thirty (30) day period. The bond surety must be present at the sale and execute the Sale Bond and the Affidavit of Surety.

The Boone County Master Commissioner shall sell the real estate by public sale on a day and time to be fixed by him on the Courthouse steps of the Justice Center, 6025 Rogers Lane, Burlington, Kentucky unless and only if inclement weather causes the sale to be held in the open area of the Justice Center before going through Security.

The Gallatin County Master Commissioner shall sell the real estate by public sale on a day and time to be fixed by her at the south door of the Gallatin County Courthouse in Warsaw, Kentucky.

34. Change in Procedure: Failure to make payment in compliance with the terms of Sale shall result in the filing of a Motion for Contempt at the next Motion hour following the date by which payment is to be made.

35. Change in Procedure: Upon the Plaintiff withdrawing property from a scheduled sale by the Master Commissioner for reasons other than a bankruptcy filing, the Plaintiff shall pay and deliver the costs to the Master Commissioner no later than 4:00 p.m. on the first business day following the day of sale cancellation.

36. Change in Procedure: In the case of a bankruptcy filing stopping a sale, the Plaintiff shall pay and deliver the costs to the Master Commissioner no later than thirty (30) days after receiving the cost bill from the Master Commissioner.

37. Change in Procedure: In the case of a sale in which the Plaintiff is the successful bidder, the Plaintiff shall pay and deliver the costs to the Master Commissioner no later than thirty (30) days after the sale date. A self addressed and stamped envelope shall be enclosed with full payment of case to return the Deed to Plaintiff's counsel.

38. Change in Procedure: Upon the Plaintiff prior to Sale making arrangements with the defendant borrower(s) to reinstate the loan or accept payments and forebear on pressing the foreclosure action, the Plaintiff shall cause the action to be dismissed without prejudice within sixty (60) days of said arrangements unless otherwise ordered by the Court. The Circuit Judges do not want these cases remaining open with no action for months and in some cases years.

39. Change in Procedure: In every Order of Distribution the Master Commissioner fees and costs will be itemized by the Master Commissioner's Office as follows:

Master Commissioner Judicial Sale Fee	\$ _____
Master Commissioner Deed Preparation Fee	\$50.00
Master Commissioner Report/Recommendation Fee	\$50.00
Advertising Costs	\$ _____
Appraisal Fees	\$ _____
AOC Administrative Fee	\$100.00
Lien Holder	\$ _____
SUB-TOTAL	\$ _____

40. The Master Commissioner does not physically file documents to release liens in the County Clerk's Office. Likewise, the

Commissioner does not pay taxes unless the Commissioner is specifically ordered to do so pursuant to an Order of Distribution.

41. If there are delinquent city and/or county taxes being paid in the Order of Distribution, counsel for Plaintiff must make sure to get the payoffs far enough out to allow the Sale to be confirmed, costs paid, Order of Distribution approved and signed and checks written and mailed.

42. Change in Procedure: In an action involving the property of a party before the Court by constructive service alone, a CR 4.11 Bond with Insurance Company Surety must be filed. Neither Orders of Distribution nor Deeds will be given without the bond. It is the Plaintiff's obligation to file the bond with surety whether or not the Plaintiff actually purchased the property.


43. Change in Procedure: An Assignment of Judgment/Bid must be provided to the Master Commissioner in writing no later than three (3) business days following the Sale date.


44. The legal description attached to the Judgment and Order of Sale must contain the following:

- A. Legible legal description
- B. PIDN
- C. Group No.
- D. Back reference or source of title.

45. Before filing a Complaint, Plaintiff's counsel should determine whether there are single or double-wide manufactured homes (as defined in KRS 186.650) located on the subject real estate against which Plaintiff intends to assert a lien. If so, unless the manufactured home(s) has been converted to real estate, the Complaint needs to specifically describe the manufactured home(s), including make, model, size and Vehicle Identification Number, set forth the legal basis upon which the lien is asserted and attach copies of the legal instruments creating the lien. If the manufactured home has been converted to real estate pursuant to KRS 186A.297, a file/stamped copy of the Affidavit of Conversion with recording information should be attached to the Complaint. If the existence of a manufactured home against which Plaintiff wants to assert a lien is not discovered until after the Complaint is filed and served, CR 5.01 would require that Plaintiff amend its Complaint to include the new or additional claim and re-serve the Defendant(s).

CHANGES IN PROCEDURE APPROVED AND SO ORDERED:

  
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JUDGE ANTHONY W. FROHLICH

  
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JUDGE LINDA R. BRAMLAGE