Dismissal for Failure to Prosecute Creates a Trap for Lender

Amundsen Davis Financial Services Alert
December 5, 2019

Both the Federal Rules of Civil Procedure and the Indiana Trial Rules contain a provision which permits a court to dismiss an action for failure to prosecute the action or failure to abide by court orders. When a party files suit and lets the action languish without action, many courts will issue an order directing the party to move the action forward or face its dismissal. If the court enters an order of dismissal under Federal Rule of Civil Procedure 41(b) or Indiana Trial Rule 41(E), *unless otherwise stated*, the dismissal is treated as a decision on the merits of the claim and will bar later litigation of the underlying claim. One Indiana lender recently found that the consequences of Trial Rule 41(E) can be dire. *Mannion v. Wilmington Savings Fund Society, FSB,* 133 N.E.3d 240 (Ind. App. 2019).

Michael Mannion executed a note and secured it with a mortgage on his residence in November, 1998. Approximately ten years later, he filed bankruptcy and received a discharge from his debts, including any personal liability on the note. As permitted by the Bankruptcy Code, the mortgage remained in place with respect to Mannion's residence, and Mannion was required to make payments if he wanted to retain the real estate. Or was he?

Mannion made no payments after obtaining his discharge, and Bank of America filed a foreclosure suit against him and the real estate in April, 2009. While Bank of America could not obtain a personal judgment against Mannion because his debt had been discharged, the bank would still be able to seek an *in rem* foreclosure of its mortgage and sell the residence to satisfy the amount of the note plus any interest and fees. If a deficiency existed after the sale, the bank would be unable to collect from Mannion. If there was a surplus after the sale, the county sheriff would remit the excess funds to Mannion. But Bank of America failed to move the foreclosure action forward, and the trial court set the matter for hearing. When Bank of America did not appear at the hearing, the trial court dismissed the case pursuant to Indiana Trial Rule 41(E) in April 2011.

In April 2019, Wilmington Savings Fund Society FSB ("Wilmington") filed a foreclosure action against Mannion and alleged that he had failed to make payments due under the note after April 2011, thus creating new defaults which were actionable. Wilmington filed a motion for summary judgment asserting that

PROFESSIONALS

Martha Reddy Lehman
Partner

RELATED SERVICES

Banking & Finance

the residence still secured future payments of the note. Mannion filed a motion for summary judgment and asserted that the April 2011 dismissal had settled the matter conclusively in his favor. The trial court granted Wilmington's motion for summary judgment and ordered a foreclosure sale of the residence. Mannion appealed.

On appeal, the Indiana Court of Appeals ruled for Mannion. The court found that the April 2011 dismissal on the merits had effectively ended the litigation with Mannion as the prevailing party. The court was not persuaded by Wilmington's arguments that Mannion had new defaults since the 2011 dismissal or that it would be unfair to allow Mannion to retain the residence when he had not paid for it. The court opined that the prior lender created the situation by failing to prosecute the foreclosure action. While Wilmington apparently moved its foreclosure suit forward with diligence, that was not enough to overcome the impact of Trial Rule 41(E).

This case provides several important lessons for lenders. First, if a lender files suit, it should be prepared to prosecute the suit with diligence. If there is a need for delay, keep the court informed. Second, if a plaintiff receives a notice regarding the failure to prosecute, it should respond immediately and ask that the action be dismissed (without prejudice) or that the action be allowed to proceed. Third, if a lender is considering the purchase of a note from another lender, the purchaser should conduct due diligence before making the purchase to determine if the note is still enforceable and whether any collateral is still properly secured. These steps can help avoid the unpleasant surprise that awaited Wilmington in this case.