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Practical Aspects of the Statutory Requirements Concerning Diligent Search and Deficiency Decrees

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COMMENTS

PRACTICAL ASPECTS OF THE STATUTORY REQUIREMENTS CONCERNING DILIGENT SEARCH AND DEFICIENCY DECREES

INTRODUCTION

In many areas of the law, the practicing attorney is often unable to find practical guidelines in the reported cases which will aid him in pending litigation. This article will provide an empirical study of two of these areas.

One area concerns the requirement that a "diligent search and inquiry" be made to discover the residence of the defendant before constructive service of process will be allowed.[1] This method of service is widely used in a large part of the domestic relations and real estate[2] litigation in the Dade County circuit courts. Tied in with much of the litigation in real estate matters is the second problem of whether the court will allow a deficiency decree[3] for the amount owing on a purchase money mortgage after the clerk's sale has been made.[4]

These two problems—although unrelated—will have a bearing on the outcome of much litigation and are of great practical importance.

In order to ascertain what the Dade County circuit courts demand in these two areas, interviews were conducted with eight judges of the Eleventh Judicial Circuit.[5] It is hoped their answers will give the lawyer practical solutions which cannot be found in the case law.

In these interviews each judge was asked: (1) what he considered to be the minimum necessary to constitute "diligent search and inquiry"

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1. FLA. STAT. § 48.04(1) (1961).

2. Because of the continuing growth in the number of mortgage foreclosure suits, the constructive service statute (FLA. STAT. ch. 48 (1961)) has become increasingly important. See 6 JUDICIAL COUNCIL OF FLA. ANNUAL REPORT, Exhibit V (1960). The Miami News, on March 21, 1962, p. 1A, reported that 3,572 mortgage foreclosure suits were filed in 1961, compared with 786 in 1957, 1,511 in 1958, 1,620 in 1959 and 2,164 in 1960.

3. A deficiency decree is "one for the balance of the indebtedness after applying the proceeds of the sale of the mortgaged property to such indebtedness." Grace v. Hendricks, 103 Fla. 1158, 1169, 140 So. 790, 794 (1932).

4. FLA. STAT. § 702.02(2) (1961) provides: "In any final decree of foreclosure, the court shall direct its clerk to sell the mortgaged property at public sale on the day specified in such final decree . . . . "

5. Prior to these interviews, each judge was assured that he would not be quoted by name, nor identified by any reference to his division.

under the statute,[6] and (2) what elements he would consider in granting or denying a deficiency decree to a purchase money mortgagee.[7]

The interviews revealed that the courts impose different standards of "diligent search and inquiry" in real estate actions than in divorce litigation. A separate discussion of the requirements of each will be made.[8]

I. DILIGENT SEARCH AND INQUIRY

"Diligent search and inquiry" under the Constructive Service of Process Statute[9] imposes the requirement of "reasonable diligence"[10] or "due diligence."[11]

In the leading case of *McDaniel v. McElvy*,[12] the Florida Supreme Court outlined the following requirements for diligent search and inquiry:

> What and how much evidence the court shall require to satisfy it upon the question of due diligence in these matters rests largely with the court granting the order. Extraordinary steps to ascertain the whereabouts of the party are not required. But judgments which exclude persons from any interest in or lien upon land should not be rendered without actual notice, when by the exercise of reasonable diligence actual notice can be given. Reasonable diligence in such matters is an honest effort, and one appropriate to the circumstances, to ascertain whether actual notice may be given, and, if so, to give it. Such effort, however, need not embrace a search in remote parts of the state . . . ; and it is not essential that

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6. FLA. STAT. § 48.04 (1961) provides: "The sworn statement of the plaintiff, his agent or attorney, for service of process by publication against a natural person, shall show: (1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant."

7. FLA. STAT. § 702.06 (1961) reads in part: "In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court . . . ."

8. FLA. STAT. § 48.01 (1961) enumerates the types of suits or proceedings in which service of process by publication may be had. Divorce actions, mostly uncontested, foreclosure and quiet title suits provide the bulk of the actions in which constructive service is permitted. See 6 JUDICIAL COUNCIL OF FLA. ANNUAL REPORT, EXHIBIT V (1960).

9. FLA. STAT. ch. 48 (1961).

10. Grammer v. Grammer, 80 So.2d 457, 460 (Fla. 1955); McDaniel v. McElvy, 91 Fla. 770, 807, 108 So. 820, 833 (1926): "[I]n suits of this nature, where personal service cannot be effected after the exercise of reasonable diligence and an honest and conscientious effort to do so, appropriate to the circumstances, a reasonable method of imparting notice by publication which affords the defendant reasonable opportunity to receive the notice and present his defense, having reference to the character of the suit and the probable place of residence of the defendant, is due process of law, provided the requirements of the statute be strictly followed."

11. *Id.* at 800, 108 So. at 831. The *McDaniel* case construed the term "diligent search and inquiry" contained in Fla. Laws 1925, ch. 11383, § 3, at 138.

12. 91 Fla. 770, 108 So. 820 (1926). See KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE § 73, at 144 (1939); 10 FLA. JUR. *Divorce* § 77, at 488 (1956); 25 FLA. JUR. *Process* § 31, at 409 (1959).

> all possible or conceivable means should be used. But the effort should usually extend to inquiry of persons likely or presumed to know the facts sought.[13]

Three-fourths of the judges said a different standard was applied in a divorce action than in a real estate action with reference to the minimum diligent search required, and the manner of diligent search employed. These judges believed an examination by the judge of the attorney or his client in a divorce action should be much more stringent than the examination of the plaintiff's attorney in an action involving real estate.[14] Their reasoning was that in an action involving real estate, the title would be questioned subsequently by many different attorneys who had occasion to examine the abstract on that particular parcel of real estate. Therefore, inasmuch as suits involving property are more frequently questioned later, it is presumed the attorney will comply with the requirements in the first instance, even though he is not questioned at the time, because his diligence will be questioned at a subsequent date. One judge stated that "in many cases the plaintiff does not want to find the man [because the plaintiff would like to have the suit uncontested];[15] however, most people can be found if you really want to find them."[16]

A. *Real Estate Actions*

The cases dealing with real estate provide some interesting examples of the requirements of diligent search and inquiry. A mortgagee who lived across the street from the mortgaged property, which had been rented, was held to have failed to exercise reasonable diligence when he failed to inquire of the tenant as to the mortgagor's current address.[17]

In another case, when the defendant took title to real property under a deed which recited his address, service by publication against this defendant, accompanied by a sworn statement that the defendant's residence was unknown, was invalid since it was shown the defendant still lived at the address recited in the deed.[18]

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13. 91 Fla. at 804, 108 So. at 832.

14. One judge expressed it in terms of "the social issue of the validity of remarriages being involved."

15. By way of illustration, this judge recalled an instance in a divorce action in which the plaintiff's attorney alleged that the defendant-wife resided at a particular address in California. The plaintiff's "girl friend" lived at that address, however, and received the summons for the wife. Subsequently, the wife, not having received notice of the suit, successfully had the divorce decree set aside.

16. One of the judges reported that a former colleague used to ask the classic question of attorneys seeking constructive service, "If the defendant owed you $50,000, you could find him, couldn't you?" Whereupon, he would flatly deny the use of constructive service on the "unknown" defendant.

17. MacKay v. Bacon, 155 Fla. 577, 20 So.2d 904 (1945).

18. Davock v. Whelen, 156 Fla. 670, 24 So.2d 46 (1945).

Furthermore, if the correct address of the defendant could have been ascertained from the records of the tax collector or the clerk of the circuit court, and this inquiry was not made, the decree will be set aside.[19] It is a lack of due diligence to fail to check the telephone directory or city directory to ascertain the correct address of the defendant, when the defendant's address could have been so obtained.[20]

One of the judges said that if an attorney's name and return address are shown on the deed rather than the defendant's address, the attorney should be contacted and inquired of as to the whereabouts of the defendant. Most of the judges stated that as a minimum, the plaintiff should have inquired of the: (1) tax collector;[21] (2) clerk of the circuit court;[22] (3) telephone or city directory;[23] (4) information operator; and, (5) of course, tenants in possession as to the whereabouts of the defendant. The plaintiff also should send a letter to the defendant's last known address.[24] One judge thought that recent employers, if known, should be contacted as to the defendant's whereabouts. Most of the judges agreed that neighbors of the property in question should be asked about the present residence of the defendant, and they also agreed that relatives, if known, should be similarly questioned.

None of the judges thought it necessary to employ steps such as checking the schools,[25] the motor vehicle commissioner,[26] utility companies, the probate and marriage records, or hiring a credit bureau or investigator to seek the defendant. This evidence, while good, is ordinarily cumulative and unnecessary to comply with "diligent search and inquiry."

B. *Divorce Actions*

In divorce cases three-fourths of the judges said that an absolute minimum was inquiry of the defendant's relatives as to his present address. These judges require the plaintiff to have written to the last address of the spouse, or to have inquired of the latter's family. Some judges even require a special hearing to take evidence on whether the defendant's residence had been inquired of from his family. Other judges require copies of the

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19. Adams v. Fielding, 148 Fla. 552, 4 So.2d 678 (1941).
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. From a practical viewpoint, a letter to the last known address of the defendant would be the first and most direct step in ascertaining the whereabouts of the defendant. If the letter is returned with no forwarding address shown, *then* the attorney would be obligated to commence his "diligent search and inquiry."
25. Schools could be contacted to acquire the defendant's current address in the event the defendant has school-age children.
26. The motor vehicle commissioner could be contacted to inquire if the defendant had purchased a driver's license or an automobile tag anywhere in the state.

correspondence from the defendant since the filing of the bill which would show that the defendant had actual knowledge of the suit. Also, the judges related that the varying circumstances of a suit would usually dictate the amount and type of diligent search which should be conducted. One judge said that diligent search was not required in a divorce action based on desertion, since the plaintiff had not heard from the defendant for eight years. This judge said in other divorce actions he merely required that the plaintiff have written the friends and relatives of the defendant to ascertain the defendant's address.

Due to his belief that divorces should be freely granted, one judge stated that he imposed very lenient requirements with reference to diligent search. Most of the other judges said generally that the minimum requirements of diligent search and inquiry in a divorce action would be: (1) a letter to the defendant's last known address;[27] (2) a check of the local telephone book or city directory;[28] (3) an inquiry of the information operator; and (4) a check with the defendant's relatives, if they can be ascertained. Furthermore, any special information which the plaintiff has should be investigated in an effort to ascertain the defendant's residence. For example, if the defendant is a veteran collecting compensation, his address should be obtained from the Veterans' Administration. If the defendant is eligible for social security, that bureau should be checked. If the defendant is in frequent trouble, or has been known to be in trouble with the police, a search of the police records should be made.

The minimum standards are required in all cases. Any additional requirement will vary from case to case, depending on the facts and circumstances known.

II. Deficiency Decrees

In the area of deficiency decrees, the major problems arise in purchase money mortgage situations.[29] Ancillary to these is the problem of what constitutes a purchase money mortgage.[30] Is a lender who takes a mortgage

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27. See note 24 *supra.*

28. Adams v. Fielding, 148 Fla. 552, 4 So.2d 678 (1941).

29. It should be noted that Fla. Stat. § 702.06 (1961) distinguishes the remedy of a purchase money mortgagee to wit: "In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor."

30. The traditional definition of a purchase money mortgage is "a mortgage given, concurrently with a conveyance of land, by the *vendee to the vendor*, on the same land, to secure the unpaid balance of the purchase price." (Emphasis added.) Black, Law Dictionary 1162 (4th ed. 1951).

as security at the exact time of the sale of property by the third party grantor to the grantee-borrower a purchase money mortgagee?

This question does not appear to be clearly settled by the Florida Supreme Court, but in the case of *Cheves v. First Nat'l Bank*,[31] the court held:

> A mortgage to secure the purchase money given by a purchaser of land simultaneously with the conveyance of the land to him, *does not necessarily* lose the character of a purchase-money mortgage merely because taken in the name of a person other than the vendor, *by the vendor's procurement*.[32]

Three of the judges interviewed said that they would feel obligated to abide by the *Cheves* decision and hold a lender to be a purchase money mortgagee. The other judges, however, said that a lender should not be considered to be a purchase money mortgagee[33] and one judge said that the supreme court would not hold the same way today.

The Internal Revenue Service in conceding the priority of a purchase money mortgage over a federal tax lien stated

> that the test of when a mortgage is a purchase money mortgage is not whether it is executed to the vendor but whether the proceeds are to be used to apply on the purchase price. Thus, a purchase money mortgage should be given precedence over all other claims or liens arising through the mortgagor though prior in time, regardless of whether the mortgage was executed to the vendor or to a third person if such purchase money mortgage was executed as part of the same transaction as the execution of the deed of purchase . . . .[34]

The writer of the Florida Bar Journal article in which the above "concession" was reported concluded: "No reason is seen why the above position is not applicable to purchase money mortgages generally and not merely to those given to the V.A."[35]

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31. 79 Fla. 34, 83 So. 870 (1920).

32. *Id.* at 41, 83 So. at 872. (Emphasis added.) The Lawyer's Title Guaranty Fund has argued that the *Cheves* case can be distinguished because it appeared that the mortgagee was acting as agent for the vendors and took the mortgage in its name at the vendor's specific request, and has concluded that "we do not consider that the cases could be relied on as the basis for a conclusion that, in the instant case, the mortgage to the federal savings and loan association necessarily would be held to be within the same category as a purchase money mortgage." See LAWYER'S TITLE GUARANTY FUND TITLE NOTE 174-58.

33. Their reasoning was that a commercial lending institution should not be categorized as a grantor of real property.

34. This concession appeared in a letter to the Veterans' Administration dated July 20, 1960. 35 FLA. B.J. 203, 204 (1961).

35. *Ibid.*

Settlement of this controversy will require an opinion by the Florida Supreme Court.

There is no absolute right to obtain a deficiency decree in a foreclosure action.[36] Whether or not this decree will be granted is held to be "within the sound judicial discretion of the court."[37] The discretion vested in the court must be supported by established equitable principles and is, of course, subject to review on appeal.[38]

In the leading case of *Taylor v. Prine*,[39] in which the chancellor denied the deficiency decree solely because the mortgage involved was a purchase money mortgage, the Florida Supreme Court held:

> the chancellor may take into consideration the fact that the mortgage involved is a purchase-money mortgage, and that the mortgagee became the purchaser at the sale. Those facts, however, standing alone, and in the absence of other equitable considerations, are not sufficient grounds upon which to deny the mortgagee-complainant a deficiency decree.[40]

The court, however, affirmed the chancellor's order on the equitable ground that the land was re-acquired by the mortgagee at the sale for less than five per cent of the mortgage indebtedness and concluded that "the chancellor's order . . . should not be condemned, upon equitable principles . . . , even though the chancellor assigned an insufficient reason for making the order . . . ."[41]

In *Houk v. Weiner*[42] the court, citing no cases, flatly held that the denial of a deficiency decree was no abuse of discretion when the purchase money mortgagee bought the property at a master's sale for a price far less than the amount due under the mortgage.[43]

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36. The jurisdiction of the equity court to grant a deficiency decree in a foreclosure action is permissive rather than mandatory. See 22 FLA. JUR. *Mortgages* § 413, at 511 (1958) and cases cited therein.

37. See note 7 *supra*.

38. See 22 FLA. JUR. *Mortgages* § 418, at 521 (1958) and cases cited therein.

39. 101 Fla. 967, 132 So. 464 (1931).

40. *Id.* at 969, 132 So. at 465.

41. *Id.* at 970, 132 So. at 466.

42. 53 So.2d 304 (Fla. 1951).

43. In the Decree Confirming Sale in the Circuit Court of the Eleventh Judicial Circuit, Chancery No. 128665, Judge Charles A. Carroll ordered:

> "2. Plaintiff's motion or application for a deficiency decree against the defendants is hereby denied.
>
> "3. The denial of the motion for deficiency decree is made in the attempted exercise by this Court of its discretion. The Court is cognizant of the fact that it has no real discretion in this matter, and that the Court may deny a deficiency decree only where good, sound equitable reasons exist in favor of the defendants why they should not be charged with a deficiency decree in addition to their loss of the property which was involved in the foreclosure suit.
>
> "4. Strong equities of that character exist in favor of the defendants in

A. *Real Property*

Three-fourths of the judges said there was a difference in the considerations relied upon in granting or denying a deficiency decree in a purchase money mortgage situation involving real property and one involving a chattel.[44] All of the judges said, in effect, that deficiency decrees *ordinarily* should not be granted to a purchase money mortgagee on the foreclosure of real property. The question to the purchase money mortgagee of real property upon his application for a deficiency decree is, "can you show that the security upon which your mortgage was taken has been so depreciated, reduced, or impaired as to entitle you to a deficiency decree?"[45]

The judges agreed that the main circumstance which would entitle a purchase money mortgagee of realty to a deficiency decree would be acts of waste or destruction to the property by the mortgagor.[46] The judges were split on whether abnormal depreciation or a severe drop in market value should entitle a purchase money mortgagee to a deficiency decree.[47]

B. *Chattels*

As stated above, most of the judges said there was a different consideration made on the application for a deficiency decree in respect to a chattel. The eight judges were split exactly on the question of whether they would grant a deficiency decree to a purchase money mortgagee of a chattel.[48] As in real property mortgages, the most important element considered is whether there had been an act of waste to the chattel by the mortgagor, and all of the judges agreed that a deficiency decree would issue in that event. One judge remarked, however, "I have never granted a deficiency decree to a purchase money mortgagee on anything." Generally, it can be said that all of the judges were more prone towards granting a deficiency decree to a chattel mortgagee than a real property mortgagee, *if* they would grant one at all.

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> this suit in the opinion of this Court, which preclude the granting of the deficiency decree. . . . [T]he report of sale here shows that the mortgagee-plaintiff bought the property in at the sale, and so has regained the property together with such amounts as were paid thereon prior to foreclosure."

44. One judge reasoned that the legislative intent of FLA. STAT. § 702.06 (1961) pertaining to deficiency decrees was to afford relief to mortgagors of real property who had over-extended themselves during the "boom." He said that he did not believe that the legislature intended that it apply to chattel mortgagees also.

45. The judges thought that in the absence of such a showing, the mortgagee should be required to take back the property for the amount owing on the mortgage since it should be presumed that the property, when purchased, was "worth the money."

46. It is odd in the opinion of the writer that no Florida cases can be found which hold to this effect. However, this seems to be a very realistic approach.

47. In such a situation some judges felt that to deny a deficiency decree would be too harsh a penalty on an "innocent" mortgagee.

48. See note 44 *supra*.