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"Good cause": A phrase in search of a definition

By Michael G. Cortina

Any attorney that practices in commercial litigation will eventually come into contact with the Illinois Mortgage Foreclosure Law[1] ("IMFL") for one reason or another. While well drafted, some portions of the IMFL are vague and open to interpretation and one such area relates to the right to possession of property subject to foreclosure. Specifically, the phrase "good cause," as used in the IMFL to establish a mortgagee/mortgagor's pre-judgment possession rights in real estate subject to foreclosure, has troubled the Illinois courts as they struggle to find a definition for the phrase.

Right to Possession Under the IMFL

Under section 15-1701 of the IMFL, certain presumptions exist regarding a party's right to pre-judgment possession of the real estate subject to foreclosure. Simply put, mortgagors (debtors) are presumed to be entitled to possession

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Marzano is overruled, and there was much rejoicing

By Michael G. Cortina

In 2008, the Appellate Court of Illinois made a ruling that turned the issue of personal jurisdiction into a chilling world of confusion and unintended results. On the first day of Spring, 2014, the Illinois Supreme Court thawed the ice by overruling the 2008, decision of the Appellate Court, among others, and returned the issue of personal jurisdiction to its rightful place.

In early 2009, this author published an article regarding the Second District case of *GMB Financial Group, Inc. v. Marzano*[1] and criticized the decision as one that created traps for the unwary. Six years later, the Illinois Supreme Court has returned the issue of a court's jurisdiction back to where it was intended by overruling *Marzano* and other cases that held along similar lines that strayed from the path created by the legislature.

This article briefly reviews the decision of *BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP v. Mitchell*[2] and how it overruled *Marzano* and held that a party's waiver of personal jurisdiction is prospective only and does not retroactively validate void orders entered by the circuit court without personal jurisdiction.

The previous article on the *Marzano* case summarized the state of the law of personal jurisdiction:

> Prior to the year 2000, parties who wanted to contest service of a summons needed to file a "Special and Limited Appearance," whose sole purpose was to contest jurisdiction. This became something of a well-known trap for parties and attorneys because many times attorneys did not know that they had grounds to contest service (and therefore the court's jurisdiction over the defendant) until after they became more involved in the case. If the attorney filed a general appearance before they filed a "Special and Limited Appearance," the issue was deemed waived and the party was considered to have given the court jurisdiction by failing

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of *residential* real estate, while mortgagees (lenders) are presumed to be entitled to possession of all types of real estate *other than residential*.

When dealing with residential real estate, a mortgagee can overcome the presumption in favor of the mortgagor, and be placed as mortgagee in possession of the real estate, if: 1. The mortgagee is authorized to possession under the terms of the mortgage; 2. The court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing; and 3. The mortgagee objects to the mortgagor's possession showing "good cause" why the mortgagee should be in possession.

In commercial or non-residential real estate, the mortgagee is presumed entitled to possession if it is authorized under the terms of the mortgage and the court is satisfied that there is a reasonable probability of success that the mortgagee will prevail on the merits. However, a mortgagor can overcome this presumption by showing "good cause" why he should remain in possession.

Under either type of mortgage (residential or commercial), the burden is on the mortgagee to establish a right to possession under the mortgage and a likelihood of success at a hearing on the merits. Establishing these criteria rarely presents a problem for a mortgagee - they either do or do not have a right to possession under the contract or adequate grounds for foreclosure. It is the burden of establishing "good cause" that shifts depending on the type of real estate at issue.

To obtain pre-judgment possession in a residential foreclosure, a mortgag*ee* must, in addition to the other requirements, establish "good cause" why it should be placed in possession. Similarly, in a commercial foreclosure, a mortgag*or* must establish "good cause" to remain in possession of commercial real estate while a mortgage foreclosure is pending.

Difficulties arise for either party attempting to establish good cause under the IMFL because few Illinois courts have addressed this issue and those that have addressed good cause argument have failed to provide concrete guidance as to what exactly constitutes "good cause."

The question is therefore begged, what is "good cause"?

Good Cause

There are no cases in Illinois that provide a specific definition for "good cause." However, there are some cases that tell us what is *not* good cause, and they are instructive.

The *Travelers* Case

In *Travelers Ins. Co. v. LaSalle Nat. Bk.*, 200 Ill. App. 3d 139 (2nd Dist. 1990), the mortgagee moved for possession of non-residential property that was subject to foreclosure. While *Travelers* is primarily cited as one of the first cases to address which party has the burden to show "good cause" when the mortgagee seeks possession, it also teaches us that the fact that the mortgagee is adequately protected is not "good cause" for the mortgagor to remain in possession. In this case, the mortgagor of non-residential property claimed that the mortgagee did not lack adequate protection and therefore should not be placed in possession. The court, however, concisely noted that whether the mortgagee is adequately protected is not a relevant consideration because the IMFL does not limit the mortgagee's right to possession to the time when it lacks adequate protection. Therefore, adequate protection, or lack thereof, is not "good cause."

The *Mellon* Case.

In *Mellon Bk., N.A. v. Midwest Bk. & Trust Co.*, 265 Ill. App. 3d 859 (1st Dist. 1993), the mortgagor of commercial property objected to the mortgagee's motion to be placed in possession and for the appointment of a receiver. The mortgagor advanced three arguments to allege "good cause." First, the mortgagor attempted to portray the mortgagee as "an unscrupulous bank taking advantage of a poor, unsophisticated land owner in dire financial straits." *Mellon*, at 869. The court, however, noted that the mortgagor was anything except unsophisticated and was also represented by a prominent Chicago law firm. Therefore, the court rejected the first argument claiming "good cause."

The second argument claiming "good cause" was that the mortgage allegedly lacked consideration. Again the court disagreed with the mortgagor and held that consideration was present in the mortgage.

The final argument claiming "good cause" was that the mortgagee was estopped from foreclosing because they had accepted late payments in the past. Once again, the court determined that this argument lacked merit and quoted from the exhibits to show that the estoppel argument failed.

What is interesting about *Mellon* is that "good cause" may have existed for the mortgagor to remain in possession if it had been successful in its arguments. The court did not say that these arguments were not sufficient to establish "good cause", the court merely found that the arguments lacked merit. Therefore, any of the three arguments in *Mellon*, if proven, could be considered "good cause."

The *Home Life* Case.

In *Home Life Ins. Co. v. American Nat. Bk. and Trust Co.*, 777 F.Supp. 629 (N.D. Ill. 1991), the court considered another "good cause" argument by a mortgagor attempting to maintain possession of commercial property. In *Home Life*, the mortgagor claimed that no other entity was more qualified than the current manager of the property and that the appointment of a receiver would only result in a lesser-qualified person managing the building. The court held that it was the mortgagor's burden to show why it should remain in possession and not the mortgagee's burden to show good cause for the appointment of a receiver. The fact that the mortgagor's manager is qualified and experienced in property management was not sufficient to establish "good cause" where the mortgagee had shown that the property was in default.

Next, the mortgagor claimed that negotiations to lease the property would be hampered if a receiver were appointed. The court held that the alleged possibility of threatened lease negotiations (with the only evidence in support being an affidavit from the mortgagor) was insufficient to establish "good cause." The court also noted that if the threatened lease argument were successful, then it would be next to impossible for a mortgagee to ever be placed in possession because a mortgagor would only have to claim that lease negotiations were threatened in order to maintain possession.

Summary

"Good cause" has *not* been established under the following arguments advanced by

mortgagors:

1. The mortgagee is adequately protected;
2. The manager of the real estate is highly qualified;
3. Threatened lease negotiations.

"Good cause" was claimed, but not proven, by mortgagors by making the following arguments:

1. The mortgagor was unsophisticated and the mortgagee was an unscrupulous lender taking advantage of the dire financial conditions of the mortgagor;
2. The mortgage lacked consideration;
3. The mortgagee is estopped from foreclosing because it accepted late payments.

Therefore, caselaw has only given us guidance on what is not "good cause." Unfortunately, that is akin to defining an antelope by saying it is not an elephant; of course this does not define an antelope because it merely tells us that it is not a large, gray herbivore with a long trunk. This shows the need for more guidance from the legislature on a real definition of "good cause."

Bankruptcy Code

A lesson on defining "good cause" can be found in Chapter 11 of the United States Code (the "Bankruptcy Code"). Under Section 1104 of the Bankruptcy Code (*11 U.S.C. 1104*), the term "cause" is used for the situation where the appointment of a trustee is sought for bankruptcy estates under Chapter 11 of the Bankruptcy Code. Under Section 1104:

> the court shall order the appointment of a trustee -
>
> > (1) *for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management*, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor of the amount of assets or liabilities or the debtor.

11 U.S.C. 1104(a) (emphasis added).

The Bankruptcy Code's definition of "cause" is tailored to the specific situation needed - the appointment of a trustee in a Chapter 11 case when the manager of the debtor's affairs needs to be replaced. It has also been expanded to include other situations, such as when the current management has a conflict of interest. *See, In re Cajun Electric Pwr. Coop.*, 74 F.3d 599 (5th Cir. 1996). While the Bankruptcy Code's definition of "cause" is still rather broad and is not limited to only fraud, dishonesty, incompetence, or gross mismanagement, it at least provides some guidance as to what "cause" could be with a non-exclusive list. The Illinois legislature could draft an equally useful definition of "good cause" in the IMFL using the Bankruptcy Code and current case-law for guidance as to what "good cause" should mean; at the very least, the definition could give examples of "good cause" as the Bankruptcy Code gives examples of "cause" by using a non-exhaustive list of examples.

Conclusion

While some cases have been instructive on what is *not* "good cause," there is still the lack of a concrete definition of what actually constitutes "good cause." Until the IMFL is amended to include a definition of "good cause," mortgagors and mortgagees alike will be saddled with the burden of creating arguments as to why "good cause" exists and leave the decision to the discretion of the trial court judge. ■

1. 735 ILCS 5/15-1101, et seq.

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to contest service before filing an appearance.

The Illinois legislature finally dealt with this trap by amending the Code of Civil Procedure in the year 2000. Public Act 91-145, effective January 1, 2000, eliminated "Special and Limited Appearances" altogether and thereby ceased the elevation of form over substance. The statute at issue, 735 ILCS 5/2-301, now allows parties to object to the court's jurisdiction after the filing of a general appearance, but it must be done "prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear." The new section of the statute, section a-5, reads:

> If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person.[3]

Subsequent to the year 2000, amendment, however, a conflict arose between the appellate courts in the State about the meaning of the amendment. Some courts held that a voluntary submission to jurisdiction acted prospectively only (that is, from the date of the submission forward), while others, like *Marzano*, held that a voluntary submission acted both prospectively and retroactively. As the Illinois Supreme Court noted in the *Mitchell* case, "the critical issue here, though, is whether the waiver of all objections applies retroactively to validate an order or judgment entered without personal jurisdiction."[4]

The fear of the consequences of *Marzano* and its progeny was noted using an example in the previous article on the *Marzano* decision:

> …. suppose a plaintiff obtains a money judgment against a defendant, but never properly served the defendant with a complaint and summons. Then, the plaintiff engages in supplementary proceedings in order to collect the judgment, and serves a third-party citation to discover assets on the defendant's bank. The bank freezes the defendant's account and answers the citation. Fearing the fallout of bouncing checks, the defendant appears in court and objects to the proposed turnover of funds by claiming that the account is exempt from turnover. The citation is then dismissed after the funds are held to be exempt.

Under *Marzano*, by appearing in court and asserting an exemption, the defendant has acted to waive the objection to the court's jurisdiction over her even though she only acted in post-judgment supplementary proceedings. Justice O'Malley made it clear that waivers apply both prospectively and retroactively. Under *Marzano*, Due Process is in serious jeopardy.[5]

In *Mitchell*, the Illinois Supreme Court analyzed the year 2000, amendment to the personal jurisdiction statute to determine whether it was intended that a waiver of personal jurisdiction be both prospective and retroactive, or prospective only. The Court held that the amended statute "is ambiguous as to the effect of a party's waiver or prior orders entered without personal jurisdiction."[6] The Court then viewed the sparse legislative history on the amendment and quoted Sen. Hawkinson's explanation for the amendment which stated that the amendment was just a "cleanup"[7] that was "designed to prevent an unknowing waiver."[8] After reading Sen. Hawkinson's rationale for the amendment, the Court quickly concluded that the amendment was intended to prevent an unknowing waiver of a party's objections to personal jurisdiction and not create new methods to unknowingly waive those same objections.

After concluding that the amendment was not intended to create new jurisdictional traps for the unwary, the Court was able to easily conclude that it was not the legislature's intent to adopt a rule that allowed for a defendant's waiver to validate retroactively orders entered without personal jurisdiction.[9] The Court reaffirmed what it called the "longstanding rule that 'a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date.'"[10]

The decision in *Mitchell* is a welcome one as it returns clarity to what had become a rather murky area of the law. Prior to *Mitchell*, courts in the First District dealt with dueling decisions on whether waivers of personal jurisdiction could be retroactive or not; but courts in the Second District had little choice but to follow the holding of *Marzano* and apply waivers of jurisdiction prospectively and retroactively.

Now, thanks to the *Mitchell* decision, the fear of an inadvertent waiver, or the transformation of a void judgment into a valid one, has been eliminated. ■

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1. *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2nd Dist. 2008).
2. *BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311 (March 20, 2014).
3. Michael G. Cortina, *Trapping Peter to Save Paul: How* Marzano *Creates a Jurisdictional Trap for Defendants*, Commercial Banking, Collections and Bankruptcy Section Newsletter, vol. 53, no. 3, Jan. 2009.
4. *BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP v. Mitchell*, at par. 35.
5. Michael G. Cortina, *Trapping Peter to Save Paul: How* Marzano *Creates a Jurisdictional Trap for Defendants*, Commercial Banking, Collections and Bankruptcy Section Newsletter, vol. 53, no. 3, Jan. 2009.
6. *Mitchell.* at par. 38.
7. *Id.* at par. 39, *quoting* 91st Ill. Gen. Assem., Senate Proceedings, Mar. 11, 1999, at 42-43 (statements of Senator Hawkinson).
8. *Id.*
9. *Id.* at par. 43.
10. *Id.*