

# Did You Know?

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## MORTGAGE FORECLOSURE - IRREGULARITY OR JURISDICTION DEFECT

RPAPL Section 231(2)(a) requires publication of the Notice of Sale in a city where the newspaper is published, where the property is located in a city. Publication is generally considered to be an area where it is issued and first distributed for circulation. (cf. *Vil. Of Tonawanda v. Price*, 171 NY 415). Although the property was located in the City of Yonkers, the final judgment required that the publication of the Notice of Sale be made in the Reporter Dispatch, a newspaper published in White Plains, and distributed throughout the County of Westchester. All postings of the said Notice were made within the City of White Plains.

Defendant moves to vacate the Final Judgment on the ground that the cited provisions were violated; and that he was not given personal notice of the sale, since he had made three monthly payments after the action to foreclose was commenced.

Dealing with the publication issue, the Court noted that older cases strictly construed as jurisdictional any variances to the provisions of the predecessor version of the Civil Practice Act. However, since the enactment in 1963 of the CPLR, and particularly of Section 2003, actions were allowed within one year to set aside a final judgment upon failure to comply with the provisions of the CPLR, provided “a substantial right of a party was prejudiced by the defect.” (cf. *Gegerson v. Northern Operating Corp.*, 342 NYS2d 424 [AD], holding that Section 2003 which relates only to “the notice, time or manner of the sale,” was applicable to mortgage foreclosure proceedings.) Many such variations have been considered to be mere irregularities, not amounting to jurisdictional defects. (See many cases cited as to failure to publish; and failure to properly post.)

Examining the facts presented in many other cases in which a sale had been vacated, and others in which it had not, this Court concluded that in the subject matter, there was no prejudice shown. Among the determining facts herein, was the fact that a third-party was the successful bidder.

Citing *PNA v. White Eagle Hall Co.* (470 NYS2d 642 [AD]), this Court further held that a party who did

not appear in the action, is not entitled to receive a notice of sale. The making of some monthly payments does not achieve this end.

***CME Group, Ltd. v. Cellini***

661 NYS2d 740 (S. Ct. Westchester Co.-1997).