



nerej

Massachusetts foreclosure practice in light of the Ibanez decision

June 17, 2010 - Front Section

The recent Land Court decision in the case of U.S. Bank National Association, as Trustee v. Ibanez and its two consolidated cases has created a conflict with REBA Title Standard #58 and its underlying rationale.

Pursuant to the title standard, a title is not defective by reason of "The recording of an assignment of mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." In a nutshell, this means that if B forecloses a mortgage originally held by A, it is immaterial whether A's assignment predates or postdates the foreclosure sale.

In Ibanez and in the other two cases-Rosario and Larace-the Land Court ruled on the validity of three different scenarios relating to the date of the assignment vis- a- vis the date of the first publication of the mortgagee's sale of real estate/foreclose sale. In Rosario, the assignment was in existence and in recordable form (although not recorded) at the time of the first publication. In Larace, the assignment was dated after the date of first publication but had an "effective date" which predated the first publication. In Ibanez, the assignment was executed after the date of first publication.

At first blush, based on the Title Standard, it would appear that all three foreclosures were valid. Unfortunately, the Land Court disagreed. In fact, the Land Court found that only the Rosario foreclosure was valid. The Land Court held that G.L. c. 244, Section 14 must be given by the "holder of the mortgage". Failure to do so renders the "sale void as a matter of law". As a result, the foreclosures in Ibanez and Larace were invalidated since they did not comply with the statute. It's important to remember that it is not necessary to record the assignment prior to publishing but only that it be in existence and in recordable form at such time.

The plaintiff filed a motion to vacate the judgment. The motion was heard on April 17, 2009. On October 14, 2009, Judge Long rendered his decision which denied the plaintiff's motion to vacate the judgment.

The Land Court noted that in each case the bank was the only bidder and bought back at a discount from appraised value which wiped out the defendants' equity and created a deficiency. The foreclosing mortgagee could not get title insurance. At the hearing, the plaintiffs produced the notes and assignments in blank which are not suitable for recording since there is no assignee. The Land Court found that the plaintiffs' own securitization documents show that such assignments were required. With all available files, it took 10 months in one of the cases and 14 in the other to obtain the assignments in recordable form. Such a burden should not fall on the high bidder at the foreclosure sale. "A bidder does not expect to purchase the right to a potential lawsuit, which only entitle him or her to actually obtain the property if such lawsuit is successful".

The plaintiffs argued that they followed "industry standards and practice". The Land Court held that if this is true, they should seek a change in the law.

The Massachusetts Supreme Judicial Court (SJC) has granted direct appellate review. Oral arguments are scheduled for Fall 2010. We are anxiously awaiting the SJC's decision in view of its enormous importance to the future of foreclosure practice in Massachusetts.

Harold Clarke is regional counsel at Westcor Land Title Insurance Company, White Plains, NY.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540