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## **Harold Clarke - Massachusetts foreclosure practice after decision in the case of U.S. BNA as trustee v. Ibanez**

June 23, 2011 - Spotlights

On January 7th, the Supreme Judicial Court (SJC) rendered its decision in the Ibanez case.

Before discussing the court's decision, here is a brief review of the procedural history of the case.

The land court's decision in the case of U.S. Bank National Association, as Trustee v. Ibanez and its two consolidated cases had 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. The land court held 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 plaintiffs filed a motion to vacate the judgment. The motion was heard on April 17th, 2009. On October 14th, 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 mortgagees could not get title insurance. The plaintiffs suggested that there were documents that would demonstrate that prenotice and preforeclosure assignments existed. The land court granted the plaintiffs leave to produce such documents provided they were in the form they were in at the time the foreclosure sale was noticed and conducted. The plaintiffs produced the notes and assignments in blank which are not suitable for recording since there is no assignee listed. The land court found that the plaintiffs' own securitization documents showed 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 said that if this is true, they should seek a change in the law.

The SJC granted direct appellate review and affirmed the land court's judgment. The SJC held that "We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied".

The plaintiffs had the burden of proving the validity of their foreclosures. Since Massachusetts is a non-judicial foreclosure state, there must be strict compliance with the terms of the statutory power of sale. The court noted that only "the mortgagee or his executors, administrators, successors or assigns" can exercise the statutory power of sale.

Unlike the land court, however, the court continued:

"We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage."

The court ruled that possession of the note does not allow the holder to foreclose.

"In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment." The court stated that "the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such."

The court was not persuaded that post-foreclosure assignments were valid pursuant to REBA Title Standard No. 58 and industry practice. The court found that such "reliance is misplaced because this proposition is contrary to...G.L. c.244, Section 14".

The court rejected the warning in REBA's amicus brief that "If the rule as announced in these decisions is not limited to prospective application, inequitable results that will cause hardship and injustice are inevitable, and will likely be widespread".

The court noted that its rulings are prospective only if they make a "significant change in the common law." Such was not the case here where the law was well settled. "All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities." In a concurring opinion, this was referred to as "the utter carelessness with which the plaintiff banks documented the titles of their assets."

As judge Long had suggested in his decision, perhaps it is time to change the law. Since the SJC began its discussion by noting that "Massachusetts does not require a mortgage holder to obtain

judicial authorization to foreclose on a mortgaged property," and reading between the lines, one solution would be for Mass. to adopt judicial foreclosures. Another possibility would be to return to the earlier practice in which the land court/superior court would review and approve in writing the foreclosure documents prior to recording. Perhaps the easiest solution would be to require the plaintiff in its Complaint to Foreclose Mortgage to cite the recording information for the assignment(s) by which it became the holder rather than simply to state "Your plaintiff is the assignee and holder of a mortgage". If the assignments did not exist, the complaint could not be filed.

It will be interesting to see how "widespread" the SJC's decision becomes.

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