

New foreclosure decision -More traps for the unwary

November 17, 2011 - Front Section

It's the end of game 2 of the Foreclosure World Series, and so far it's Borrowers 2, Lenders 0.

For the second time this year, the Mass. Supreme Judicial Court (SJC) issued a watershed decision, *Bevilacqua v. Rodriguez*, reviewing the process of foreclosing real estate mortgages. Earlier this year, in *U.S. Bank v. Ibanez*, the SJC held that a foreclosure conducted under the Statutory Power of Sale was void if the lender could not establish it was the mortgage holder at the commencement of the process. In *Bevilacqua*, the SJC addressed the ramifications to a third-party who apparently acquired title post-foreclosure.

In a nutshell, the SJC ruled that *Bevilacqua* did not have standing to challenge the title of the foreclosed borrower, Pablo Rodriguez. At foreclosure, U.S. Bank purchased the mortgaged property and subsequently sold it to *Bevilacqua*. It is not uncommon that foreclosing mortgage holders are the high bidder purchaser at foreclosure. The SJC determined that, under the standards in *Ibanez*, it was not established that U.S. Bank held record title to the mortgage through a clear chain of assignments from the original mortgage holder, and, therefore, *Bevilacqua* could not receive title based upon the foreclosure. In essence, *Bevilacqua's* deed was void.

Did *Bevilacqua* receive anything as a result of the foreclosure sale, and does he have any recourse? The SJC suggested that if *Bevilacqua* could prove that he holds the record title to the mortgage, he would be the assignee of the mortgage. The implication is that if *Bevilacqua* can prove that he is the record holder of the mortgage, he can proceed to re-foreclose the mortgage to terminate Rodriguez's rights. Interestingly, *Bevilacqua* has already developed the property into four condominium units.

Bevilacqua claimed that he became the holder (assignee) of the mortgage as a result of his deed from U.S. Bank. Even so, the SJC concluded that *Bevilacqua* did not obtain title to both U.S. Bank's mortgage and Rodriguez's unforeclosed interest in the property. While *Bevilacqua* might be able to show his deed operated as an assignment of the mortgage, Rodriguez would still hold the right to redeem (pay off) the mortgage. Simply put, without establishing that Rodriguez's right to redeem was terminated by a valid foreclosure, *Bevilacqua* did not have standing to challenge Rodriguez's title and such challenge must, as the Land Court held, be dismissed. The SJC disagreed with the Land Court's holding that such dismissal is "with prejudice," instructing that dismissal should be "without prejudice," allowing an action to be brought again, albeit on a different theory.

Bevilacqua also claimed he was a Bona Fide Purchaser (BFP) without notice of the title defect thereby insulating him from such defect. The SJC ruled that *Bevilacqua* did not have BFP protection due to the fact that the defective foreclosure proceedings resulted in *Bevilacqua's* title being "void" and that any BFP status which might be argued would thus be unavailable.

Finally, the SJC did not issue guidance on whether *Bevilacqua* could receive title through the route of foreclosure by entry, although it did note that such a process exists. Foreclosure by entry is a

parallel foreclosure track with foreclosure by sale and employed by virtually all lenders. Foreclosure by entry would, if completed correctly, independently result in clear title to the mortgaged property being vested in the successful purchaser, or their successor, after three years from the entry. To be consistent with Ibanez, one must presume, however, that foreclosure by entry cannot start until the party making the entry as mortgage holder actually holds record title to the mortgage. Under Ibanez, the question remains whether establishing record ownership of the mortgage after the entry would start the clock ticking on foreclosure by entry.

Confused? You are not alone.

Surely, we will be hearing more on the issues in Ibanez and Bevilacqua as the map of how to resolve issues of defective mortgage titles is charted under future cases and appeals. Until then, the issues presented in this line of cases will remain yet another hurdle to be cleared in the residential real estate recovery process.

Gary Lilienthal is a partner at Bernkopf Goodman LLP, Boston, Mass.

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