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Mass. Supreme Judicial Court rules on title remedy by purchaser from questioned foreclosure

June 21, 2012 - Spotlights

In a widely anticipated sequel to *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass 637 (2011), which invalidated foreclosures conducted by two banks as trustees of securitization trusts because of inadequate documentation of mortgage assignments and transfers, the Massachusetts Supreme Judicial Court denied a potential remedy for titles thrown into question by *Ibanez*. *Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011). Once again, however, the high court indicated that there were other potential remedies available for the dilemma posed by *Ibanez*.

Bevilacqua arose out of a foreclosure tainted by *Ibanez*. On March 18th, 2005, Pablo Rodriguez granted a mortgage on property in Haverhill, Mass. to MERS, as nominee for Finance America, LLC. Subsequently, U.S. Bank National Association, not MERS or Finance America, proceeded with foreclosure pursuant to the statutory power of sale and on June 29th, 2006 executed a foreclosure deed to transfer the property to U.S. Bank as trustee under a securitization trust. Nearly one month later, on July 21st, 2006 MERS assigned the mortgage to U.S. Bank. On October 9th, 2006 U.S. Bank executed a confirmatory foreclosure deed to U.S. Bank, as trustee, and eight days later, on October 17th, 2006 U.S. Bank, as trustee, granted a quitclaim deed to Francis Bevilacqua. The post-foreclosure assignment clouded Bevilacqua's title under *Ibanez*.

On April 12th, 2010, seeking a way to clear the title to the property, Bevilacqua filed a petition to compel Rodriguez to "try title" to the property. In Massachusetts try title actions are creatures of statute, G.L. c. 240, §§ 1-5, and fall within the exclusive original jurisdiction of the Massachusetts Land Court. The statute allows a person in possession of land who claims title to that land to file a petition to compel adverse claimants to either disclaim their interest in the property or assert a claim to the property. The respondent, Rodriguez, was never located and never entered an appearance in the action. The Land Court determined, however, that Bevilacqua did not hold title to the property because of the defective foreclosure and, thus, did not have standing to bring a try title action. The Land Court dismissed the action with prejudice for lack of jurisdiction and the Supreme Judicial Court granted Bevilacqua's application for direct appellate review.

The Supreme Judicial Court rejected Bevilacqua's contention that the quitclaim deed from U.S. Bank gave him record title to the property and standing to bring the try title action, reasoning that the mere recording of a title document does not constitute record title when the document itself is invalid. Nor could Bevilacqua demonstrate record title by tracing his chain of title back from the quitclaim deed through the foreclosure deed to the mortgage because, in laying out the title history in his petition, Bevilacqua had effectively alleged that U.S. Bank was not the assignee of the mortgage when it purported to foreclose. The Supreme Judicial Court also went on to hold that Bevilacqua could not claim record title as a bona fide purchaser for value and without notice. If the underlying transaction was merely voidable, a bona fide purchaser might take good title. The unauthorized foreclosure sale

conducted by U.S. Bank, however, was void as demonstrated by the title records and, therefore, Bevilacqua could not be a bona fide purchaser.

As it did in Ibanez, the Supreme Judicial Court left the door open to other means to clear the cloud cast on numerous titles by the Ibanez decision. (The Ibanez decision recognized that alternative foreclosure by entry may provide a separate ground for clearing title. Under G.L. c. 244 Â§Â§ 1 and 2 a mortgage holder who enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. Ibanez, 458 Mass. 637, n.15). The high court directed the Land Court to change its ruling to a dismissal without prejudice so Bevilacqua would not be barred from bringing other actions regarding title to the property. Citing venerable precedent, the Supreme Judicial Court stated that an ineffective foreclosure deed can operate as an assignment of the mortgage and assumed "without deciding, that there is a factual basis on which Bevilacqua may claim to be the assignee of the mortgage," thereby clearing the way for Bevilacqua to re-foreclose the mortgage. Bevilacqua, 460 Mass. at 774.

Lawrence Heffernan is an attorney at Robinson & Cole LLP, Boston, Mass.

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