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The changing landscape in foreclosures: You may need more than a GPS for guidance

July 26, 2012 - Spotlights

In the wake of the recent Supreme Judicial Court (SJC) decisions regarding non-judicial foreclosures in Massachusetts, starting with the watershed Ibanez case (U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637 (2011)), a prospective purchaser with a foreclosure in the chain of title must carefully scrutinize the entire foreclosure process to determine whether the foreclosure sale was valid or void. In Ibanez, the SJC determined that one who sells property under a power of sale must strictly follow the terms of the power and that failure to do so will result in a void sale. More specifically, a foreclosing party must have title to the mortgage at the time of the notice of sale and foreclosure to be authorized to foreclose under the statutory power of sale (MGL c. 183, Â§21 and c. 244, Â§14). While an assignment does not have to be in recordable form at the time of the notice of sale, there must be proof that an actual assignment was timely made to the party seeking to foreclose. In Ibanez, the foreclosing party could not demonstrate that they were the holder of the mortgage at the time of the notice of sale and, therefore, failed to demonstrate that they had acquired fee simple title to the property by purchasing it at the foreclosure sale.

The Bevilacqua case followed on the heels of Ibanez (Bevilacqua v. Rodriguez, 460 Mass. 762 (2011)). In Bevilacqua, a purchaser of property through a foreclosure sale subsequently brought an action to try title against the mortgagor because the mortgage was assigned to the party conducting the foreclosure sale after the sale had taken place. The SJC confirmed that the petitioner must: (a) be in possession of the disputed property; and (b) hold a record title to that property in order to have standing to bring a try title action. The recording of a quitclaim deed obtained through a foreclosure sale purporting to transfer title to that property to the purchaser was not sufficient, by itself, without reference to its chain of title, to establish that the purchaser was the holder of record title sufficient to have standing to bring the try title action after the sale. The purchaser from an assignee of a mortgage who foreclosed prior to actually having title to the mortgage is not considered to be a bona fide purchaser for value. The SJC determined that the assignment of the mortgage to the foreclosing party after the foreclosure sale resulted in a void sale and gave the petitioning purchaser no standing to bring the try title action since the foreclosing party was not the holder of the mortgage at the time of the sale. Although the petitioner had possession of the property, he did not have record title through foreclosure sufficient to bring the try title action. Accordingly, the purchaser of the property acquired a void title.

Eight months later, in the Eaton case (Eaton v. Federal Nat. Mort. Ass'n., 462 Mass. 569 (2012)), the SJC addressed the issue of whether the foreclosing mortgage holder must at the time of the notice of sale and foreclosure also hold the underlying mortgage note in order for the foreclosure to be valid. The SJC held that a foreclosure under a power of sale requires the foreclosing mortgage holder, at the time of the sale, to hold the mortgage and also hold either the underlying mortgage

note or be acting on behalf of the note holder pursuant to a written authorization. If not, the foreclosure sale is void. It is sufficient under agency principles that one who is the authorized agent of the note holder may stand "in the shoes" of the "mortgagee" as that term is used in the statutes. The SJC also stated that the foreclosing mortgage holder does not have to have physical possession of the mortgage note to conduct a valid foreclosure. The SJC indicated in that decision that the SJC's interpretation of the term "mortgagee" was not to be retroactive, but prospective and effective for mortgage foreclosure sales for which mandatory notice of sale is given after the date of the Eaton opinion (June 22, 2012).

In order to take foreclosure due diligence one step further following the Eaton decision, one local title company issued a title standard to its agents requiring them to obtain from the foreclosing mortgage holder and record an affidavit attesting to compliance with the Eaton decision, along with a copy of the original mortgage note and all allonges thereto, if any. The affidavit is to state that the foreclosing mortgagee also was in possession of the mortgage note at the time of the foreclosure. The affidavit should set forth the chain of ownership of the mortgage note, including the date and identity of each transferor for each transfer from the date of the note through the date of the foreclosure sale. In the event the foreclosure was handled through an authorized agent, the affidavit should be accompanied by a power of attorney from the note holder for that agent effective at the time of the first publication of the notice of sale.

As part of the due diligence to be performed prior to scheduling or attending a foreclosure sale, one should make sure that before the first notice of sale: (a) the foreclosing party is the record holder of the mortgage being foreclosed; (b) the foreclosing party is either the holder of the mortgage note or is authorized to act and is acting as agent for the note holder pursuant to a written power of attorney; (c) all of the supporting documentation to confirm the actual chain of title of the note holder has been satisfactorily reviewed to confirm current ownership of the mortgage note and mortgage; and (d) all of the terms of the power of sale are strictly followed. The failure to do so may result in the un-marketability of title and the inability to obtain a satisfactory title insurance policy. Instead, one may wind up having to navigate through the slow and costly judicial system in an attempt to finally obtain a satisfactory title to the property purchased, although such efforts may prove to be unsuccessful.

The decisions in Ibanez, Bevilacqua and Eaton make it clear that there now are numerous foreclosed titles that, once examined in the light of these SJC decisions, will be determined to be defective. It is also made clear in Ibanez that a post-foreclosure assignment of the mortgage that states its effective date as one that precedes the notice of sale and foreclosure will not be treated as a pre-foreclosure assignment and will not give validity to the foreclosure sale. However, a valid, but unrecorded, assignment of mortgage by the actual title holder that is in effect at the time of the notice of sale and recorded after the sale is sufficient to confirm that the foreclosure sale was conducted by the proper party.

The SJC's decisions in these three cases also give rise to various issues that remain unresolved going forward. How does the mortgage holder address those troublesome circumstances brought to light by these recent judicial decisions? First, if the foreclosure sale was held prior to the foreclosing mortgage holder acquiring record title to the mortgage, was the foreclosure sale a valid foreclosure sale? It seems clear, based upon Ibanez, that no valid foreclosure sale took place, since the foreclosing party had no title to sell at the time of the sale unless there was an acceptable off-record assignment. If no valid foreclosure sale was held, then the current title holder of the mortgage,

assuming such party also is the record holder of the underlying mortgage note and provided the statutory provisions of MGL c. 183, Â§21 and MGL c. 244, Â§14 are complied with, is still the mortgage holder and should be able to commence another foreclosure under the power of sale contained in the mortgage and convey good title to the mortgaged property to the purchaser at the second sale.

On another front, since foreclosure under a power of sale is statutory, the most direct solution to this foreclosure morass may be by legislative action, but that could result in creating more issues. Should the legislature pass corrective, retroactive legislation to address those past foreclosure sales where title to the mortgage and underlying mortgage note were subsequently acquired by the foreclosing party? Should that correct the defective foreclosure? An amendment to the statutory provisions governing the exercise of the power of sale by mortgage holders might correct this title deficiency by allowing those past assignments recorded within a specified period of time after the sale to relate back to the date of the commencement of the foreclosure process provided the notice of sale was first published within such time period and the post-foreclosure curative documents are recorded.

Presently, there are two bills pending before the legislature that attempt to address these issues. One is 2011 Mass House Bill 1193, which proposes a moratorium on the foreclosure of any mortgages that are, or ever were, registered at Mortgage Electronic Registration Systems, Inc. Another is Senate Bill No. 00830, which seeks to amend MGL c. 244, Â§15, by requiring the recording of an Affidavit from a foreclosing party confirming that it was the holder of the mortgage for purposes of such foreclosure. Such an affidavit shall be conclusive evidence in favor of a good faith purchaser for value subsequent to a foreclosure sale unless the owner of the equity of redemption commences an action in Superior SJC or Housing SJC to invalidate the sale for lack of title within 90 days from the date of recording of such affidavit and records a memorandum of lis pendens pursuant to MGL c. 184, Â§15, within 30 days after the commencement of such action.

In addition, new legislation might also be filed and passed requiring judicial authorization prior to the commencement of any future foreclosures. Such judicial oversight might be fashioned solely to require the foreclosing mortgage holder to file a petition with the SJC solely to confirm that the petitioner has valid legal title to the mortgage and the underlying mortgage note. The petition would provide the SJC with evidence of the chain of title to both the mortgage and underlying note sufficient to obtain for recording or registration prior to the actual commencement of any foreclosure proceedings a judicial decree authorizing the foreclosure sale. Such a requirement would force all foreclosing parties to make sure the proper chain of title for both the mortgage and the underlying note into the foreclosing entity have been obtained so as to comply with all statutory and judicial requirements. Of course, there would need to be an expedited process available for this purpose that could be set up to be co-terminus with the waiting period for residential foreclosures under MGL c. 244, Â§35A.

It is unfortunate that all of this confusion has resulted from the abject failure of many large mortgage holders to maintain their own proper records to confirm the ownership of their loans and to record the necessary documentation in the public records to complete the chain of title for all mortgages and underlying mortgage notes.

Although it is unclear at this point where we will ultimately wind up, one thing is certain; if foreclosure is your goal, you may need more than a GPS to obtain the desired result.

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