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Thompson v. JPMorgan – Just when we thought it was safe to go back into foreclosure title waters - by Ward Graham

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In the latest blow to the Massachusetts non-judicial mortgage foreclosure sale process and titles derived from such foreclosures, the First Circuit Court of Appeals ("First Circuit") invalidated a mortgage foreclosure by JPMorgan Chase Bank, N.A. ("JPMorgan") based on the "potentially deceptive" pre-foreclosure notice of default and acceleration provided to the borrowers pursuant to the mortgage and state law.

In Thompson v. JPMorgan Chase Bank, N.A., 915 F.3d 801 (Feb. 8, 2019, a panel of the First Circuit overturned the Federal District Court's dismissal of the Thompsons' post-foreclosure challenge to JPMorgan's foreclosure of their mortgage claiming that the pre-foreclosure notice did not strictly comply with the notice provisions of the mortgage with respect to the borrowers' right to reinstate even after default and acceleration. Specifically, the borrowers claimed that the notice did not comply with Paragraph 19 of the standard Fannie Mae mortgage form, which states in relevant part:

If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of judgment enforcing this Security Instrument.

Id., at 802. After 5 years of the Thompsons failing to make payments on their June 13, 2006, $322,500 mortgage for 5 years by August, 2016, JPMorgan (now the holder of the mortgage) the borrowers the requisite default and acceleration notice on August 12, 2016. In addition to informing the borrowers, inter alia, that the amount necessary to tender in order to avoid acceleration of the debt and foreclosure of their mortgage was $200,056.60 and they had until November 10, 2016 to do so, "the notices [also] explained to the Thompsons that they had 'the right to reinstate after

acceleration of the Loan and the right to bring a court action to assert the nonexistence of a default, or any other defense to acceleration, foreclosure, and sale.' The notices also said the Thompsons could 'still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place.'" Id. at 803.

Because the borrowers never tendered the amount due, either by November 10, 2016, or by the time of the foreclosure sale on November 17, 2016. A month after the foreclosure sale, the Thompsons file the court action to challenge the foreclosure.

Relying on the Massachusetts Supreme Judicial Court's decision in Pinti v. Emigrant Mortg. Co., 472 Mass. 226 (2015), the First Circuit reasoned that the difference between the mortgage Paragraph 19 period of "five days before the sale of the Property pursuant to any power of sale" and the statement in the notice that the Thompsons could "still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place" (emphasis added) rendered the notice "potentially deceptive" because it did not strictly reiterate the language of Paragraph 19.

Notwithstanding that the Pinti decision was focused on the default and acceleration notice provisions of Paragraph 22 of the standard Fannie Mae mortgage and that Paragraph 19 is not a notice provision but rather a simple statement of a borrower's rights to reinstate, the First Circuit determined that the "strict compliance with the terms of the mortgage" requirement set forth in Pinti applied here and that there was no need for the borrowers to either claim actual prejudice, actual deception as to when they could reinstate or a tender of payment or even the ability to make payment of the more than $200,000 due by the time of the foreclosure.

Despite its first-time expansion of the Pinti decision's strict compliance rule to a foreclosing mortgagee's notice that provides the borrowers with greater rights than provided in the mortgage to reinstate their loan (until the foreclosure sale takes place as opposed to 5 days before), the First Circuit did not say anything about applying the decision prospectively (at least within the federal court system) as did the SJC in the Pinti decision upon which the First Circuit relied.

Consequently, the ripple effects of this decision on foreclosures and foreclosure titles have already begun to rival those that occurred after the now 10-year-old Land Court decision in U.S. Bank, N.A. v. Ibanez, 17 L.C.R. 679, 2009 WL 795204 (Long, J., Mar. 26, 2009). As back then, title insurance companies are extremely reluctant to insure titles coming out of recent foreclosures, either directly or through later REO sales by the foreclosing lenders.

Fortunately, the case is not yet done. It is now pending a Petition for Rehearing filed by JPMorgan. As of the writing of this article, there have been five Amicus Briefs submitted in support of JPMorgan's Petition by Fannie Mae and Freddie Mac, the Real Estate Bar Association for Massachusetts, and lender groups such as the Massachusetts Bankers Association and the Massachusetts Mortgage Bankers Association.

The petition and briefs include requests for rehearing en banc and certification of this question over to the SJC as it is both a fundamental change in Massachusetts foreclosure law and perhaps an

unwarranted expansion of the Pinti decision for several reasons.

First, unlike a Land Court decision cited in and attached to JPMorgan's Petition, Lom v. Selene Finance, LP, et al, 18-Misc.-324 (Mass. Land Ct. Sept. 27, 2018)(Piper, J.)(which dismissed a challenge to the same type of notice as challenged in Thompson), the First Circuit gave no consideration to the failure of the borrowers to show a tender of payment or the ability to pay.

Second, Paragraph 19, in subparagraph (b) provides that the reinstatement period is governed by "such other period as Applicable Law might specify for the termination of Borrower's right to reinstate." As the Petition and briefs point out, the form of pre-foreclosure notice that is required by the Division of Banks and set out in 209 C.M.R. 56.04, adopted in March, 2012, is precisely the language used in JPMorgan's notice as mandated. That such a right to reinstate (or "redeem") is also mandated, as of January 1, 2016, by the amendments to G.L. c. 244, § 35A. Sub-section (c)(8) requires that the pre-foreclosure notice inform the borrowers "that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale." Thus, the notice JPMorgan sent in this case not only gives the borrowers greater rights to reinstate or "redeem" than the mortgage, the language of the notice was mandated by both regulations and statute.

As the briefs also point out, as the form of notice provided here has been mandated since March, 2012, reminiscent of the infamous Ibanez era, there are thousands of foreclosure titles now held by innocent purchasers that can be upset by this decision. Let's hope the First Circuit revises its decision or, more appropriately, refers the case over to the SJC to address the issues raised and the court follows the analytical approach of Judge Piper in Lom v. Selene Finance, LP, supra, and we can more safely wade into the foreclosure title waters once again.

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