

Title to Foreclosed Properties in Doubt as a Result of Recent Massachusetts Decision

October 2011 by [Thomas J. Enright](#) and [Patricia Antonelli, Esq.](#)

The Massachusetts Supreme Judicial Court (the “SJC”) has released its long-awaited decision in the case of *Bevilacqua v. Rodriguez* (“*Bevilacqua*”), a ruling which presents a plethora of title issues for purchasers of foreclosed properties, lenders who hold mortgages on foreclosed properties and title insurers who insured titles to foreclosed properties. In *Bevilacqua*, the SJC essentially held that foreclosure sales that were noticed prior to the foreclosing entity obtaining title to the mortgage are “void,” as opposed to “voidable,” and are therefore incapable of passing title to even a bona fide third party purchaser without notice of the defect. The lone silver lining in the decision is that the SJC did not preclude the possibility that, in certain circumstances, the purchaser could be deemed to have received from the lender an assignment of mortgage which would then entitle the purchaser to foreclose.

In *Bevilacqua*, the original mortgagee, Mortgage Electronic Registration Systems, Inc. (“MERS”), failed to assign its mortgage to the foreclosing lender until after the foreclosure had taken place and the foreclosure deed had been executed. The foreclosing lender, which also purchased the property at the sale, then executed a “confirmatory foreclosure deed” to itself and then sold the property to Mr. Bevilacqua. Mr. Bevilacqua subsequently filed a petition with the Massachusetts Land Court to compel the “former” homeowner, Mr. Rodriguez, to “try title” to the property. The “try title” claim is a Massachusetts statutory procedure whereby someone with possession and record title to a piece of property may have all adverse claims to the property disposed of. Mr. Rodriguez failed to appear and could not be located. The Land Court, on its own, dismissed Mr. Bevilacqua’s petition based on the “invalid foreclosure.” The SJC granted Mr. Bevilacqua’s application for direct appellate review.

On appeal, the SJC first noted that the foreclosure sale was invalid based upon the fact that the relevant assignment of mortgage was not executed until after the foreclosure sale, in violation of the SJC’s recent decision in *U.S. Bank, Nat’l Ass’n. v. Ibanez* (“*Ibanez*”). Mr. Bevilacqua argued that he was a bona fide purchaser for value and without notice of the title defect and, thus, still had good title. The SJC disagreed, noting that the records in the Registry of Deeds clearly provided constructive notice that the foreclosure was not properly effectuated. More importantly, the SJC suggested that even if Mr. Bevilacqua had been a bona fide purchaser, his title would have still been invalid because a wrongful foreclosure sale is void, not voidable. Had it been deemed voidable, the sale, even if wrongful, would have still been effective to pass title to the property to Mr.

Bevilacqua. Despite arguments that the case law in Massachusetts was unsettled on this point, the SJC noted “[o]ur recent decision in [*Ibanez*], however, concluded that ‘[a]ny effort to foreclose by a party lacking ‘jurisdiction and authority’ to carry out a foreclosure under [the relevant] statutes is void.’ We decline the invitation to revisit this issue.”

The *Bevilacqua* decision is not all bad. The SJC recognized, without expressly reaffirming, the long-standing Massachusetts principle that an invalid foreclosure deed can nonetheless operate as an assignment of mortgage, stating that Mr. Bevilacqua’s “claim to be holder of the mortgage has at least a plausible basis[.]” Ultimately, the SJC held that this sort of relief was “inconsistent” with a “try title” claim since Mr. Bevilacqua was tasked with demonstrating that there was a claim to title that was “adverse” to his own. The claim of a homeowner is not, as the SJC held, adverse to the claim of a mortgagee.

The takeaway from the *Bevilacqua* and *Ibanez* cases is that a foreclosing lender must have title to the mortgage, either by way of assignment or by way of an underlying transfer through a loan securitization, before it will be deemed to have standing to notice and conduct a valid foreclosure sale in Massachusetts. To the extent the lender is without standing (meaning the lender does not have sufficient title to the mortgage to foreclose), the foreclosure will be deemed “void”, and title to the property will revert back to the borrower even if the property is in the hands of a bona fide purchaser for value and without notice of the void foreclosure. The purchaser may be able to argue that the foreclosure deed, or subsequent quitclaim deed from the foreclosure purchaser, operates as an assignment of the relevant mortgage, entitling the purchaser to re-foreclose.

Industry participants are now waiting for the SJC to determine one final issue relevant to standing to foreclose: whether the foreclosing lender must also be entitled to enforce the promissory note. On October 3, 2011, oral arguments were held in the case of *Eaton v. Fed. Nat’l Mortgage Assoc.* (“*Eaton*”). In *Eaton*, the Superior Court had enjoined an eviction, holding that the former homeowner had a likelihood of succeeding in her claim that the foreclosing entity was not the holder of the note and was therefore without standing to foreclose. Before the Superior Court decision in *Eaton*, another Massachusetts Superior Court, the United States Bankruptcy Court for the District of Massachusetts and the United States District Court for the District of Massachusetts had all issued decisions holding that under Massachusetts law, the identity of the holder of the promissory note was irrelevant as it concerned standing to foreclose since the statutory power of sale spoke to mortgagees, not note-holders. Once the SJC’s decision in *Eaton* is published, lenders in Massachusetts will have definitive criteria governing standing to foreclose in Massachusetts. Due to the previous uncertainty in these areas, it has always been this firm’s practice to require

assignments of mortgages prior to noticing foreclosure sales and to advise clients that they should obtain possession of the relevant promissory note prior to exercising the power of sale.

The *Bevilacqua* decision has not come as an unexpected surprise to those in the real estate industry. Our office is well-positioned to assist clients in resolving the issues that are raised by these cases. Lenders have an array of defensive and proactive steps they may take to help blunt the impact of *Ibanez* and *Bevilacqua*. Standing to foreclose under *Ibanez* may be demonstrated despite the lack of a timely assignment of mortgage, and the specific timing of the assignment is crucial to determining what options lenders have.

If you believe you have a foreclosure-related title issue or have any questions, please contact:

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