

## MERS' Standing to Foreclose Upheld in Rhode Island State Court Challenge

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Rhode Island is the most recent state in a long line of jurisdictions to rule that Mortgage Electronic Registration Systems, Inc. ("MERS") has standing to foreclose. The Rhode Island court further ruled that MERS, as mortgagee and nominee for the mortgagee, may exercise the statutory power of sale in its own name.

The case of *Bucci v. Lehman Brothers Bank, et al.*, C.A. No. PC 09-3888, was filed in the Providence County Superior Court. The facts of the underlying action are typical of many foreclosure scenarios occurring across the country. A loan was originated and the borrower executed a promissory note made payable to the lender. Contemporaneously, as security for the repayment of the promissory note, the borrower granted a mortgage on the residential property to MERS. The mortgage was granted by the borrower/mortgagor to MERS as nominee for the Lender, granting all the rights and privileges of a mortgagee to MERS, including the statutory power of sale.

As with many non-judicial jurisdictions, Rhode Island's legislature enacted a statutory process allowing a mortgagee to foreclose on its mortgage following a borrower's default. Rhode Island General Laws § 34-11-22 codifies the statutory power of sale, which many, if not all MERS originated mortgages incorporate by reference ("Statutory Power of Sale").

The borrower eventually defaulted on its repayment obligations under the terms of the promissory note. The loan was accelerated and the borrower failed to cure. Non-judicial foreclosure proceedings were commenced whereby, pursuant to Rhode Island's statutory scheme, a notice of foreclosure was sent to the borrower and foreclosure notices were published in the statutorily prescribed form and manner.

In this case, prior to the scheduled foreclosure date, the borrower filed a complaint seeking injunctive relief to enjoin the foreclosure sale. The complaint alleged, *inter alia*, that: the Rhode Island statutory scheme does not allow MERS to exercise the Statutory Power of Sale in the mortgage because Rhode Island does not recognize a "nominee mortgagee"; MERS, because it is not the Lender, does not have standing to foreclose; and MERS is precluded from foreclosing because it is not the owner of the promissory note. The Court granted the initial request for relief pending a substantive hearing on the issues. In an unusual procedural move, the Court administratively consolidated dozens of other cases raising similar issues throughout Rhode Island. Five days later, a preliminary injunction hearing was held and, pursuant to Rule 65(a)(2) of the Rhode Island Rules of Civil Procedure, the Court consolidated the preliminary injunction hearing with the trial on the merits.

Following the full hearing, on August 25, 2009, the Court issued its decision denying the borrower's requests for relief. In so ruling, the Court "specifically [held] that MERS, in the case at bar, has standing to and may foreclose the mortgage granted to it by the Plaintiffs utilizing the Statutory Power of Sale referenced therein."

After a brief description of MERS' functions, the Court first considered MERS' contractual right to foreclose pursuant to the mortgage document. Citing directly to the mortgage, the Court

noted that the borrower granted “the Statutory Power of Sale to MERS, as nominee for Lender, its successors and assigns.” The Court went on to quote the mortgage which stated that: “if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property[.]” (Emphasis in decision). In addition, the Court, rejecting certain of the borrower’s other contentions, found that the “fact that paragraph twenty-two of the mortgage states that the Lender ‘may invoke the STATUTORY POWER OF SALE’ does not negate the previous language in the mortgage directly granting MERS, as mortgagee in a nominee capacity, the right to invoke the Statutory Power of Sale.” Accordingly, MERS has the contractual right to exercise the Statutory Power of Sale because it is the named mortgagee and nominee of the Lender, and its successors and assigns, and MERS was acting on behalf of the beneficial owner of the promissory note.

Next, the Court tackled the borrower’s assertion that MERS does not have the statutory authority to foreclose. First, the Court determined that there is no express statutory prohibition impacting MERS’ ability to foreclose. Next, citing the Statutory Power of Sale, the Court determined that because the “mortgagee or his, her or its executors, administrators, successors or assigns” can exercise the power of sale, so too can MERS as the mortgagee. Simply put, the Court found that MERS “is the mortgagee because the mortgage executed by the [borrower] so states.” “The fact that MERS acts in a nominee capacity for the lender . . . does not diminish MERS’ role as the mortgagee nor is there created a new legal term ‘nominee mortgagee.’” Therefore, not only is there “[n]othing in the Rhode Island statutes prohibit[ing] MERS, as mortgagee in a nominee capacity, from foreclosing under the Statutory Power of Sale,” MERS “may invoke the Statutory Power of Sale as the mortgagee.”

Through its decision, the Court, in the clearest language addressed the various challenges that have been asserted against MERS’ authority to foreclose under Rhode Island law. As a result, the multitude of pending cases seeking to enjoin Rhode Island foreclosures by attacking MERS’ standing will most likely be resolved in a perfunctory and consistent manner in favor of MERS. An appeal by the borrowers is anticipated.

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