

## Missouri Federal Court Sets Aside Tax Sale in Favor of MERS

By: Dana Fidazzo, Esq., Venable LLP<sup>1</sup>

*Mortgage Electronic Registration Systems, Inc., et al. v. Robert Bellistri*  
*No. 4:09-CV-731 CAS (E.D. Mo. 2010)*

On July 1, 2010, the United States District Court in the Eastern District of Missouri set aside a tax sale that was the subject of a quiet title action in state court later affirmed by the Missouri Court of Appeals. In doing so, the court found that Mortgage Electronic Registrations Systems, Inc.'s ("MERS") interest in the underlying deed of trust (the "Deed of Trust") was sufficient to (i) require notice of redemption under Missouri's Jones-Munger Act, (ii) require MERS' joinder in the quiet title action and (iii) trigger a due process right to notice of the tax sale.

Under the facts of the case, Bellistri was the successful bidder at a tax sale of the property on August 22, 2005. At that time, MERS was the named beneficiary under the Deed of Trust, as nominee for the original lender. Bellistri delivered the required notice of redemption under the Jones-Munger Act to the original lender, but not to MERS. In September 2006, Bellistri obtained a collector's deed for the property. On April 4, 2007, MERS assigned the Deed of Trust to Ocwen Loan Servicing, L.L.C. ("Ocwen"). Subsequent to that assignment, Bellistri filed an action in state court to quiet title, naming the borrower and Ocwen as defendants. The state circuit court granted Bellistri's motion for summary judgment, which Ocwen appealed and the Missouri Court of Appeals affirmed on the basis that Ocwen lacked standing. MERS and its parent then filed an action in the United States District Court in the Eastern District of Missouri seeking a declaratory judgment and injunctive relief.

The court determined that MERS was required to be delivered notice of redemption under the Jones-Munger Act and should have been joined in the quiet title action as a defendant. As a result of Bellistri's failure to do either, the court set aside and voided the collector's deed. In arriving at this ruling, the court interpreted the plain language of the Jones-Munger Act to require notice of redemption to any party who claims a publicly recorded interest in the property. The court confirmed that MERS claimed a publicly recorded interest in the property as beneficiary under the Deed of Trust, as nominee for the lender. The court also confirmed that MERS' interest in the property as beneficiary under the Deed of Trust was sufficient to require joinder in the quiet title action under Missouri Revised Statutes Section 140.330, which requires joinder of all parties who appear of record to have a claim in, or lien upon, the real property. In interpreting both statutes, the court stressed that the interest claimed by MERS did not need to be "adjudged legally valid" in order to trigger the requirements of the statutes. This conclusion was consistent, in the court's view, with the Fourteenth Amendment's protection of property, which the court emphasized protects all legitimate claims to property interests, not just unequivocal ownership rights in property.

This same analysis led the court to rule that the collector's deed violated MERS' due process rights by attempting to divest MERS of its interests in the property without notice and an opportunity to be heard. The court cited MERS' right to enforce the lien of the Deed of Trust

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against the property, including the right to foreclose, as a specific property interest (citing, among others, *Kinsella v. Landa*, 600 S.W.2d 104, 107 (Mo. Ct. App. 1980) and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)). The court also stated that Missouri could not provide MERS with a statutory right to notice of the tax sale and then arbitrarily deprive MERS of that right.

Although the court did not ultimately determine whether MERS' interest in the Deed of Trust was a legally valid interest, the case should be considered a victory for MERS and MERS' defenders. Recent decisions by state courts have called into question whether MERS, as nominee, held any real interest in the mortgage or deed of trust, instead characterizing MERS' relationship with the lender as that of a "straw man." (See *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009) and *Bank of New York vs. Raftogianais, et al.*, No. F-7356-09 (N.J. Super. Ct. Ch. Div. June 29, 2010). In this case, the court recognized that MERS' claim to interest in the property as nominee of the lender under the Deed of Trust was sufficient to require statutory notices and to trigger due process rights. In addition, the court emphasized that MERS' fundamental business model is predicated upon MERS' legal right to receive the types of notices required under the Jones-Munger Act in order to protect its members' security interests in property. The court cautioned that if tax purchasers were permitted to obtain title to property without properly notifying MERS, then the MERS® System would be compromised and its members would not be protected.

## **LENDER'S LIEN SURVIVES DESPITE FAULTY ACKNOWLEDGMENT**

By: Katie Graves Williams, Esq. <sup>1</sup>

Recently, the 8<sup>th</sup> Circuit Bankruptcy Appellate Court overturned the Bankruptcy Court District of Nebraska decision that held that a recorded deed of trust was void due to a faulty acknowledgement under Nebraska state law. *BowlNebraska v. Omaha State Bank* (MLW No. **60814**/Case No. 10-6016 - 8 pages) (U.S. Bankruptcy Appellate Panel, 8th Circuit, Federman, J.) The Appellate Court held that although the acknowledgment may not have met all of the state's filing requirements, the recorded notices of default contained enough information to provide notice to a bona fide purchaser of the bank's claimed interest. *Id.* Whether the acknowledgement was faulty was not at issue. The recorded notices of default were deemed to provide constructive notice and therefore defeated the strong arm power of Bankruptcy Code 544(a)(3), which allows the debtor in possession/trustee to avoid any lien as if he were a bona fide purchaser at the time the case is filed. *Id.* at 8.

BowlNebraska, L.L.C., a Nebraska limited liability company, filed for Chapter 11 Bankruptcy in June 2009. In an adversary proceeding, BowlNebraska sought to either have liens held by Omaha State Bank declared void or to avoid them pursuant to strong arm power provided by Section 544 of the Bankruptcy Code. In September 2006, Steve Sempeck and Theodore Baer executed a deed of trust to Omaha State Bank on behalf of BowlNebraska. Both signatures were notarized by Christopher Maher, the president of the bank and the brother-in-law of Theodore Baer. BowlNebraska defaulted on its loan and the bank began recording its notices of default. The Bankruptcy District Court determined that the liens were void under Nebraska law which provides "[a] notary public is disqualified from performing a notarial act . . . if the notary is a spouse, ancestor, descendent, or sibling of the principal, including in-law, step, or half relatives." Neb. Rev. Stat. § 64-105.01. The relationship between Maher and Baer was found to taint the entire document and thus extended to Sempeck as well. *BowlNebraska v. Omaha State Bank* (MLW No. **60814**/Case No. 10-6016 - 8 pages) (U.S. Bankruptcy Appellate Panel, 8th Circuit, Federman, J.) at 5.

On appeal, the Appellate Court noted that the Debtor conceded to the validity of the liens outside of the bankruptcy. Therefore the Court only considered whether or not the liens were voidable under §544. *Id.* at 3. "Section 544(a)(3) of the Code provides that [the trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or

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of any creditor, the rights and powers of, or may avoid the transfer of any property of the debtor or any obligation incurred by the debtor that is voidable by . . . a bona fide purchaser of real property . . . whether or not such purchaser exists.]" *Id.* In order to determine whether BowlNebraska was a bona fide purchaser, the Appellate Court looked to Nebraska state law. Section 76-238 of the Nebraska Statutes provides that a faulty recording of mortgage or deed of trust is ineffective only as to those *without notice*. *Id.* at 6, *citing Caruso v. Parkos*, 637 N.W.2d 351, 359 (Neb. 2002) ("A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. The burden of proof is upon a litigant who alleges that he or she purchased the property for value and without notice. This burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land.")

The valid recording of the default notices by Omaha Bank after the recording of the deed in trust and before the Chapter 11 filing by the Debtor was not in dispute. The Debtor conceded to the validity of the liens outside of bankruptcy. Thus, the Appellate Court reversed the Bankruptcy Court's decision in favor of BowlNebraska, L.L.C and concluded that they did not meet their burden in showing they were without actual or constructive notice of Omaha Bank's interest in the property. *Id.* at 8. Even though one notice may have been faulty, the other notice prevailed.

## **Who's On First; The Mortgage Servicer's Standing to Bring Suit**

By: Samuel H. Levine, Arnstein & Lehr LLP<sup>1</sup>

In today's complex world of mortgage backed securities it is less than clear who has standing to foreclose a mortgage or assert a claim based on a mortgage or other agreement. Is the proper party the trustee of the securitization trust, the owner and holder of the mortgage and mortgage note? Or, is the proper party, the trustee's delegate, the mortgage servicer or special servicer, who administers the trust pursuant to a pooling and servicing agreement?

In CWCapital Asset Management v. Chicago Properties, 2010 U.S. App LEXIS 13229, the issue was whether the plaintiff as a mortgage servicer had standing to bring a lawsuit in its own name based on a "Subordination, Non-Disturbance and Attornment Agreement" (SNDA) to which the securitization trust, the landlord/mortgagor and the former tenant, the Blockbuster Video Rental Company ("Blockbuster") were parties. The case also presented issues of contract interpretation under Illinois law. The underlying suit claims that the servicer, CWCapital, standing in the lender's shoes is contractually entitled to the money that Blockbuster paid to the mortgagor, Chicago Properties, in settlement of a suit by Blockbuster for unpaid rent.

The district court concluded that the servicer was not the real party in interest, and therefore dismissed the suit. The district court found that the servicer did not present a writing setting forth its authority by assignment or otherwise to initiate its

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action against the defendants. The district court also rejected attempts by the trustee to ratify the servicer's suit on behalf of the bank. The Court of Appeals reversed the dismissal with directions to enter judgment on the merits for the defendants. The Court held that the servicer was entitled to bring suit in its own name as the real party in interest. However, the servicer was not entitled to recovery on the merits of its claim.

The Court reviewed the documents and explained the servicer's role in administering a mortgage-backed security in concluding that the servicer had standing. In particular, the Court looked at the applicable pooling and servicing agreement.

The Court described the servicer's role in administering a mortgage backed security. It described a mortgage backed security as a giant bond that is secured by a large number of mortgages, including the mortgage against the mortgagee's building. The income from the mortgages is the income from the bond. The mortgages that secure the mortgage-backed security are placed in a securitization trust, and the trustee, or in this case the trustee's delegate (the plaintiff servicer) is responsible for servicing them.

The Court further explained that the trust holds legal title to the mortgages. The servicer is the trust's collection agent. The Court likened the servicer to an assignee for collection, who must render to the assignor the money collected by the assignee's suit on his behalf (minus the assignee's fee) but can sue in its own name.

The Court's analogy of a servicer to an assignee for collection was based on its reliance on the recent Supreme Court's holding in the case of Sprint Communications Co. v. APCC Services, Inc., 554 U.S. 269, 128 S.Ct. 2531 where that court held that an assignee for collection has standing to sue, within the meaning of Article III of the

Constitution. In Sprint, the Court held that an assignee who holds legal title to an injured party's claim has constitutional standing to pursue the claim even if the assignee has agreed to remit all proceeds from the litigation to the assignor. Sprint, 554 U.S. 128, S.Ct. at 2533. In so holding the Supreme Court relied on historical practice of federal courts that permitted assignees to bring suits in their own right when they were assigned title for the sole purpose of collection. The Court in CWCapital explained that although the servicer may not be an assignee; it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of the defaulted loan that it services.

Although the pooling and servicing agreement between the trustee of the mortgages backing the mortgaged-backed security and the servicer was less than clear, it made the servicer, the real party in interest. The Court looked at the following provisions of the Agreement.

1. The servicer "shall ...have full power and authority, acting alone, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable;
2. The trustee shall at the servicer's "written request...promptly execute any limited powers of attorney and other documents furnished by the [Servicer]...that are necessary or appropriate to enable [the Servicer] to carry out [its] servicing and administrative duties hereunder,;" and
3. Without the Trustee's written consent, "except as relates to a Loan that the ...Servicer...is servicing pursuant to its respective duties herein (in which case such servicer shall give notice to the Trustee of the initiation), [the

Servicer shall not] initiate any action, suit or proceeding solely under the Trustee's name without indicating the...Servicer's representative capacity."

The Court concluded that based on its review of the law and the pooling and servicing agreement that the trust held legal title to the underlying mortgages and to the claim, but delegated equitable ownership to the servicer. Additionally, the applicable agreement required the trustee to confer with the servicer whatever authority the servicer needed to perform its servicing duties.

The Court stated

"It is thus the servicer under the agreement who has the whip hand; he is the lawyer and the client, and the trustee's duty, when the servicer is carrying out his delegated duties, is to provide support. The securitization trust holds merely the bare legal title;" the Pooling and Servicing Agreement delegates what is effectively equitable ownership of the claim (albeit for eventual distribution of proceeds to the owners of the tranches of the mortgage – backed security in accordance with their priorities) to the servicer."

Accordingly, the servicer has standing to sue as the real party in interest. The Court also concluded that there existed an independent basis not to dismiss the suit, based on Fed. R. Civ. P. (17)(a). Rule 17(a)(3) provides that a case should not be dismissed because it has not been brought in the name of the real party of interest "until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action," and "after ratification joinder, or

substitution, the action proceeds as if it had been originally commenced by the real party in interest.” The Court found that the trustee submitted an affidavit in the district court, which was not contradicted, ratifying the suit on the trustee's behalf.

The Court then addressed the merits of the claim against Blockbuster. Blockbuster settled the breach of lease lawsuit for \$161,000.00 although it owed the mortgagee \$471,000. The SNDA defined the rights of the parties in the event of a default. A critical provision in the SNDA, which was the subject of the case, for the protection of the lender was that the lender is not bound by any rent that the tenant may have paid in advance, nor by any modification of the lease made without the lender's consent that reduces the term of the lease or the tenant's monetary obligation under it.

The Court found that there was no event of default which could trigger Blockbuster's liability under the SDNA. The mortgagor/landlord has continued to make its monthly mortgage payments in full. Furthermore, the servicer did not present evidence that Blockbuster's failure to direct rent impaired the value of its collateral.

The CWCapital case demonstrates that standing to assert a claim based on a mortgage or other agreement is not always clear. However, given the structure of the securitization trust, and the broad delegation to the servicer to sue on behalf of the trust, the standing of the mortgage servicer, standing in the lender's shoes to assert a claim makes sense.