RECENT OHIO FORECLOSURE CASES: LENDERS BEWARE

By Stephen R. Buchenroth and Gretchen D. Jeffries

Two recent foreclosure cases from the United Stated District Court for the Northern District of Ohio have created a stir among real estate lawyers and the securitization industry. In both instances, the court dismissed complaints to foreclose on mortgages because the plaintiff-lender failed to submit to the court a copy of the assignment of the note and mortgage evidencing the plaintiff's status as holder of the note and mortgagee under the mortgage.

The decisions surprised some lawyers who have apparently grown accustomed to the lax practice of a number of courts of allowing attorneys for foreclosing mortgagees to obtain a judgment decree of foreclosure without requiring proof of their standing in the form of an endorsed note and recorded assignment of the mortgage. While it may create some logistical problems for foreclosing lenders who have taken assignment without requiring all the formal procedures to be satisfied, the decisions should come as no surprise to anyone familiar with foreclosure law in the State of Ohio. In fact, the courts' decisions are merely a restatement of Ohio Foreclosure Law 101 – to obtain judgment on a promissory note, the plaintiff must be able to provide evidence that it is the holder of the note, and to obtain a decree in foreclosure the plaintiff must prove that it is the mortgagee of record. There are no shortcuts to those requirements.

***In re Foreclosure Cases*, 2007 WL 3232430 (N.D.Ohio, Oct. 31, 2007)**

In a somewhat colorful opinion, Judge Christopher A. Boyko dismissed fourteen foreclosure actions based on plaintiff-lender's inability to establish standing for the actions at the time of filing of the complaint. Judge Boyko stated that the notes/mortgages attached to the complaint identified the mortgagee and promisee as the original lending institution, not the plaintiff-lender, and no reference to the plaintiff-lender could be located in the chain of title. Further, Judge Boyko noted that later-proffered assignments of the notes/mortgages did not show the plaintiff-lender to be the owner of the notes/mortgages as of the date of the complaint; rather the assignments expressed a present intent to convey all rights in the notes/mortgages to the plaintiff-lender upon receipt of sufficient consideration on the date such assignments were signed and notarized.

Judge Boyko dismissed plaintiff-lender's argument that it is the "real party in interest" (Fed.R.Civ.P. 17), as not apropos to the foreclosure complaints. Judge Boyko cited the commentary to Fed.R.Civ.P. 17 which states, "[t]he provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.... It is, in cases of this sort, intended to insure against forfeiture and injustice…." Judge Boyko found that the plaintiff-lender neither alleged mistake nor that a party could not be identified and that the plaintiff-lender would not suffer injustice by the dismissal of the complaints other than on the merits.

Judge Boyko went on to admonish that "[t]his Court acknowledges the right of banks, holding valid mortgages, to receive timely payments. And, if they do not receive timely payments, banks have the right to properly file actions on the defaulted notes-seeking foreclosure on the property securing the notes. Yet, this Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations."

In one of the more colorful footnotes to a decision, Judge Boyko expressed his disdain for plaintiff-lenders skirting the formal requirements for establishing jurisdiction and standing: "[u]nlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate. The Court will illustrate in simple terms its decision:

> 'Fluidity of the market'-'X' dollars,
> 'contractual arrangements between institutions and counsel'-'X' dollars,
> 'purchasing mortgages in bulk and securitizing'-'X' dollars,
> 'rush to file, slow to record after judgment'-'X' dollars,
> 'the jurisdictional integrity of United States District Court'-'Priceless.'"

A recent decision from the United Stated District Court for the Southern District of Ohio paid homage to Judge Boyko's flair for certain pop culture references, as well as his holding in this case by finding "with regard [to] the enforcement of standing and other jurisdictional requirements pertaining to foreclosure actions, this Court is in full agreement with Judge Christopher A. Boyko of the United States District Court for the Northern District of Ohio who recently stressed that the judicial integrity of the United Stated District Court is 'Priceless'". *In re Foreclosure Cases*, 2007 WL 4056586 (S.D. Ohio, Nov. 15, 2007).

***In re Foreclosure Actions*, 2007 WL 4034554 (N.D.Ohio, Nov. 14, 2007)**

Two weeks after Judge Boyko's decision, Judge Kathleen McDonald O'Malley followed Judge Boyko's lead by dismissing thirty-two foreclosure actions for lack of standing. In a less colorful, but tightly reasoned case, Judge O'Malley acknowledged that "a foreclosure plaintiff…especially one who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit was filed. In other words, a foreclosure plaintiff must provide documentation that it is the owner and holder of the

note and mortgage as of the date the foreclosure action is filed." Judge O'Malley further set forth that an affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient and that the appropriate documentation includes assignment documents executed before the foreclosue action was commenced.

These Ohio decisions have further stoked an already hot debate among real estate lawyers regarding the status of MERS (Mortgage Electronic Registration Systems) and its ability to foreclose on mortgages. In its ordinary course of business, MERS transfers ownership of mortgages electronically between MERS members without paper assignments and without any indication to county clerks' or county recorders' offices where the subject properties are located. Recent case law around the nation and even within states is varied on whether MERS has standing to foreclose on a mortgage.

On the one hand, pundits argue that MERS has standing to foreclose on a mortgage because MERS is the legal holder of the note (and the mortgage which transfers as an incident of the note), despite the fact MERS has no beneficial ownership.

A recent decision in New York held that MERS had standing to foreclose on a mortgage when the record showed that the note was endorsed by the originating bank to a subsequent bank and ultimately transferred and tendered to MERS. *Mortgage Electronic Registration Systems, Inc. v. Coakley,* 41 A.D.3d 674 (N.Y.A.D. 2d Dept., 2007). The Court concluded that at the time of the commencement of the action, MERS was the lawful holder of the promissory note and of the mortgage, and accordingly, had standing to bring the action. The Court also found support for its position in the terms of the mortgage instrument in which the defendant had expressly agreed without qualification that MERS had the right to foreclose upon the premises in the event of default.

A recent Florida case also found that a nominee in possession of a note has standing to foreclose on the mortgage, even though the nominee is not the beneficial owner of the note and mortgage. *Mortgage Electronic Registration Systems, Inc. v. Azize*, 965 So.2d 151 (Fla. App. 2d, 2007). While the Court remanded the case to determine whether MERS had possession of the note, the Court found that MERS is a collection agent for the purposes of enforcing mortgage notes and MERS would have standing to file foreclosures if MERS could show itself to be the owner or holder of the note.

On the other hand, some courts are reticent to establish that MERS has standing to pursue a foreclosure action, because MERS does not hold the beneficial interest in the note/mortgage. Such deference for the beneficial owner of the note/mortgage is evidenced in a 2006 case out of New York. *LaSalle Bank National Association v. Lamy*, 12 Misc.3d 1191(A) (N.Y.Supp. 2006). The court held that LaSalle Bank, as assignee of MERS, had no ownership in the mortgage and as such, no cognizable claim for foreclosure. The Court stated that "it is axiomatic that to be effective, an assignment of a note and mortgage given as security therefor must be made by the owner of such note and mortgage and that an assignments made by entities having no ownership interest in the

note and mortgage pass no title therein to the assignee." The court then stated that a nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.

Although the ability of MERS to pursue foreclosure actions will continue to be fleshed out in the courts, the Ohio decisions serve as a warning to all lenders and their counsel that the courts will no longer be asleep behind the wheel while the formal procedural requirements regarding assignment of notes and mortgages are ignored.

****

Stephen R. Buchenroth is a partner in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a former head of the firm's real estate and commercial practice group. He is a former Chairman of the Real Property Section of the Ohio State Bar Association and a member of the American College of Real Estate Lawyers. Gretchen Jeffries is an associate in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a member of its commercial and real estate group. Ms. Jeffries is a graduate of The Ohio State University and The University of Texas School of Law.