Legal Analysis

The Massachusetts Supreme Judicial Court’s Foreclosure Jurisprudence: A Review of 2011 and a Preview of 2012 and Beyond

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In the years leading up to the current economic crisis, a boom in real estate prices, fueled in part by relaxed mortgage underwriting and predatory lending practices, left the real estate market vulnerable. Since then, falling home prices and unemployment have made it difficult for many homeowners to sell or refinance their homes. This confluence of factors led to a surge in foreclosures, which now take place at rates unseen since the Great Depression.

Simultaneously, changes in the mortgage industry have introduced new uncertainties into well-settled areas of law. Lenders used to retain most mortgage loans they originated, but today most securitize and sell them. In this process, loans are grouped or “pooled,” and investors buy securities backed by specific slices or “tranches” of each pool, entitling them to a portion of the revenue generated from the homeowners’ payments. These practices mean that courts now hear foreclosure-related proceedings involving mortgages (the security interest in the home allowing home to be sold if loan is not repaid) divorced from promissory notes (the promise to pay the loan) and review operative legal documents without complete records of their long transaction histories.
The SJC’s 2011 Foreclosure Decisions


Ibanez critically examined the conduct of foreclosing entities that had noticed and conducted foreclosure sales before recording, or even receiving, an assignment of the mortgage containing the power of sale that authorized them to do so. 458 Mass. at 651. In Ibanez, the SJC affirmed the Land Court’s decision to invalidate the two foreclosures at issue. The SJC held that only a present holder of a mortgage may exercise the statutory power of sale in a foreclosure auction. Id. at 648. Noticing and conducting a foreclosure sale without holding the mortgage violates the statutory power of sale; the resulting foreclosure sale is void. Id.

The SJC further concluded that a foreclosing entity cannot comply with the power of sale in G. L. c. 244, § 14 if it only possesses the relevant promissory note without the associated mortgage. Id. at 652-653. Possession of the promissory note entails an equitable right to an assignment of the associated mortgage, not the right to exercise the power of sale. Id. The SJC did not discuss the converse, i.e., whether a mortgage-holder that does not also hold the promissory note may exercise the power of sale.

Ibanez meant that the foreclosures of an unknown number of properties in Massachusetts were now void. The titles to these improperly foreclosed property are said to have “Ibanez defects.” Some of these properties had been resold to third-party purchasers, and Ibanez did not address what would happen to them. In Bevilacqua, the SJC held that one potential remedy for affected subsequent purchasers, the “try title” action defined by G.L. c. 240, §§ 1-5, is unavailable. 460 Mass. at 780.

In Bevilacqua, the property was originally owned by Rodriguez. U.S. Bank foreclosed upon Rodriguez’ property and recorded a foreclosure deed before receiving or recording an assignment of the mortgage,
creating an *Ibanez* defect. Bevilacqua subsequently acquired the property from U.S. Bank. In April 2010, after the initial Land Court decision in *Ibanez*, Bevilacqua filed a try title action, alleging the *Ibanez* defect and naming Rodriguez as the potential claimant. Rodriguez defaulted, but a Land Court judge sua sponte dismissed the action.

The SJC affirmed. First, the SJC concluded that, because the foreclosure was “void” under *Ibanez*, Bevilacqua could not claim, based on such a defect, that a potential adverse claim to the property existed without fatally undermining his own status as a lawful holder. 460 Mass. at 772. The *Ibanez* defect meant that Bevilacqua could not be a lawful holder of the property as required by the try title statute — making the action unavailable. *Id.*

Second, the SJC assumed without deciding that an *Ibanez*-defective foreclosure and any subsequent transfer operates as an assignment of the associated mortgage and concluded that Bevilacqua had alleged a valid claim to the mortgage. *Id.* at 773-774. Such a valid claim would necessarily mean that the mortgage was still effective and Rodriguez still held equitable title and a right of redemption. *Id.* at 775-776. Bevilacqua’s resulting legal title would not be adverse to Rodriguez’s equitable title under the title theory of mortgages that applies in Massachusetts. *Id.* Because the try title statute requires an “adverse claim,” the SJC concluded that Bevilacqua’s claim must fail. *Id.*

Finally, the SJC concluded that Bevilacqua had sufficient notice of potential title defects to preclude bona fide purchaser status. *Id.* at 778-779. The irregularity of the recorded documents, according to the SJC, prevented Bevilacqua from taking the property without notice of the *Ibanez* defect. *Id.*

Accordingly, Bevilacqua’s try title action against Rodriguez failed. However, the SJC expressly left open the possibility of Bevilacqua conducting another foreclosure sale, in compliance with the power of sale in G. L. c. 244, § 14, in order to remedy the *Ibanez* defect. *Id.* at 776 n.10. Amicus briefs listed other possible remedies for third-party buyers, such as: suing the foreclosing entity for rescission and damages; obtaining a release from the originally foreclosed-upon homeowner; foreclosing by entry in accordance with G.L. c. 244, §§ 1-2; or seeking relief from the title insurer. The SJC did not address these other potential remedies.
The remaining SJC foreclosure cases address defenses to post-foreclosure evictions. In *Bailey*, the SJC held that the Housing Court has jurisdiction to decide the validity of a foreclosure sale. Bank of New York (BNY) foreclosed upon Bailey’s property. 460 Mass. at 330. When Bailey did not vacate the property upon request, BNY filed a summary process eviction action against him in Housing Court. *Id.* Bailey defended by challenging the validity of the foreclosure sale. *Id.* at 331. The Housing Court judge allowed summary judgment for BNY, holding that she had no jurisdiction to consider Bailey’s defense. *Id.* at 328.

The SJC reversed. Noting the Housing Court’s concurrent jurisdiction with the Superior, District, and Boston Municipal Courts over summary process actions, the long-standing rule that a summary process defendant may challenge his opponent’s right to possession, and the interests of judicial economy, the SJC concluded that the Housing Court may properly decide the validity of a foreclosing entity’s legal title in a summary process action. *Id.* at 333-334. *Bailey* requires that, where the issue is disputed, the plaintiff in a post-foreclosure summary process action “make a prima facie showing that it obtained a deed to the property at issue and that the deed and affidavit of sale, showing compliance with statutory foreclosure requirements, were recorded.” *Id.* at 334. The SJC did not address how a defendant may challenge such a showing or whether a successful challenge to the validity of a foreclosing entity’s legal title in summary process would allow former owners to attack the underlying foreclosure.

*Nunez* concerned protections, enacted in August 2010, for tenants in residential properties foreclosed upon by certain institutional lenders. G. L. c. 186A, inserted by St. 2010, c. 258. To evict tenants of such properties, the statute requires “just cause” and defines only six scenarios where an institutional lender would have “just cause” for eviction. G.L. c. 186A, § 1(a). Prior to the statute’s enactment, the Federal National Mortgage Association (FNMA) gave Nunez required notice and filed a summary process action seeking his eviction. After the statute’s enactment date, Nunez moved to dismiss, arguing that, without just cause to evict, FNMA could not maintain the summary process action. A judge of the Housing Court agreed and dismissed the case. 460 Mass. at 512-513.
In *Nunez*, the SJC affirmed. It held that the statute, while not retroactive in nature, protects tenants from any attempt to evict them, including pursuing an already-filed summary process action or enforcing a summary process judgment. *Id.* at 518-520. The SJC did not decide whether each separate “action” in the eviction process should be considered a separate violation of G. L. c. 186A, § 6, which requires a minimum fine of $5,000.

What do these decisions mean for foreclosure practice? A foreclosing entity must obtain and execute all operative legal documents demonstrating its right to foreclose prior to the publication of notice of sale. If a defective foreclosure has already taken place, a putative owner may not use the try title statute to remedy the defect; a re-foreclosure may be available. Issues about the foreclosure process that were not litigated at the time of the foreclosure may be raised as defenses in post-foreclosure eviction actions. These actions are typically tried in Housing and District Courts, venues where pro se litigants may more easily and inexpensively raise challenges to the foreclosure process than they could in Superior Court. Finally, institutional lenders-turned-owners seeking to evict tenants post-foreclosure must be sure to have “just cause” to do so or risk fines of $5,000 or more per action in furtherance of the eviction.

**Major Foreclosure Issues Still Outstanding in Massachusetts**

Many foreclosure-related issues remain unresolved in Massachusetts. Although the 2011 decisions are significant, issues the SJC is likely to decide in the coming months will affect the validity of many more foreclosed properties and subsequent transfers.

One such unanswered question, whether Massachusetts law requires a foreclosing entity to hold both the note and the mortgage in order to foreclose, is at the heart of *Eaton v. Fed. Nat’l Mortgage Ass’n*, SJC-11041, which was argued before the SJC in October 2011. As in *Bailey*, *Eaton* arose from a former owner’s post-foreclosure eviction. Eaton defended by arguing that the foreclosing entity, Green Tree Servicing, LLC (Green Tree), did not have authority to enforce the note through foreclosure proceedings because it did not hold the note. The Housing Court stayed the eviction while Eaton sought relief in
Superior Court. The present SJC case stems from Green Tree’s interlocutory appeal of Superior Court Judge McIntyre’s order granting Eaton a preliminary injunction barring her eviction.

In the preliminary injunction decision, Judge McIntyre concluded: (1) Massachusetts common law requires that the foreclosing entity hold both the note and the mortgage in order to foreclose; (2) G. L. c. 244, § 14 does not displace this common law requirement; and (3) sound public policy supports this rule. *Eaton v. Fed. Nat’l Mortgage Ass’n*, No. 11-1382 (Mass. Super. June 17, 2011). In contrast, recent Massachusetts federal court decisions have held the opposite. See, *e.g.*, *In re Huggins*, 357 B.R. 180, 183 (Bankr. D. Mass. 2006). Because the process of securitization routinely separates ownership of the note and mortgage, the SJC’s decision in *Eaton* will have broad implications in the Massachusetts housing market, potentially invalidating thousands or even tens of thousands of completed foreclosures around the state.

The separation of mortgage and note is also at the heart of questions about Mortgage Electronic Registration Systems, Inc. (MERS). MERS is frequently named as mortgagee (or nominee for the lender, or both simultaneously) in a mortgage; even when it is not, many lenders assign mortgages to MERS as part of the securitization process. MERS then retains the mortgage security interest while the note, which entitles the holder to the stream of mortgage payments, is sold. MERS claims that this system allows its users to transfer and track ownership while avoiding the need to record assignments.


Other new questions might arise if the Massachusetts Legislature passes new foreclosure-related legislation. The Legislature previously passed St. 2010, c. 258, discussed *supra* in relation to Nunez.
A variety of foreclosure-related bills have been sponsored in the 2011-2012 session. Some would reform the process of foreclosing in Massachusetts by mandating pre-foreclosure mediation (see, e.g., S.673), converting Massachusetts to a judicial foreclosure state (see, e.g., S.676), or mandating certain loan modifications (see, e.g., S.868). Echoing issues raised in Eaton, some bills focus on the role of the note holder in the foreclosure process to ensure that the note holder authorizes the foreclosure (see, e.g., S.771) or to require that the foreclosing entity hold both the note and the mortgage (see, e.g., S.684). Other proposals provide relief to buyers who purchased properties with Ibanez or other title defects (see, e.g., S.830) or to certain bona fide purchasers at foreclosure sales (see, e.g., S.684). Bills have also been proposed that would protect former owners from certain post-foreclosure evictions (see, e.g., S.767). Any new legislation would, of course, change Massachusetts foreclosure law and likely raise new questions for the courts to decide.

Conclusion

In 2011, the SJC resolved many pressing questions posed by the occurrence of so many complex, potentially-defective foreclosures. But as foreclosures continue in staggering numbers across the Commonwealth, contemporary mortgage industry practices mean that many will raise novel legal issues. The Legislature is also active in this area, and many current bills, if enacted, would raise new questions for the courts to answer. The SJC’s 2011 foreclosure decisions will likely be only the beginning of a series of dramatic changes in Massachusetts foreclosure law.

Endnotes

1 For more detail on securitization, see, e.g., Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1 (2011).
2 The “try title” action permits a property holder who believes his title may be in question to name the potential adverse claimant in a lawsuit and compel him to try his claim to the property. If the potential adverse claimant defaults, he loses his claim. If the claimant appears, the parties try the disputed title.
3 Under Massachusetts title theory, a mortgage grants legal title to the mortgagee while the mortgagor retains equitable title. When the debt is repaid, legal title is transferred to the mortgagor. See, e.g., Ibanez, 458 Mass. at 649.
4 Because Massachusetts is a non-judicial foreclosure state, the burden is on homeowners facing foreclosure to bring any legal challenges in Superior Court.