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A Roundup of Foreclosure Law Decisions in 2012


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We reviewed every Appellate Division case in the first eleven months of 2012. In raw count, the lenders beat the borrowers by a rough margin of 2:1, but that number does not necessarily reflect a swing in sensitivities. The appellate division decisions in 2012 showed strict application of the laws and notable lack of sympathy for borrowers evidenced by recent years' legislative enactments, issuing decisions that were decidedly pro-lender. One trend continuing in 2012 is that the Second Department has the lion's share of the reported cases and is therefore the most fruitful source of stare decisis.

Standing, Basic Principles

The 2012 cases adhered to the principle that mere servicers who cannot account for the whereabouts of the promissory note lack standing to bring a foreclosure action.[1] Practitioners in the field refer to these as "where's the note?" defenses and see them in any case where the servicer is other than the originator of the mortgage. Since the borrower has no way of knowing if the note actually traveled with the mortgage, savvy defense counsel always interpose the defense and hope for the best. In CSFB 2004–C3 Bronx Apts v. Sinckler,[2] the record seems to imply that the mortgagor assumed that a "where's the note" defense would be available and was simply disappointed when it turned out that the mortgagee actually had it. The Appellate Division's uncharacteristic rapid reversal (four months!) of the trial court probably indicates the appellate panel's impatience with trial court decisions based on mercy rather than law. Something similar happened in Deutsche Bank Trust Americas v. Codio,[3] where the plaintiff was able to produce an allonge (a document showing the actual chain of assignment with original signatures at each endorsement) showing it to have been the proper assignee of the mortgage. Clearly such matters can be a question of fact.[4] However, other cases have stated that there are methods for foreclosing without actually possessing the promissory note.[5]

Repairs to Standing

If standing was defective at the time of the commencement of the action, it appears that the standing cannot be corrected. The decision standing for that idea, U.S. Bank v. Dellarmo,[6] showed that the attempted correction was not itself correct and therefore the principle we set forth could be distinguished as mere dicta. Although already implied in 2011, 2012 made it clear that if the plaintiff in a foreclosure proceeding lacks standing at the time of commencing the action, later acquisition of that standing does not cure the action. It must be commenced from scratch—but only if it can be.

If, however, the plaintiff did have standing to bring the action in the first place, the proper plaintiff may assign both the mortgage and the lawsuit to a successor. Under such circumstances, it is proper to amend the caption to reflect the new parties.[7] However, substitution in the action (and amendment of the caption) is not mandatory, but rather the original action can proceed as is after the assignment.[8] A purchaser of a failed bank's assets has standing to commence a foreclosure action, even if it is immune from whatever counterclaims the borrower may have asserted against the failed bank.[9]

It may be that while searching for the proper plaintiff, the statute of limitations has run so as to intercept the suit. Oddly, however, this can actually run in favor of the lender. Normally, part of the bringing of a foreclosure action is the acceleration of all future payments on the mortgage to being due and payable forthwith. However, if in the prior action, the lender lacked standing to bring the suit at all, the lender also lacked standing to accelerate the note. Thus, when the proper plaintiff comes along to bring the suit, that plaintiff can accelerate what remains on the note and is not already barred by the statute of limitations.[10] While this does not give the plaintiff 100 percent of the borrowed funds, it can give the plaintiff considerably more than the zero it would have gotten had the previous plaintiff's acceleration been effective.

While normally we think of standing issues as being relative to the standing of the plaintiff, the standing issue can arise with respect to the defendants as well. Thus, where property is owned as tenants by the entirety and only one spouse signs the note and mortgage, the foreclosure proceeding cannot be prosecuted against the nonsignatory spouse and, of course, therefore is of little value as against the signatory spouse. In other words, whether or not a house divided can stand, if it's divided, it can't be foreclosed on.[11] Where the proceeding is brought against a dead person, there is no fixing it.[12] One must start the proceeding against the personal representative of the estate. Where the defendant claims to hold a superior mortgage herself, the foreclosure proceeding may also be defeated.[13]

Fraudulent Practices

In foreclosures, anyone can be guilty of fraud: lender, assignee, or even the homeowner.

Since the passage of The Home Equity Theft Prevention Act (HETPA), codified as Chapter 308 of the Laws of 2006,[14] the kinds of behavior characterized as "predatory lending" has undeniably diminished. As a result, by 2012, the amount of case law under the statute had considerably dropped off. Where it does appear, however, is in dealing with the question of whether the mortgage was valid in the first place and therefore qualified to be an appropriate instrument upon which to foreclose. A consumer seeking to resist a foreclosure must show either substantively that she was taken advantage of in predatory practices or that the loan was issued after the HETPA law went into effect creating presumptions of predation. (Emigrant Mortg. v. Fitzpatrick).[15] It should be noted that Fitzpatrick holds the consumer responsible for the contents of the great mass of information presented at the time of loan applications and closings and does not take into account the well-known phenomenon that people simply do not read these materials. The court rejected the sympathetic approach, instead holding:

Here, the plaintiff's evidence established that Fitzpatrick was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income. Such evidence established its prima facie entitlement to judgment as a matter of law dismissing the second affirmative defense. In opposition, Fitzpatrick failed to proffer any evidence sufficient to raise a triable issue of fact as to whether the plaintiff made any materially misleading statements or committed any misconduct with respect to the subject loan.

Although the originating bank may have done nothing at all, that does not mean that an assignee of the bank is equally innocent. Where the one who is sitting as plaintiff in the foreclosure proceeding actually maliciously caused the default, while the foreclosure proceeding itself may still lie, ancillary relief within the court's discretion is properly denied the plaintiff.[16] However, it is unclear whether if the predatory practice had been committed by the initial plaintiff in the suit whether the foreclosure relief in chief would also have been denied.

Where the premises are conveyed out from under a mortgage in order to avoid the mortgage, no matter how many such conveyances there are, they can all be set aside and the foreclosure allowed to proceed.[17]

Mortgages routinely contain clauses indicating that they are the complete understanding of the parties and that there are no oral representations or that any such oral representations are "merged" into the mortgage. However, a so-called "merger clause" in a mortgage will not necessarily bar claims of fraudulent representations, at least not where the clause is "bare bones." Thus, the mortgage itself is vulnerable to attack through oral testimony claiming fraudulent inducement. (LibertyPointe Bank v. 75 East 125th Street, LLC[18]). Contrast this with Emigrant Mortg. v. Fitzpatrick, supra,[19] that refuses to allow an attack on the mortgage based on a predatory lending claim where the mortgage transaction included boilerplate disclosures. Philosophically, these two cases are difficult, if not impossible to reconcile. We note, in this regard that LibertyPointe is from the First Department, whereas Fitzpatrick is from the Second Department and may therefore represent contrary views that will develop their own body of developing precedent.

Inadequate Consideration

Normally, land is sold on a flat fee basis. The price is set for the parcel, regardless of the size of the parcel. However, where the premises were supposed to be sold on a price per acre basis and there was less acreage than actually contracted for and the borrower defaults, the smaller size of the property is not a complete defense to the foreclosure. The foreclosure can proceed, but the amount foreclosed upon will be reduced downward.[20] In Thompson v. Naish[21] the Fourth Department held that where the borrower pays the full amount demanded, but pays it late, the borrower is still in default of the mortgage and foreclosure is appropriately ordered. That is not as harsh a rule as it appears, given RPAPL §1341, permitting the defendant to pay off the remaining sums (the late fees and such) owed in order to prevent the sale of the property.

Counterclaims

A waiver in a mortgage of defenses or counterclaims does not preclude a counterclaim based on fraud, if properly asserted.[22]

Mortgagees in Possession

Finally, we note under Bank of America v. Oneonta, L.P.,[23] that a mortgagee in possession after an order of reference can safely expect reimbursement for the items spent after the appointment of a referee only if they are actually specified in the mortgage instrument allowed to be advanced, but nothing else—reimbursement should only be approved for expenditures that are necessary to maintain the premises. The referee the court appoints on the plaintiff's motion, not the plaintiff, is charged with running the property. While the plaintiff in that case was simply out of luck in expending other funds for which reimbursement was refused, the Third Department precisely states what the plaintiff could have done to ensure that it would not be expending funds not subject to reimbursement.

The court wrote, "The prudent course for plaintiff would have been to seek court approval in advance of undertaking any actions that might be deemed ultra vires and obtaining permission to act and add the expenditure to the amount of its judgment, or move to expand the receiver's powers and have the court authorize him to undertake those actions or make those expenditures." (emphasis supplied). In other words, rather than spending the funds and hoping for the best, the plaintiff could have sought court permission to spend the money itself or empower the receiver to do so. Consistent with our theme of strict enforcement, we find the court looking to the mortgage instrument itself and allowing only those expenses expressly specified in it—absent the prior permission. The Appellate decision does not rule out the idea that Trial Term could have gone beyond the four corners of the mortgage in the sound exercise of discretion, given adequately persuasive reasons to do so prior to the making of the expenditure.

Conclusion

All four Appellate Divisions should be applauded and lauded for following the rule of law and enforcing contracts as written in 2012. Such rulings should keep the few lenders left lending, knowing that they will have the ability to collect the borrowed money or homes pledged albeit a few years after starting an action.

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Endnotes:

1. In the Second Department: U.S. Bank v. Dellarmo, 94 A.D.3d 746, 942 N.Y.S.2d 122; Citibank v. Van Brunt Properties, 95 A.D.3d 1158, 945 N.Y.S.2d 330; U.S. Bank v. Cange, 96 A.D.3d 825, 947 N.Y.S.2d 522; Wells Fargo Bank v. Hudson, 98 A.D.3d 576, 949 N.Y.S.2d 703.
2. 96 A.D.3d 680, 949 N.Y.S.2d 21 (1st Dept. 2012).
3. 94 A.D.3d 1040, 943 N.Y.S.2d 545 (2d Dept. 2012).
4. Deutsche Bank Nat. Trust v. Rivas, 95 A.D.3d 1061, 945 N.Y.S.2d 328 (2d Dept.).
5. Bailey & Weinstein, "Using the Judicial System to End the Foreclosure Crisis," New York Law Journal, Aug. 8, 2012.
6. 94 A.D.3d 746, 942 N.Y.S.2d 122 (2d Dept.).
7. Citibank v. Van Brunt Properties, 95 A.D.3d 1158, 945 N.Y.S.2d 330 (2d Dept.); GRP Loan v. Taylor, 95 A.D.3d 1172, 945 N.Y.S.2d 336 (2d Dept. 2012).
8. IndyMac Bank v. Thompson, —N.Y.S.2d—, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (AD 2d Dept. 2012).
9. JP Morgan Chase Bank v. Miodownik, 91 A.D.3d 546, 937 N.Y.S.2d 192 (1st Dept.).
10. Wells Fargo Bank v. Burke, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dept.).
11. U.S. Bank v. Lieberman, 98 A.D.3d 422, 950 N.Y.S.2d 127 (1st Dept.).
12. Wendover Financial Services v. Ridgeway, 93 A.D.3d 1156, 940 N.Y.S.2d 391 (4th Dept. 2012).
13. South Point v. Redman, 94 A.D.3d 1086, 943 N.Y.S.2d 543 (2d Dept. 2012).
14. Parts of HETPA appear in §595 of the

Banking Law, §265-a of the Real Property Law and §1303 of the Real Property Actions and Proceedings Law, the last of which being specifically concerned with foreclosure.

15. 95 A.D.3d 1169, 945 N.Y.S.2d 697 (2d Dept. 2012).

16. Norwest Bank Minnesota v. E.M.V. Realty, 94 A.D.3d 835, 943 N.Y.S.2d 113 (2d Dept. 2012).

17. Pritchard v. Curtis, 95 A.D.3d 1379, 944 N.Y.S.2d 341 (3d Dept.).

18. 95 A.D.3d 706, 946 N.Y.S.2d 26 (1st Dept. 2012).

19. 95 A.D.3d 1169, 945 N.Y.S.2d 697 (2d Dept. 2012).

20. Shufelt v. Bulfamante, 92 A.D.3d 936, 940 N.Y.S.2d 108 (2d Dept. 2012).

21. 93 A.D.3d 1203, 940 N.Y.S.2d 714 (4th Dept. 2012).

22. Archer Capital Fund v. GEL, 95 A.D.3d 800, 944 N.Y.S.2d 179 (2d Dept. 2012).

23. 97 A.D.3d 1023, 949 N.Y.S.2d 794 (3d Dept. 2012).