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The Most Significant Title and Foreclosure Cases of 2015

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Since one author, Adam Leitman Bailey, started practicing law 20 years ago, when a terrible court decision without any basis in law would arrive, we would be thankful that the Court of Appeals was in session and had the final word. Those days are gone and today's Court of Appeals makes policy-based decisions rather than relying on precedent and the law even, as demonstrated below, it overturns two hundred years of precedence. This pattern has continued this year. In this article we analyze two decisions by the Court of Appeals and one by the U.S. Supreme Court.

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In *Faison v. Lewis*,[1] the Court of Appeals rocked the stability in the transfer of title by eliminating the statute of limitations from one entire category of cases. In *Flushing Savings Bank v. Bitar*,[2] the court explained the rules for determining the proper deficiency judgment amount and appraisal requirements. In *Jesinoski v. Countrywide Home Loans*,[3] the U.S. Supreme Court got into the act with a unanimous decision that will also negatively affect the stability of residential real estate transfers and lending

'Faison v. Lewis'

In *Faison*, the court in a 4-3 decision over a stirring dissent with the better arguments, ruled that when bringing a suit to invalidate a mortgage because of a forgery in the chain of title, there is no statute of limitations. This is part of a family of cases coming down from the Court of Appeals over the last several decades depriving the very concept of statute of limitations of the certainty it held a generation ago.

In *Faison*, the plaintiff sought to set aside a mortgage based on a purportedly forged deed. The bank defended on the basis that more than six years had passed since the issuance of the deed, more than two years since the plaintiff had discovered the purported forgery. While opponents of *Faison* have focused on the fact that the statute of limitations was disregarded on the mere allegation of a forgery, it is common in litigation for procedural questions to be so wrapped up in the facts of the case that carts frequently appear to precede horses. However, the real problem with *Faison* is not why the statute of limitations was disregarded, but rather that it was at all.

The majority of the court makes the rather weak-kneed argument as follows:

> Having failed to persuade based on our case law, the defendant argues that a statute of limitations is necessary to protect the sanctity of real property titles. However, Section 213(8) contains a two-year discovery rule, which potentially extends the life of a claim years beyond the six-year statutory term. As a consequence, land titles already are subject to challenge, based on a forged deed, far into the future.

The referenced CPLR section, namely, 213(8) reads:

> an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

Thus, 213(8) has two standards for fraud limitations period: six years from commission of the fraud or two years from its discovery. The court is arguing that this latter period is both so vague and potentially so long that, the effective limitations period is already very long and the court is therefore doing no harm by changing it from very long to infinite.

This argument is absurd on its face. When the Legislature defines something in terms that may be difficult to ascertain under some sets of facts, that does not mean that there is no harm done in removing any definition at all. And, whether there is harm or not, it is for the Legislature to define not only the duration of statutes of limitations, but what triggers them, not the courts. The courts should, generally speaking, be in the business of interpreting statutes, not abolishing them.

The basis of the court's decision is that forgery confers no rights and therefore sets no demarcation point for the invocation of rights. While the court cites to many cases that say that forgery confers no rights, the "therefore" is unsupported in the case law and the dissent is quick to point this logical flaw out.

The real problem with *Faison* is that by completely abolishing the statute of limitations, it also completely abolishes the stability of title that comes with defined periods of time when titles can be challenged. While some of that is intrinsic in title law, such as adjudications over the ancient rights of Native Americans, by and large the bedrock of our real property system is that these rights are stable and challenges to them

rare. In *Faison*, the court disregards this principle.

'Flushing Savings v. Bitar'

In *Bitar*, the court unanimously ruled that in seeking a deficiency judgment above the fair market value of a foreclosed-upon premises, the foreclosing plaintiff does not have to get the application right in the first instance. A defective application is subject to correction. However, the correction that is called for is a detailed factual analysis of how to arrive at the fair market value of the foreclosed-upon premises.

Two things are noteworthy in the history of this case, both of them appearing in the footnotes of the decision. The first is that the Attorney General of the State of New York submitted an amicus brief opposing the bank's positions. The court unanimously rejected the Attorney General's point of view. Had the Attorney General prevailed, the bank would have had a tight deadline to get its application for a deficiency judgment right and only one chance to get it right. The court, in its decision, allows for one correction, but carefully footnotes, "We express no opinion as to what steps a court may take in the event the lender, having been given an additional opportunity to submit the necessary and relevant proof, nonetheless submits inadequate proof in the second instance."

The flaw in the application was simply that it was bulk produced without any genuine individualized study of the circumstances of the case. The court rejected the application for a deficiency judgment as being "unsubstantiated" and demanded that any such application contain some level of detail of factual data to back up the affiant's contentions, without the court setting forth what those details need be. It left that to the discretion of individual judges and we can well imagine that actual practice of the judges will vary widely by department and even more widely by the proclivities of the individual judges hearing these applications.

Until *Bitar*, the concern for the mechanical processing of foreclosure matters was largely limited to the initial phases of foreclosure procedure. With *Bitar*, we now see the court focusing on the later stages of foreclosure procedure: the actual sale and the ensuing procedures until the foreclosure has reached its very last phase. *Bitar* is therefore important not merely for its rule that the application for a deficiency judgment must be hand-crafted by legal counsel, but rather as a signal that all areas of mortgage foreclosure procedure[4] will now be expected to be hand-crafted rather than bulk processed.

Now where the party that was plaintiff in the foreclosure action was also the successful bidder at the foreclosure auction, the application for a deficiency judgment must include detailed analyses of how the appraiser arrived at the appraised value of the property. This will certainly include things like the sales price of other comparable properties geographically close or otherwise relevant to the distressed property. Where sales are not available, presumably assessments can be used and appropriate mathematical formulae can be applied to derive an estimate of market value from the assessed value, at least where the assessment is relatively recent.

'Jesinoski v. Countrywide'

With *Jesinoski* being a unanimous decision of the U.S. Supreme Court, and one knowing the immense diversity of philosophy on that court, one is naturally led to wonder why the unanimity. This is all the more true because it is a Scalia opinion, a short one at that, and there are no concurrences, certainly no dissents. We have to believe that the answer lies in the confluence that the decision presents between the strict constructionist point of view one normally finds with the five conservative justices of the current court and the pro-consumer view one finds with the four liberal justices. These two viewpoints trumping all other considerations, must then have led to all nine of them agreeing.

The question before the court was simple: Under the Truth In Lending Act (TILA), must one, within three years of the making of the loan, commence an action to rescind a home loan on the basis of failure to conform to the disclosure requirements of the act or does it suffice to send a mere letter to the bank disaffirming the loan? The court ruled that it was enough to send a mere letter within the three-year period, mere indeed, not necessarily certified mail or any other formal requirements. Justice Antonin Scalia writes, "Although §1635(f) tells us *when* the right to rescind must be exercised, it says nothing about *how* that right is exercised."[5] Indeed, since the statute under consideration says, "shall have the right to rescind…by notifying the creditor, in accordance with regulations of the board, of his intention to do so,"[6] under Scalia's interpretation, there appears to be no particular need that the "notifying" even be in writing.

Now, what Scalia has going for himself in this is the actual wording of the statute and readers of this Journal are most likely well aware that legislation is both routinely and notoriously (to us) sloppily written. So, where the statute says "notifying" and does not say "commencing suit," it is a reasonable interpretation that Congress intended the "notifying" to be a predicate to suit rather than a statute of limitations for the suit itself. However, *Jesinoski* does not regard it as a predicate to suit, but rather as an alternative to suit.

Perhaps Congress really did intend that one could either write a letter or bring a suit, but if so, it was an unusually naïve moment for Congress as any socially aware person would understand that the bank is not going to sit idly by in being told its mortgage was invalid and there is going to be a suit, even if it is the bank commencing it in the form of a declaratory judgment action, rather than the mortgagor being the commencing party.

However, Congress could have decided that the moment of rescission was to be a mere lay person's nontechnical letter or even a telephone call. But, if that is the case, the law is radical indeed. The virtue of commencing lawsuits is that they are public records, depending on the local practice either immediately where in New York they are commenced with the filing of a complaint or soon to be in jurisdictions where commencement is achieved through the service of process.

They are thus easy for anyone seeking to know the current financial structure of a piece of real property to research. Contrast that with private correspondence, telephone calls, or emails, where even the person initiating the contact may often have no record of the communication, much less a public record, and the validity of the mortgage becomes a matter not of public record for what can be a rather long time.

The effect of this decision, therefore, is to

in the rather lively trade in mortgages that may have been partly responsible for the Great Recession of 2008, but in a greatly restricted sense continue to have a value in our legal system. After all, a private person who holds a mortgage on a piece of property may wish to sell the mortgage in order to realize some of the cash inherent in the deal immediately, rather than over what is typically a 30-year period, a period that may even exceed that person's life expectancy. However, where a mere phone call can invalidate the mortgage that is being sold, it is no longer a marketable instrument. Thus, there is an anti-consumer consequence to *Jesinoski* as well.

Post-*Jesinoski*, the very least the proposed assignee of a mortgage is going to want from the holder of the underlying note is an affidavit that there have been no communications of any kind to the assignor purporting to disavow the note. However, the assignee should also be examining the documentation that the mortgagor received at the time of the origination of the loan, especially if fewer than three years prior to the assignment, to ensure that the documentation is to the satisfaction of the assignee in compliance with the TILA and that may well necessitate some highly focused inquiries.

The answer the Supreme Court would no doubt give to that observation is that the answer is for Congress to amend the statute so as to remove these undesirable effects. Both the *Faison* and *Jesinoski* decisions necessitate state and federal legislative intervention to restate the law in the former case, and to codify reliable notice requirements for the latter. Until and whether the Legislature and Congress acts, the stability of some title transfers and whether lenders will continue to lend and title companies insure, remain endangered.

ENDNOTES:

1. 25 N.Y.3d 220 (2015).

2. 25 N.Y.3d 307 (2015).

3. 135 S.Ct. 790 (2015).

4. And judgment foreclosure, condominium common charge foreclosure, and anything else that borrows mortgage foreclosure procedure.

5. Emphasis in the original.

6. As quoted in the opinion.

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