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State mortgage-servicing case law takes a consumer protection turn

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The law regulating mortgage servicers in Massachusetts continues to evolve. Last year in these pages, I summarized several 2014 decisions that largely favored mortgage servicers and significantly limited several popular foreclosure-defense theories.

In 2015, however, the tide seems to have turned back. In the past year, three significant Massachusetts decisions hold mortgage servicers to exacting standards.

The Supreme Judicial Court significantly limited its 2014 ruling on right-to-cure notices, holding that the foreclosing entity must strictly comply with the right-to-cure-notice provision of the mortgage.

The Appeals Court imposed a heavy burden on foreclosing entities to demonstrate their authority to foreclose in subsequent litigation. The Appeals Court also ruled that failure to strictly comply with the regulations of the Department of Housing and Urban Development in an FHA-insured mortgage could void a foreclosure sale.

Right-to-cure notices

The leading, and perhaps most surprising, mortgage-servicing holding of 2015 was *Pinti v. Emigrant Mortgage Co.*, 472 Mass. 226, 243 (2015). That decision likely will reignite litigation over the technical terms contained in right-to-cure notices sent to borrowers at the start of the foreclosure process.

The *Pinti* decision holds mortgage servicers to a strict standard of compliance and walks back the SJC's 2014 decision in *U.S. Bank, Nat'l Ass'n v. Schumacher*.

A mortgage servicer is required to send a notice of the borrower's right to cure a default in Massachusetts for two reasons. First, paragraph 22 of a standard Massachusetts mortgage requires a notice. Second, G.L.c. 244, §35A also requires a notice.

In 2014, the SJC ruled that strict compliance with Section 35A was not necessary for a valid foreclosure in Massachusetts because "[a] homeowner's right to cure a default is a preforeclosure undertaking that, when satisfied, eliminates the default and wholly precludes the initiation of foreclosure proceedings in the first instance, thereby protecting and preserving home ownership." *U.S. Bank Nat. Ass'n v. Schumacher*, 467 Mass. 421, 431 (2014).

Rather than strict compliance, Justice Ralph D. Gants' concurrence in *Schumacher* suggested that a right-to-cure notice that failed to comply with Section 35A would only void a foreclosure sale if it rendered it "fundamentally unfair."

In 2015, however, the SJC took a somewhat contrary view with respect to paragraph 22 of the mortgage. In *Pinti*, the SJC ruled that "Paragraph 22 [of the standard Massachusetts mortgage] demands strict compliance, regardless of the existence, or not, of prejudice to a particular mortgagor."

In *Pinti*, the servicer's right-to-cure notice informed the borrowers that they "have the right to assert in any lawsuit for foreclosure and sale the nonexistence of a default or any other defense [they] may have to acceleration and foreclosure and sale."

That language did not track the requirement of paragraph 22, because rather than informing the borrowers that they had the option to bring a court action, it incorrectly informed them that the servicer would bring an action in which they would have an opportunity to present defenses.

The SJC ruled that the mortgagee's failure to strictly comply with each of the terms of paragraph 22 rendered the foreclosure sale entirely void. The court even rejected the "fundamentally unfair" standard of *Schumacher*.

As such, it appears from *Pinti* that a failure to comply with the requirements of paragraph 22 could void an ensuing foreclosure sale, even as against a bona-fide third party years later.

While the SJC ruled that the effect of *Pinti* would be prospective only, other courts have applied its holding to already-pending cases. See *Aurora Loan Services, LLC v. Murphy*, 88 Mass. App. Ct. 726 (2015) (*Pinti* holding applies to cases pending on appeal); *Paiva v. Bank of New York Mellon*, No. 14-CV-14531-ADB, 2015 WL 4746411, at *3 (D. Mass. Aug. 11, 2015) (*Pinti* applies where motions for summary judgment were filed before *Pinti* announced).

What is more, the *Pinti* decision raises the legitimate question of whether a mortgagee's failure to send a right-to-cure notice that complies with paragraph 22 triggers liability under Chapter 93A. The decision suggests that paragraph 22 serves a "consumer protection purpose."

Of course, if failure to send a compliant notice triggers Chapter 93A, mortgage servicers may face enhanced penalties, including the payment of a borrower's attorneys' fees.

Proof of authority of foreclosing mortgagee

In another decision holding mortgage servicers to an exacting standard, the Appeals Court ruled that a question of fact existed as to a servicer's authority to foreclose on behalf of an investor in *Khalsa v. Sovereign Bank, N.A.*, No. 14-P-1898, slip op. (Mass. App. Ct. Jan. 11, 2016).

Massachusetts allows ownership of a note and mortgage to be "split," or owned by different parties. *Eaton v. Federal Nat'l Mort. Ass'n*, 462 Mass. 569 571 (2012). Under that regime, the holder of the mortgage may foreclose only if it is acting on behalf of the

holder of the note.

In *Khalsa*, the Appeals Court affirmed the denial of summary judgment to a foreclosing mortgagee because its summary judgment record failed to demonstrate that it was acting on behalf of the note holder. In that case, the mortgage was held by Sovereign Bank, the servicer, but the note was owned by Freddie Mac, the investor. The servicer foreclosed in its own name.

The borrower alleged that the servicer wrongfully foreclosed because it did not hold the note. The servicer filed a motion for summary judgment and argued that it was acting at the investor's behest. That argument was based on an affidavit by an employee in the servicer's default department that pointed to the investor's 2,799-page seller/servicer guide.

The Superior Court denied the motion for summary judgment on the ground that the statement was "unsupported" and "based on no apparent personal knowledge."

The servicer then filed a second motion for summary judgment, supported by an affidavit from an assistant treasurer of the investor. The investor affidavit also cited the seller/servicer guide and said that "[the investor] authorizes a servicer to initiate foreclosure proceedings in accordance with the Guide."

Again, however, the Superior Court denied the motion for summary judgment because "one is left to speculate as to how (if at all) [the assistant treasurer] has any personal knowledge of the facts he asserts."

The Appeals Court affirmed those holdings. It ruled that both affidavits failed to meet the requirements of Mass. R. Civ. P. 56(e) because both affidavits failed to demonstrate how the affiant had knowledge of the facts asserted.

The Appeals Court ruled that the servicer's summary judgment affidavits failed to make even a prima facie showing that the servicer was empowered to foreclose. In doing so, the *Khalsa* decision does not point to any evidence presented by the borrowers to controvert either of the servicer's affidavits.

Indeed, the Appeals Court even went on to suggest that in a wrongful foreclosure suit, the foreclosing entity may have the burden to prove its authority to foreclose once the borrower makes a "plausible showing" that the foreclosing entity lacked authority to act on behalf of the note-holder.

For that reason, *Khalsa* is a striking departure from recent cases ruling in favor of mortgage servicers. For example, in *Federal National Mortgage Association v. Hendricks*, the SJC ruled that the owner of property after a foreclosure sale could make out a prima facie case for possession of the property by merely introducing the conclusory statutory form foreclosure affidavit. 463 Mass. 635, 642 (2012).

Khalsa appears to reject that view entirely, although the Appeals Court did not address *Hendricks*.

HUD regulations requiring face-to-face meetings

Finally, the Appeals Court also held that a foreclosing entity must strictly comply with HUD regulations when foreclosing an FHA-insured mortgage.

FHA-insured mortgages contain the phrase: "This Security Instrument does not authorize acceleration or foreclosure if not permitted by [HUD regulations]." Those regulations, in turn, require that mortgage servicers attempt to conduct a face-to-face loss-mitigation meeting with the borrower before the borrower misses three payments.

In another case, the Appeals Court joined the growing number of courts nationwide ruling that the failure to conduct a face-to-face meeting is potentially fatal to a later foreclosure of an FHA-insured mortgage. Cook, 87 Mass. App. Ct. 382, 390, review denied, 36 N.E. 3d 31 (Mass. 2015).

In *Cook*, the borrowers argued that the foreclosing entity failed to conduct a face-to-face loss-mitigation meeting before their third missed payment, as required by HUD regulations.

The Appeals Court first ruled that HUD regulations are incorporated by reference in FHA-insured mortgages. It then rejected the mortgage servicer's argument that strict compliance with HUD regulations was not required to conduct a valid foreclosure sale.

It therefore ruled that a genuine issue of fact existed as to whether the mortgage servicer had complied with the face-to-face meeting requirement of HUD regulations when it conducted a large-scale loss-mitigation event at Gillette Stadium.

Significantly, however, the *Cook* decision makes two points that dull, somewhat, the adverse effects of its judgment. First, to prevail in subsequent litigation, a mortgage borrower must show that the failure to meet the face-to-face deadline in the regulations caused prejudice.

Second, *Cook* expressly rejected the "worst case" scenario feared by most mortgage servicers — that missing the three-payment deadline removes the servicer's ability to foreclose forever.

Rather, *Cook* suggests that the servicer could still meet the regulation's requirement by "giving the borrower an opportunity to access loss mitigation services that she should have been offered through a face-to-face meeting."

If one thing is certain from the last year of mortgage decisions, it is that litigation over mortgage servicing practices in Massachusetts is far from over. MLW

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