

MASSACHUSETTS SUPREME JUDICIAL COURT HOLDS THAT BAD FORECLOSURE = BAD TITLE FOR BONA FIDE PURCHASER

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The Massachusetts Supreme Judicial Court ruled this week that owners of property whose titles have been rendered defective due to improper foreclosures cannot bring a court action to clear their titles under the “try title” procedure in the Massachusetts Land Court. The Court, which in January found that banks can’t foreclose on a house if they don’t own the mortgage, went one step further in a closely watched case and said a sale after that foreclosure doesn’t transfer the property. Therefore, the buyer couldn’t bring his court action against a previous owner, the Court ruled. Left open, however, was whether owners could attempt to put their chains of title back together and conduct new foreclosure sales to clear their titles. Unfortunately, the Court did not provide the real estate community with any further guidance as to how best to resolve these complicated title defects.

The Court upheld a lower-court decision that said Francis J. Bevilacqua III, the buyer of residential property in Haverhill, Massachusetts (who apparently invested hundreds of thousands of dollars in the property, converting it into condominiums), never owned it because U.S. Bancorp foreclosed before it the mortgage was assigned to it by MERS. The Court also held that Bevilacqua lacked standing as a “bona fide good faith purchaser for value.” This ruling could have implications in the foreclosure crisis, in which banks are accused of clouding home titles through sloppy transferring of mortgages.

“By alleging that U.S. Bank was not the assignee of the mortgage at the time of the purported foreclosure, Bevilacqua is necessarily asserting that the power of sale was not complied with, that the purported sale was invalid, and that his grantor’s title was

defective,” the Court wrote. “In light of its defective title, the intention of U.S. Bank to transfer the property to Bevilacqua is irrelevant and he cannot have become the owner of the property pursuant to the quitclaim deed.”

While the long term implications of this case on the Massachusetts real estate market are certainly ominous, buyers in other jurisdictions need to also consider the potential implications of this case. If the Court's ruling were to be adopted by other state courts, any purchaser of property at a foreclosure sale or as REO property directly from a bank, will need to examine (or hire someone to examine) a preliminary title report for the property prior to completing the purchase, in order to determine that the chain of title on the property is proper. What's more, this concern could extend to anyone who is purchasing property that was sold at any time at a foreclosure sale or as REO property. Mr. Bevilacqua was in the process of converting his property to condominiums. What if he had sold the condominiums? Would the purchasers also have faulty title? Based on the Court's analysis, it is difficult to come up with an answer other than yes.

This decision is to be contrasted with the Ninth Circuit's decision in *Cervantes v. Countrywide Home Loans, Inc.*, which was discussed in our most recent blog. Unlike the Massachusetts decision, the Ninth Circuit appeared to honor substance over form and take the equities into account in making its decision.

Bevilacqua v. Rodriguez, 10880, Supreme Judicial Court of Massachusetts (Boston).

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