

Massachusetts Land Court Paves Way For Clearing Defective Foreclosure Titles

Court Uses Novel Equitable Assignment of Mortgage Theory

In what could be the first test case of a new theory to clear up defective foreclosure titles — and much welcome news for property owners stuck with toxic titles — the Massachusetts Land Court (Judge Gordon Piper) has ruled that the theory of equitable



assignment of an improperly foreclosed mortgage can be used to clear title of an improperly foreclosed property.

The case is ***Cavanaugh v. GMAC Mortgage LLC, et al.***, 11 MISC 447901 (link below) and was recently appealed by noted foreclosure attorney, Glenn Russell, Esq., who represented the prevailing homeowners in the landmark *U.S. Bank v. Ibanez* case. The case will now go up to the Massachusetts Appeals Court, or, given its importance, perhaps taken up by the Mass. Supreme Judicial Court on direct appellate review.

In this case, GMAC Mortgage foreclosed a mortgage given by Maureen Cavanaugh of Fairhaven, then granted a foreclosure deed to Fannie Mae. The foreclosure, however, was defective because notice of the foreclosure sale was not published in the local newspaper as required by Massachusetts foreclosure law. Fannie Mae later sold the property to Timothy Lowney.

Ms. Cavanaugh sued the lenders and Mr. Lowney in a Land Court

“quiet title” action to re-claim her property back. This is essentially the same situation as presented in the [Bevilacqua vs. Rodriguez case](#) where a property owner was stuck with a defective foreclosure title. The Court in *Bevilacqua* suggested an alternative theory to solve the defective title by using the conveyance of the foreclosure deed as an equitable assignment of the original mortgage, so the new property owner could foreclose and obtain clear title in the process.

Judge Piper used this equitable assignment theory in the *Cavanaugh* case, ruling that Lowney, the new buyer, holds the GMAC Mortgage through equitable assignment, and may now foreclose upon Ms. Cavanaugh, thereby clearing the way to get clean title. Equally important, Judge Piper ordered GMAC and Fannie Mae to assign the underlying promissory note from Ms. Cavanaugh to Lowney so that he holds both the note and the mortgage as required by after the important *Eaton v. Fannie Mae* case several months ago.

This is an important and much-needed judicial development for assisting homeowners who have been unable to refinance or sell their properties due to “*Ibanez*” and other foreclosure related title defects. This case also illustrates the importance of obtaining an [owner’s policy of title insurance](#) which appears to have provided coverage to Mr. Lowney in this matter.

[Cavanaugh v. GMAC Mortgage — Massachusetts Land Court](#)

Richard D. Vetstein, Esq. is a Massachusetts real estate attorney who litigates and writes frequently about foreclosure related issues. He can be reached at info@vetsteinlawgroup.com