

Is the bank required to hold both the mortgage and note to properly foreclose in Massachusetts?

6 March 2012

Described by some as the “note and mortgage defense”; this is the question to be decided by the Massachusetts Supreme Judicial Court (“SJC”), the highest appellate court in Massachusetts, at any time now. The case is titled *Eaton v. Federal National Mortgage Ass’n*. The initial briefs have been filed, oral arguments have finished, and even the SJC extended its own deadline to issue its decision. Moreover, it asked for supplemental briefs responding to particular questions, which were filed. It is any day now.

Many legal practitioners are waiting with bated breath for the decision to be made, especially real estate attorneys, foreclosure attorneys, bankruptcy attorneys, and the few others that practice in what is known as “foreclosure defense “ (like the author of this post). The effect of this decision, if it does rule that a foreclosing party (the “mortgagee,” the entity holding the mortgage, usually a bank) must hold both the mortgage and note to properly foreclose, is predicted by many to be tremendous. Here is the reason.

It has generally been accepted under Massachusetts law that only the mortgagee is required to be held by the foreclosing party (mortgagee). Based in part on what has been exposed about the requirement that the foreclosing party just properly hold the mortgage (to understand that, you must read the *Ibanez* decision, and maybe the *Bevilacqua* decision), it is estimated that a requirement on the foreclosing party to hold both the mortgage and the note will put into question the validity of many more thousands of prior foreclosures. It appears that the SJC was concerned too about the magnitude of the effect of ruling both the mortgage and note were required. This author has been informed the particular questions the SJC requested responsive supplemental briefs to answer indicate this concern.

For those hoping to defend against a pending foreclosure this may sound like good news. However, those same people need to keep in mind that this desired possible outcome of the *Eaton* case may effect their title (right to ownership) in the event a foreclosure occurred on the property to prior owners. This means the dog some people think that they have in this fight, if it wins, may turn around to bite them.

In the event that you seek legal help to defend against foreclosure or otherwise have legal needs concerning maintaining your home, give us a call.

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