68832-4

68832-4

No. 68832-4-I

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

RYAN SANTWIRE, an individual,

Appellant,

v.

UMPQUA BANK, an Oregon Bank,

Respondent.

APPELLANT'S REPLY BRIEF

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C. U.S. Bank National Association, trustee, v. Supreme Judicial Court of Massachusetts, 458 Mass. 637, 941 N.E.2d 40, 2011 Mass. LEXIS 5 *8*

I. INTRODUCTION

In this appeal, Ryan Santwire seeks reversal of an Order of the Superior Court affirming its Commissioner's Order Appointing Custodial Receiver for Santwire's three condominium units and a small rental house on the grounds that the trial court record does not prove that Umpqua Bank (Bank), Plaintiff in the trial court, was the real party in interest and had standing at the time the Bank filed its First Amended Complaint Seeking Appointment of Receiver, that the custodial receiver was not reasonably necessary, and that Ryan Santwire's state and U.S. constitutional rights of due process were violated when the Commissioner refused to allow Santwire to present witness testimony and Exhibits on his theory of the case, and the Order entered gave the Custodial Receiver much broader powers than were reasonably necessary or warranted by the evidence presented.

Also, par. 9.2 of Umpqua Bank's Agreement with FDIC allowed the Bank to obtain "additional title documents" (i. e., assignments or allonges) from FDIC, proving Umpqua Bank was the owner and real party in interest, but it failed to do so.

Therefore, the Bank's First Amended Complaint should have been dismissed without prejudice by the Commissioner of Superior Court and Santwire should have been awarded reasonable attorney fees and costs.

Thereafter, Santwire filed a Motion for Revision of Commissioner's Order, but it was affirmed by Superior Court Judge John Erlick. [CP 95] In addition, he ruled that even though Umpqua Bank did not have standing and was not the real party in interest for purposes of obtaining a monetary Judgment, it did have standing and was the real party in interest for purposes of obtaining a custodial receiver. [See Tr., May 17, 2012, pg. 5-6]

II. ARGUMENT

A. The Bank ignored the following relevant evidence in its Answering Brief.

The Introduction and Summary at pages 1-2 of Umpqua Bank's Respondents' Answering Brief is misleading, inasmuch as it omits the following colloquy between Ryan Santwire's attorney, John Flowers, and Commissioner Velategui;

> Mr. Flowers: Do I have a chance to respond to this document [FDIC Agreement, she just gave me? The Court: **Respond with whatever you wish on Wednesday.** [emphasis added] [Tr. of Ap. 23, 2012, pg. 5]

This is the main basis for violation of constitutional due process, discussed below.

The Jan. 22, 2010 Agreement between FDIC and Umpqua Bank [CP 820] specifically provides:

> **9.2 Additional Title Documents.** The Receiver [FDIC], the Corporation [FDIC] and the Assuming Bank [Umpqua Bank] each agree, at any time, and from time to time, upon the request of any party hereto, to execute and deliver such additional instruments and **documents of conveyance as shall be reasonably necessary to vest in the appropriate party its full legal or equitable title in and to the property transferred pursuant to this Agreement are to be transferred in accordance herewith. The Assuming Bank [Umpqua Bank] shall prepare such instruments and documents of conveyance (in form and substance satisfactory to the Receiver [FDIC]) as shall be necessary to vest title to the Assets in the Assuming Bank [Umpqua Bank]**. The Assuming Bank [Umpqua Bank] shall be responsible for recording such instruments and documents of conveyance at its own expense. [emphasis added]

Umpqua Bank's argument is misleading, inasmuch as it has not cited and discussed these important facts.

B. **Law on transferring ownership of negotiable instruments**

An action may only be prosecuted by the "real party in interest", who is able to show that he, she, or it will benefit by the relief granted. State ex rel. *Hays v. Wilson*, 17 Wn. 2d 670, 672, 137 P.2d 105 (1943). See also CR 17(a). [See pgs. 9-12 of Ryan Santwire's Opening Brief.) The agreement between Umpqua Bank and the Federal Deposit Insurance Corporation is dated Jan. 22, 2010. However, the critical date for transfer of ownership of the assets is the "Closing Date" of Evergreen Bank [CP 789-887], but nowhere in the agreement does it specify a particular date which is in fact the "Banking Closing" date of the sale. More importantly, there is no specific list or schedule which lists said Promissory Notes, etc.

which are the basis for a receiver in the above entitled case. [See Declaration of John Flowers, CP 260]

It is submitted that under the best evidence rule. [ER 1002] proof of ownership of these negotiable instruments are the original instruments and assignments (allonges), produced by Plaintiff for inspection by court and counsel.

RCW 62A.3-203 [Uniform Commercial Code-Negotiable Instruments] , provides, in part: ....

> (c) Unless otherwise agreed, ***if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the unqualified endorsement of the transferor, but negotiation of the instrument does not occur until the endorsement is made.*** (emphasis added)

C. Umpqua Bank comes to Court with "unclean hands".

Umpqua Bank comes to Court with "unclean hands" inasmuch as it violated par. 9.2. [Additional Title Documents] and while this appeal of Ryan Santwire was pending in the above-entitled Court, on Oct. 04, 2012, it filed a new civil Complaint for money damages [principal, interest, costs, and attorney fees in the amount of approximate amount of $1,400,000] against Ryan Santwire [Cause No. 12-2-32770-0 SEA in Superior Court of the State of Washington, for King County [see attached

Complaint, Appendix A, of which Ryan Santwire requests Judicial Notice pursuant to ER 201], **on the same promissory note payable to Evergreen Bank that Umpqua Bank allegedly turned over to Pacific Receivers, LLC**, and which is the subject of this appeal, thereby interfering with the disposition of the above-numbered appeal in this Court and interfering with the powers of Pacific Receivers, LLC listed in the Order which is part of this appeal On October 26, 2012, Ryan Santwire, filed a Motion to Dismiss Complaint under CR 12(b (2) and CR 56, with oral argument noted for December 14, 2012 at 1:30pm and Dept. 26, before Superior Court Judge Laura Gene Middaugh.

The new Complaint also has the same defects as the First Amended Complaint Seeking Appointment of Custodial Receiver, i.e., the record does not include a written assignment (allonge) of the particular Promissory Note and Deed of Trust from the original payee and beneficiary, Evergreen Bank, to Umpqua Bank or from the FDIC to Umpqua Bank.

D. The key case cited by Umpqua Bank is distinguishable.

Umpqua Bank, on pg. 15 of Respondent's Answering Brief, cites *Federal Financial Co., v. Gerard*, 90 Wn.App. 169, 176 (Div. 1 1998), for the proposition:

> The law is settled in Washington that assignment of a promissory note by the FDIC carries with it the right to enforce the instrument.

However, the Federal Financial case is clearly distinguishable inasmuch as that case did not involve an issue of whether there was a valid assignment of the promissory note. The promissory note in the Federal Financial case was specifically endorsed by the FDIC. No such fact exists in our case. In our case, Umpqua Bank contends that a general assignment by the FDIC to Umpqua Bank of the assets of Evergreen Bank on an unspecified "Bank Closing" date necessarily included the particular promissory notes, Deeds of Trust, and a Pledge Agreement, which were not mentioned or listed in the Agreement with FDIC.

Also, the Federal Financial case involves the principal question of which statute of limitations applied to the collection of the promissory note. No such issue is involved in our case.

Therefore, is difficult to see how the Federal Financial case helps Umpqua Bank's position in our case.

E. Case law and statutes support Ryan Santwire.

The Washington Supreme Court case of Bain v. Metro Mortgage Bank Co., No. 86206 – 1, cited in [attachment1 to cited and Ryan Santwire's Opening Brief at pg. 7], found:

> Bain also asserts that foreclosure proceedings were initiated by IndyMac before IndyMac was assigned the loan and that some of the documents in the chain of title were executed fraudulently. This is confusing because IndyMac was not the original lender, but the record suggests (but does not establish) that ownership of the debt had changed hands several times. (Note 3, pg. 5). [Likewise, in our case, it is important to establish that Umpqua Bank is presently the owner of this promissory notes, thereby showing that they were not transferred by the original lender, Evergreen Bank, or "changed hands several times."]
>
> Mortgage Electronic Registration Systems, Inc. [MERS] was not the lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington, section 61.24.005(2) if it never had the promissory note secured by the Deed of Trust. [Certified Question 1, pgs. 5-6,] [Again, this is an important principle in our case, i.e., whether Umpqua Bank has present possession of the Deed of Trust signed by Ryan Santwire, making Evergreen Bank, the beneficiary. If so, Umpqua Bank should have been required to bring the original Deed of Trust and Assignment or Allonge to court when seeking the appointment of a Custodial Receiver.]
>
> [When conducting a nonjudicial foreclosure,] the Trustee . [under the Deed of Trust] shall have proof that the beneficiary [under the Deed of Trust] is the owner of any promissory note or other obligation secured by the Deed of Trust. [Pg. 9], [Likewise, in our case, it is submitted that this Court should require the Superior Court to require Plaintiff Umpqua Bank, to provide proof that it is beneficiary under the Deed of Trust and payee or the assignee of payee of the promissory note in this case.]

A general axiom of mortgage law is that obligation and mortgage cannot be split, meaning the person who can foreclose the mortgage must be the person to whom the obligation is due. [Citations omitted, pg. 13] [Again, this demonstrates that it is important for the trial court to be certain that a plaintiff, such as Umpqua Bank, is both the present owner of the promissory note and beneficiary of the Deed of Trust, not the original lender, Evergreen Bank. However, neither the Commissioner' Order Superior Court Judge John Erlick's Order this requirement.]

Washington's Deed of Trust Act contemplates that the security instrument [i.e., Deed of Trust] will follow the [promissory] note, not the other way around. [pg.22] [This language from the Bain case supports Ryan Santwire's contention Plaintiff Umpqua Bank, not the original lender, Evergreen Bank, must prove that it is be both the assignee of the particular Deed of Trust and particular promissory note in order for it to seek a custodial receiver in this case, but it has not done so.]

The third district [of California] found that the beneficiary [of a Deed of Trust] was required to show that it had the right to foreclose, and a simple declaration from any bank officer was insufficient. *Herrera v. Deutsche Bank Nat'l Trust Co.*, 196 Cal.App.4th 1366, 1378, 127 Cal.Rptr.3d 362 (2011). [Appendix B] [Likewise, in our case, Declarations from Lynette Chen-Wagner [CP 13-70] or Ky. Fullerton [CP 782-783] are not a proper substitute for the actual production of original documents in court.]

The real beneficiary [of the Deed of Trust] is the [original] lender [in our case, Evergreen Bank] whose interests were secured by the Deed of Trust, or that lender's successors. If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS [or in our case, FDIC] convey its "interests" would not accomplish this. [pg. 30]. Note 15.... See also *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011) [Appendix C] [holding bank had to establish it was the mortgage holder **at the time of foreclosure (or in our case, filing its First Amended Complaint Seeking Custodial Receiver) in order to clear title**

> **through evidence of the chain of transactions.]** Again, the identity of the beneficiary would need to be determined. [pg. 31],
>
> Washington Supreme Court could not answer a Certified Question because] that evidence is not in the record. [Thus, this Bain case further demonstrates the importance of written documents in the record in real estate litigation, not just live testimony or Declarations of witnesses discussing those documents.] [pg. 34]

It is submitted that without such original documents [promissory notes, Deed of Trust, and most importantly for our case, original assignments (allonges)], Plaintiff Umpqua Bank was not entitled to, and could not prove that it was entitled to, a Custodial Receiver of Ryan Santwire's three individual condominium units and a small rental house. Without such documentary proof, its First Amended Complaint Seeking Custodial Receiver should have been dismissed without prejudice.

However, the Washington Supreme Court case of Bain v. Metro Mortgage, supra, and its detailed discussion of negotiable instruments, has in effect made clear that promissory notes are negotiable instruments; they are not fungible products, which are interchangeable with one another. [Tr. of Ap. 25, 2012, pgs. 4-6]

F. The Commissioner's refusal to allow Ryan Santwire to testify and offer exhibits at the hearing on April 25, 2012, under the facts of our case, was a clear abuse of his discretion and a violation of constitutional due process.

RCW 7.60.190(2) states:

> Any person having... [an] interest in any estate property or in the receivership proceedings may appear in the receivership, either in person or by an attorney.... ***A ... party in interest has a right to be heard with respect to <u>all matters</u> affecting the person ....*** [emphasis added]
>
> Pgs. 8-9 its Respondents Answering Brief, Umpqua Bank admitted;
>
> *A "Supplemental" memorandum...[CP 769-771]....stated that Santwire would testify the alleged "Disrepair that if it ever exited, has been satisfactorily corrected* [CP 770]...."

Santwire's attorney asked whether Mr. Santwire would be allowed to testify, and the Commissioner stated "**no**." [emphasis added] (Tr., Ap. 25, 2012, pg. 14). The Commissioner stated that Mr. Santwire had an adequate opportunity to provide his declarations —or [sic in] the hearing last week. He had a couple of days, and then we continued it to today. Mr. Flowers said: But the other day, she [Ms. Ricci] indicated she was going to have live witnesses. (Tr., Ap. 25, 2012, pg. 14)

The Commissioner ruled:

> "The only live witnesses we need was--I gave you an opportunity to take one shot at the bank here regarding dominion, control, and the right to pursue the action as a result of the... receivership under which they purchased the assets and the rights of Evergreen from the feds. They've satisfied that." (Tr., Ap. 25, 2012, pgs. 14-15).

At pg. iv of its Table of Authorities, the Bank's attorney indicates that RAP 2.5(a) is discussed on pg. 22 of Respondent's Answering Brief. However, a reading of that page does not disclose any such discussion. RAP 2.5(a) provides, in part that a party may raise the following claimed

errors for the first time in the appellate court: ... (3) Manifest error affecting a constitutional right. It is submitted that in this case, such constitutional rights of due process are clearly "manifest" in the transcripts and documents filed in the trial court in this case, inasmuch as the Commissioner on April 23, 2012 stated that [Ryan Santwire's attorney, John Flowers, could] "respond with whatever you wish on Wednesday [April 25, 2012] ". However, on April 25 the Commissioner refused to allow Ryan Santwire to testify or present Exhibits on his theory of the case. As argued extensively. [pgs. 14-19] in the Opening Brief of Appellant Ryan Santwire, this behavior by the Commissioner [and the later affirmance by Superior Court Judge John Erlick] violated federal and state due process principles and case law in the State of Washington [including *Baxter v. Jones*, 34 Wn.App. 1, 658 P.2d 1274 (1983) and *In re Marriage of Ebbighausen*, 42 Wn.App. 99, 708 P.2d 1220 (1985), both of which were discussed extensively on pgs. 15-19 , of Ryan Santwire's Opening Brief, but not even mentioned by Umpqua Bank in Respondent's Answering Brief, including its discussion at pgs. 21-23

Once again, this demonstrates the Bank's utter disregard of borrowers' constitutional rights as it rushed to judgment and convinced the trial court to rush to judgment. Under our judicial system, this should not be allowed to happen.

G. If the Agreement between FDIC and Umpqua Bank is enforced, the Bank's First Amended Complaint should have been dismissed without prejudice.

The Jan. 22, 2010 Agreement between FDIC and Umpqua Bank, purporting to transfer all assets and liabilities of Evergreen Bank on an unspecified "Bank Closing" date, and paragraph 9.2, quoted above, clearly contemplates "additional title documents" for the conveyance of certain special assets [e.g., Promissory notes, pledge agreements, and Deeds of Trust], which were the responsibility of the Assuming Bank [Umpqua Bank] to request, prepare, and record. There is nothing in the record of this case to indicate that Plaintiff Umpqua Bank fulfilled its obligation in this regard. Under the circumstances, it comes to court with "unclean hands" by not fulfilling a clear condition precedent to its ability and standing to file this First Amended Complaint.

All of Umpqua Bank's arguments in this appeal are clearly dependent upon the contractual and statutory rights of the original lender, Evergreen Bank, having been assigned to Plaintiff Umpqua Bank prior to its filing the First Amended Complaint Seeking Appointment of Custodial Receiver in this case.

It is submitted that the Jan. 22, 2010 Agreement between FDIC and Evergreen Bank is deficient for this purpose, inasmuch as the

particular promissory notes, Pledge Agreement, and Deeds of Trust, allegedly signed by Ryan Santwire are not identified or listed in the agreement with FDIC. Therefore, the assumptions by Plaintiff Umpqua Bank, the Commissioner and Judge of Superior Court are pure speculation and cannot form the legal basis for the appointment of a Custodial Receiver.

III. CONCLUSION

Umpqua Bank's arguments in this appeal hang by the slender thread of and are clearly dependent upon it being the assignee of the contractual and statutory rights of the original lender, Evergreen Bank, prior to Plaintiff Umpqua Bank's filing of its First Amended Complaint Seeking Appointment of Custodial Receiver in the trial court. However, that thread has been snipped by the terms and provisions of paragraph 9.2 of its Agreement with FDIC, requiring the preparation, execution, and recording of additional title documents for special kinds of assets, such as these promissory notes, Pledge Agreement, and Deeds of Trust. At the time it filed its First Amended Complaint on March 21, 2012, Umpqua Bank (Bank) did not have sufficient documentary evidence that it owned (i.e., was the real party in interest) of the Promissory Note [negotiable instrument] dated July 10, 2009, payable to the order of Evergreen Bank,

or was the assignee of various Deeds of Trust, Assignments of Rent, and the Pledge Agreement, all of which were entered into by Evergreen Bank and Ryan Santwire.

Also, while this appeal was pending, Umpqua Bank repeated the same mistake by filing a separate, new civil action to collect the same promissory note which was the basis for its First Amended Complaint Seeking Appointment of Custodial Receiver, which is also the basis for this appeal.

In addition Ryan Santwire's State and U.S. Constitutional rights of Due Process were violated.

Under the circumstances, for the reasons stated above, the April 25, 2012 Order of Commissioner Velategui and in the May 17, 2012 Order Denying Ryan Santwire's Motion for Revision should be reversed, and Ryan Santwire should be awarded attorney fees and costs in the trial court and in the appeal in this case.

Dated: November 14, 2012. Respectfully submitted,

Stafne Law Firm

by: _____
Scott E. Stafne, WSBA 6964

by: _____ by SES
John Flowers, WSBA 24315
Attorneys for Appellant
Ryan Santwire

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

UMPQUA BANK, an Oregon Bank Plaintiff, v. RYAN SANTWIRE, an individual, Defendant.	NO. 12-2-32770-0SEA COMPLAINT FOR MONIES DUE AND OWING

COMES NOW Plaintiff, UMPQUA BANK, an Oregon bank, by and through its attorneys, and states and alleges for its Complaint:

1. PARTIES

1.1 The Plaintiff, UMPQUA BANK ("Plaintiff") is an Oregon Bank that is authorized to do and does business in the State of Washington and maintains its principal place of business in Roseburg, Oregon. Plaintiff is the assignee of the interest of EvergreenBank pursuant to that certain purchase and assumption agreement between the Plaintiff and the Federal Deposit Insurance Corporation dated January 22, 2010, and is the

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Successor Beneficiary and the current owner and holder of the Promissory Note and the other obligation secured by the Deed of Trusts and other security instruments which are the subject of this litigation.

1.2 Defendant Ryan G. Santwire ("Defendant") is a single individual with the last known usual abode and residence at 805 NE 51st Street, Seattle, King County, Washington 98107.

2. JURISDICTION AND VENUE

2.1 This court has both subject matter jurisdiction and personal jurisdiction in this action.

2.2 Venue is King County is proper for reasons including that Defendant Ryan G. Santwire is a resident of King County and the parties stipulated to this Court's jurisdiction in the loan documents which are the subject of this action.

3. FACTS

3.1 The Defendant executed and delivered to EvergreenBank, the predecessor in interest to the Plaintiff, a Promissory Note dated July 10, 2009, in the original principal amount of $1,251,685.04 (the "Note"). This Note replaced an earlier note between the same parties dated March 6, 2008, in the original amount of $1,531,989.21 secured by a Deed of Trust dated March 6, 2008, for property known as the Beach Drive property. A true and correct copy of the Note is attached to Plaintiff's First Amended Complaint as Exhibit A. EXH A

3.2 The Defendant also executed and delivered to EvergreenBank, the predecessor in interest to the Plaintiff, an Assignment of Rents for the Beach Drive property dated July 10, 2009, which served as additional security to the Note.

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3.3 The Defendant executed a second Deed of Trust dated July 10, 2009, for property known as the 75th Street property. The second Deed of Trust provided EvergreenBank with additional security in title to real property Defendant owns for commercial/investment purposes.

3.4 The Defendant also executed and delivered to EvergreenBank an Assignment of Rents dated July 10, 2009, for the property secured by the second Deed of Trust..

3.5 As successor in interest to EvergreenBank, Plaintiff is the beneficiary of the Note, Deeds of Trust and Assignments of Rents and these documents are now the assets of the Plaintiff.

3.6 The Note had a maturity date of July 6, 2010. Defendant failed to make the required payments under the Note and failed to pay the full amount due on the date of maturity. The loan balance, plus all fees and costs of collection remain due and owing. The payoff quote as of October 5, 2012, pursuant to the terms of the Note, is approximately $1,410,412.73.

3.7 Umpqua Bank filed a Complaint seeking appointment of a Receiver for both the Beach Drive property and the 75th Street property in March 2012.

3.8 The King County Superior Court entered an Order Appointing Receiver on April 25, 2012. The Defendant failed to file an Answer to the Complaint in that matter but did appear at the show cause hearing regarding appointment of a receiver.

3.9 Defendant is currently appealing, (without posting a bond), the Court's Order Appointing Receiver.

3.10 Plaintiff did not seek money damages for Defendant's Breach of Contract in its Complaint Seeking Appointment of Receiver.

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3.11 Defendant's failure to make the required payments pursuant to the Note and failure to pay the Note upon maturity constitute breach of the Note.

4. REQUEST FOR RELIEF

WHEREFORE, Plaintiff Umpqua Bank prays for judgment against Defendant Ryan Santwire, as follows:

4.1 Entry of judgment against the Defendant in the amount of all indebtedness and amounts due Plaintiff Umpqua Bank pursuant to the terms of the agreements between Defendant Ryan Santwire and Umpqua Bank's predecessor in interest, including, but not limited to, the Note.

4.2 Award of pre-judgment interest.

4.3 Award of attorneys' fees, costs and interest pursuant to the terms of the Note.

4.4 Entry of judgment awarding Umpqua Bank all other damages suffered by Umpqua Bank as a result of Defendant's breach of his agreements and contracts with Umpqua Bank, including, but not limited to, the Note.

4.5 For such other and further relief as this Court deems just and equitable.

DATED this 4TH day of October, 2012.

RICCI GRUBE BRENEMAN, PLLC

By: _____
Debra Eby Ricci, WSBA #22247
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Appendix B

196 Cal.App.4th 1366

__ Cal.Rptr.3d __

ROBERT HERRERA et al., Plaintiffs and Appellants,

v.

DEUTSCHE[1] BANK NATIONAL TRUST COMPANY et al., Defendants and Respondents.

C065630

California Court of Appeal, Third District, El Dorado

May 31, 2011

[As modified June 28, 2011.]

[CERTIFIED FOR PARTIAL PUBLICATION[*]]

Super. Ct. No. SC20090170

[Copyrighted Material Omitted]

COUNSEL

Terry J. Thomas for Plaintiffs and Appellants.

AlvaradoSmith, Rick D. Navarrette, Theodore E. Bacon, Amy L. Morse and Frances Q. Jett for Defendants and Respondents.

OPINION

MURRAY, J.

SUMMARY

Plaintiffs Robert and Gail Herrera lost their house in South Lake Tahoe to a nonjudicial foreclosure sale. They brought suit to set aside that sale. They challenge whether the parties that conducted the sale, defendants Deutsche

Bank National Trust Company (the Bank) and California Reconveyance Company (CRC), were in fact the beneficiary and trustee, respectively, under a deed of trust secured by their property, and thus had authority to conduct the sale. Plaintiffs also contend that they are entitled to be repaid for the expenses they incurred in repairing and insuring the property and paying back taxes if defendants are successful in establishing their interest in the property.

Defendants moved for summary judgment. In support of their motion, they requested that the trial court take judicial notice of recorded documents, including an Assignment of Deed of Trust and a Substitution of Trustee. Defendants asserted that these documents established the authority of the Bank and CRC to conduct the foreclosure sale. Defendants also provided a declaration by a custodian of records for CRC, in which the custodian did not expressly declare that the Bank was the beneficiary and CRC the trustee. Instead, she merely declared that an Assignment of Deed of Trust and a Substitution of Trustee had been recorded and these recorded documents indicated the Bank had been assigned the deed of trust and that CRC had been substituted as trustee.

Plaintiffs appeal from a judgment after the trial court granted defendants'; motion for summary judgment. They contend defendants failed to carry their burden in moving for summary judgment and the trial court erred in taking judicial notice of and accepting as true the contents of certain recorded documents.

We agree. In the published portion of the opinion, we hold that the trial court erred in accepting the contents of certain recorded document as true and relying upon that information in determining the summary judgment motion. Accordingly, we reverse the judgment in part.

In the unpublished portion of the opinion, we affirm the judgment as to the fourth cause of action, plaintiffs'; claim of unjust enrichment.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2008, plaintiffs purchased the property at 739 Alameda Avenue, South Lake Tahoe (the Property) at a foreclosure sale. On February 27, 2009, CRC recorded a ";Notice of Default and Election to Sell [the Property] Under Deed of Trust."; On May 29, 2009, CRC recorded a Notice of Trustee';s Sale. On July 6, 2009, CRC recorded a Trustee';s Deed upon Sale, showing the

Property had been conveyed to the Bank, as foreclosing beneficiary. Plaintiffs brought suit against the Bank, CRC and others to set aside the sale, cancel the trustee';s deed, quiet title to the Property, and for unjust enrichment.

In the first cause of action, plaintiffs sought to set

aside the trustee';s sale. Plaintiffs alleged they purchased ";this run-down, filthy, distressed property"; at a foreclosure sale, rehabilitated and repaired the Property and paid over $4,000 in back property taxes. They had no idea there might be a deed of trust from 2003, as it did not appear in the title search. About a year later, after plaintiffs had completed repair work on the Property, the Bank asserted an ownership interest in the Property. The Bank claimed to be the owner of the Property by virtue of a trustee';s deed recorded ";by an entity purporting to be the trustee.";

In seeking to set aside the trustee';s sale, plaintiffs alleged that during the year they were the owners of the Property, they never received any notices of assignment of trustee';s deeds or notices of deficiency, nor did they receive any notices of trustee';s sale or trustee';s deeds. They alleged, on information and belief, that ";CRC may be, or have been the Trustee, on a purported Trustee';s sale of the subject property, to an entity which may have transferred whatever interest may have been acquired in the trustee';s sale to Defendant Deutsch[e]."; Plaintiffs alleged CRC was not the trustee and had no authority to conduct a trustee';s sale, and believed no such sale had taken place. They further alleged any promissory note supporting the 2003 deed of trust was ";time barred by the statute"; and the maker, if any, ";was lulled into believing that no action would be taken to enforce the 2003 [deed of trust] because no collection actions were taken within a reasonable time and no legally required notices of deficiency were sent or recorded.";

In the second cause of action, plaintiffs sought to cancel the trustee';s deed. Plaintiffs alleged the original promissory note and deed of trust no longer existed and the Bank';s deed was invalid ";as it is based solely upon purported copies which have no force and effect.";

The third cause of action was to quiet title to the Property. Plaintiffs alleged defendants had no original, verifiable promissory note or deed of trust and had no standing to foreclose. They further alleged all rights, title and interest asserted by defendants ";were sublimated into a non-functional ';security'; instrument that gives no one entity rights in individual notes and deeds of trust."; No defendant had an interest in the Property, but they had placed a cloud upon plaintiffs'; title.

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In the fourth cause of action, entitled unjust enrichment, plaintiffs alleged they had paid back taxes, insured the Property, and repaired deferred maintenance. If defendants were successful in claiming an interest in the Property, plaintiffs wanted to be repaid for their expenditures.

The Bank and CRC moved for summary judgment or summary adjudication on each cause of action, contending there was no triable issue of fact as to any of plaintiffs'; claims. They claimed the undisputed evidence showed that the loan was in default, the Bank was the beneficiary under the deed of trust and CRC was the trustee. The default was not cured and CRC properly noticed the trustee';s sale. Notice of the sale was sent to plaintiffs and California law did not require the original promissory note to foreclose. The Bank and CRC further contended that to quiet title, plaintiffs must allege tender, or an offer of tender, of the amount owed. They also contended there was no evidence of unjust enrichment.

In support of their motion, defendants requested that the court take judicial notice of certain documents pursuant to Evidence Code sections 451, subdivision (f) and 452, subdivisions (d), (g) and (h). These documents were:

(1) the Trustee';s Deed upon Sale recorded August 13, 2008, under which plaintiffs took title to the Property;

(2) a Grant Deed recorded December 13, 2002, showing the transfer of the Property to Sheryl Kotz;

(3) the Deed of Trust recorded April 30, 2003, with Sheryl Kotz as trustor and Long Beach Mortgage Company as trustee and beneficiary (the 2003 deed of trust);

(4) an Assignment of Deed of Trust recorded February 27, 2009, assigning all interest under the 2003 deed of trust to the Bank by JPMorgan Chase Bank, as successor in interest to Washington Mutual Bank, successor in interest to Long Beach Mortgage Company;

(5) a Substitution of Trustee recorded February 27, 2009, under which the Bank substituted CRC as trustee under the 2003 deed of trust;

(6) a ";Notice of Default and Election to Sell [the Property] Under Deed of Trust"; recorded February 27, 2009;

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(7) a Notice of Trustee';s Sale under the 2003 deed of trust recorded May 29, 2009; and

(8) a Trustee';s Deed upon Sale recorded July 6, 2009, under which the Bank, as foreclosing beneficiary, was the grantee of the Property.

To support their motion, defendants also provided the declaration of Deborah Brignac. Brignac was a vice-president of CRC and a custodian of records for CRC. She was one of the custodians of records for the loan that was the subject of plaintiffs'; complaint. She declared that the CRC loan records were made in the ordinary course of business by persons with a duty to make such records and were made about the time of the events reflected in the records. In April of 2003, ";Shelia"; [*sic*] Kotz[2] obtained a $340,000 loan from Long Beach Mortgage Company, and the loan was

secured by a deed of trust on the Property. The 2003 deed of trust provided for a power of sale if the borrower defaulted and failed to cure the default. It also provided that successor trustees could be appointed.

Brignac further declared that as of February 26, 2009, $10,970.50 was ";owed"; on the note.[3] An assignment of the 2003 deed of trust was recorded February 27, 2009, indicating the transfer of all interest in the 2003 deed of trust to the Bank. A Substitution of Trustee was recorded the same date. According to Brignac';s declaration, the Bank';s substitution ";substitutes the original trustee, Long Beach Mortgage Company for [CRC].";

Brignac further declared that a Notice of Default and Election to Sell under Deed of Trust was recorded on February 27, 2009, and copies were sent to plaintiffs on March 4, 2009, as shown in the affidavits of mailing attached to her declaration. A Notice of Trustee';s Sale was recorded on May 29, 2009. Copies of this notice were mailed to plaintiffs, as shown in the attached affidavits of mailing.[4] The loan was not reinstated. The Property was sold at a trustee';s sale on June 25, 2009. At the time of sale, the total unpaid debt was $336,328.10. At no time before the trustee';s sale did plaintiffs tender the unpaid debt.

The Bank and CRC filed a separate statement of undisputed facts setting forth the facts as stated in Brignac';s declaration.

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In response, plaintiffs admitted the description of the Property and that they purchased it on June 24, 2008, at a foreclosure sale; they disputed all of the remaining facts. They asserted that the Brignac declaration was without foundation and contained hearsay and that all of the recorded documents contained hearsay.

In their opposition to the motion for summary judgment, plaintiffs began with a diatribe against the ";Foreclosure Industry, "; asserting the industry operated ";as if the Evidence Code, the law of contracts, assignments, deeds of trust and foreclosure are merely optional."; They contended defendants failed to meet their burden of proof for summary judgment because their request for judicial notice and Brignac';s declaration were inadmissible hearsay. They further contended the notice of default and the notice of trustee';s sale failed to meet statutory requirements of California law. Finally, they asserted defendants lacked standing to foreclose because they had not produced even a copy of the promissory note.

Plaintiffs moved to strike the declaration of Brignac as lacking foundation and containing hearsay. They also opposed the request for judicial notice. They argued the recorded documents were all hearsay. Citing only the Federal Rules of Evidence and federal case law grounded on the federal rules, plaintiffs argued a court cannot take judicial notice of disputed facts contained in a hearsay document. Plaintiffs disputed ";virtually everything"; in the recorded documents, arguing one can record anything, regardless of its accuracy or correctness.

The trial court overruled plaintiffs'; hearsay objections, denied plaintiffs'; motion to strike the Brignac declaration, granted defendants'; request for judicial notice, and granted defendants'; motion for summary judgment, finding no triable issue of material fact. Judgment was entered in favor of the Bank and CRC.

DISCUSSION

I. Law of Summary Judgment and Standard of Review[*]

II. First, Second and Third Causes of Action

While plaintiffs'; complaint is hardly a model of clarity, it seeks to undo the foreclosure sale. The first three causes of action -- to set aside the sale, cancel

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the trustee';s deed and quiet title -- claim, among other things, that the Bank and CRC had no authority to conduct the foreclosure sale. On this point, plaintiffs allege the Bank claims to be the owner of the Property by virtue of a trustee';s deed recorded ";by an entity purporting to be the trustee."; They further allege CRC was not the trustee and had no authority to conduct the sale; the sale did not take place or was improperly held. The first three causes of action of plaintiffs'; complaint are based on the allegations that the Bank had no interest in the Property and CRC was not the trustee and had no authority to conduct a trustee';s sale. Thus, initial issues framed by the pleadings are whether the Bank was the beneficiary under the 2003 deed of trust and whether CRC was the trustee under that deed of trust. The fourth cause of action for unjust enrichment raises different issues and will be discussed separately in the unpublished portion of this opinion.

Defendants moved for summary judgment on the basis that plaintiffs'; allegations were not supported by the undisputed facts. They asserted CRC was the trustee pursuant to the substitution of Trustee recorded by the Bank as beneficiary under the 2003 deed of trust.

To establish that CRC was the trustee and thus had authority to conduct the trustee';s sale, defendants requested that the trial court take judicial notice of the recorded Assignment of Deed of Trust, which showed the Bank was the beneficiary. Defendants also requested that the trial court take judicial notice of the recorded Substitution of Trustee, which showed the Bank, as beneficiary, had substituted CRC as trustee.

Matters that may be judicially noticed can support a

motion for summary judgment. (Code Civ. Proc., § 437c, subd. (b)(1).) However, plaintiffs contend the trial court erred in taking judicial notice of the disputed facts contained within the recorded documents. We agree.

";';Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.';"; (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [110 Cal.Rptr.2d 877].)

";Judicial notice may not be taken of any matter unless authorized or required by law."; (Evid. Code, § 450.) ";Matters that are subject to judicial notice are listed in Evidence Code sections 451 and 452. A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. [Citation.]"; (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 [55 Cal.Rptr.3d 621].)

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";Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning."; (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [228 Cal.Rptr. 878].) While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 403 [38 Cal.Rptr. 183].) "When judicial notice is taken of a document, ... the truthfulness and proper interpretation of the document are disputable."; (*StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [84 Cal.Rptr.2d 843, 976 P.2d 214] (*StorMedia*).)

This court considered the scope of judicial review of a recorded document in *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106 [62 Cal.Rptr.3d 59] (*Poseidon*). ";[T]he fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. [Citation.] For example, the First Substitution recites that Shanley ';is the present holder of beneficial interest under said Deed of Trust.'; By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact, because it is hearsay and it cannot be considered not reasonably subject to dispute."; (*Id.* at p. 1117.)

The same situation is present here in the context of this residential mortgage foreclosure litigation. The substitution of trustee recites that the Bank ";is the present beneficiary under"; the 2003 deed of trust. As in *Poseidon*, this fact is hearsay and disputed; the trial court could not take judicial notice of it. Nor does taking judicial notice of the Assignment of Deed of Trust establish that the Bank is the beneficiary under the 2003 deed of trust. The assignment recites that JPMorgan Chase Bank, ";successor in interest to WASHINGTON MUTUAL BANK, SUCCESSOR IN INTEREST TO LONG BEACH MORTGAGE COMPANY"; assigns all beneficial interest under the 2003 deed of trust to the Bank. The recitation that JPMorgan Chase Bank is the successor in interest to Long Beach Mortgage Company, through Washington Mutual, is hearsay. Defendants offered no evidence to establish that JPMorgan Chase Bank had the beneficial interest under the 2003 deed of trust to assign to the Bank. The truthfulness of the contents of the Assignment of Deed of Trust remains subject to dispute (*StorMedia, supra,* 20 Cal.4th at p. 457, fn. 9), and plaintiffs dispute the truthfulness of the contents of all of the recorded documents.

Judicial notice of the recorded documents did not establish that the Bank was the beneficiary or that CRC was the trustee under the 2003 deed of trust. Defendants failed to establish ";facts justifying judgment in [their] favor"; (*Bono v. Clark* (2002)103 Cal.App.4th 1409, 1432 [128 Cal.Rptr.2d 31]), through their request for judicial notice.

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Defendants also relied on Brignac';s declaration, which declared that the 2003 deed of trust permitted the beneficiary to appoint successor trustees. Brignac, however, did not simply declare the identity of the beneficiary and the new trustee under the 2003 deed of trust. Instead, she declared that an Assignment of Deed of Trust and a Substitution of Trustee were recorded on February 27, 2009. These facts add nothing to the judicially noticed documents; they establish only that the documents were recorded.

Brignac further declared that ";[t]he Assignment of Deed of Trust *indicates* that JPMorgan Bank [*sic*], successor in interest to Washington Mutual Bank, successor in interest to Long Beach Mortgage Company, transfers all beneficial interest in connection with the [deed of trust] to Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2003-4."; (Italics added.) This declaration is insufficient to show the Bank is the beneficiary under the 2003 deed of trust. A supporting declaration must be made on personal knowledge and ";show affirmatively that the affiant is competent to testify to the matters stated."; (Code Civ. Proc., § 437c, subd. (d).) Brignac';s declaration does not affirmatively show that she can competently testify the Bank is the beneficiary under the 2003 deed of trust. At most, her declaration shows she can testify as to what the Assignment of Deed of Trust ";indicates."; But the factual contents of the assignment are hearsay and defendants offered no exception to the hearsay rule prior to oral argument to make these factual matters admissible.

At oral argument, defendants contended that the recorded documents were actually business records and

admissible under the business record exception. We note that Brignac did not provide any information in her declaration establishing that the sources of the information and the manner and time of preparation were such as to indicate trustworthiness. (Evid. Code, § 1271, subd. (d).)[5] Information concerning this foundational element was conspicuously lacking.[6] Yet, this information was critical in light of the evidentiary

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gap establishing the purported assignments from Long Beach Mortgage Company to Washington Mutual Bank to JPMorgan Chase Bank. The records used to generate the information in the Assignment of Deed of Trust, if they exist, were undoubtedly records not prepared by CRC, but records prepared by Long Beach Mortgage Company, Washington Mutual and JPMorgan Chase. Defendants have not shown how Brignac could have provided information about the source of that information or how those documents were prepared. (*See Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039 [45 Cal.Rptr.3d 183] [district attorney unable to attest to attributes of subpoenaed records in his possession relevant to their authenticity and trustworthiness]; Evid. Code, § 1561.) Moreover, the timing of those purported assignments relative to the recording of those events on the Assignment of Deed of Trust cannot be found in the Brignac declaration or anywhere else in the record.

We also note that Brignac did not identify either the February 27, 2009 Assignment of Deed of Trust, or another key document, the February 27, 2009 Substitution of Trustee, as business records in her declaration. Rather, she referenced both documents in her declaration by stating that ";[a] recorded copy"; was attached as an exhibit. In light of the request for judicial notice, we take this statement to mean that the exhibits represented copies of records on file at the county recorder';s office.[7] On a motion for summary judgment, the affidavits or declarations of the moving party are strictly construed against the moving party. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35 [210 Cal.Rptr. 762, 694 P.2d 1134] (*Mann*).) Of course, had the documents reflecting the assignments and the substitution been offered as business records, there would have been no need to request that the court take judicial notice of them. Accordingly, we reject defendants'; newly advanced theory.

Brignac';s declaration is lacking in yet another way. It is confusing as to the effect of the Substitution of Trustee. She declares, ";The Substitution by Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2003-4 substitutes the original trustee, Long Beach Mortgage Company for California Reconveyance Company."; Brignac';s declaration (and defendants'; statement of undisputed facts) can be read to state that the Bank

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Substituted Long Beach Mortgage Company for CRC as trustee, rather than that CRC was substituted for Long Beach Mortgage Company. We must strictly construe this statement against the moving party. (*Mann, supra*, 38 Cal.3d at p. 35.) Even if we were to construe Brignac';s declaration to state that the Bank substituted CRC as trustee under the 2003 deed of trust, it would be insufficient to establish CRC is the trustee. A declaration that the Substitution of Trustee by the Bank made CRC trustee would require admissible evidence that the Bank was the beneficiary under the 2003 deed of trust and thus had the authority to substitute the trustee. As explained *ante*, defendants failed to provide admissible evidence that the Bank was the beneficiary under the 2003 deed of trust.

At oral argument, defendants asserted that plaintiffs'; hearsay objections to their separate statement of facts did not comply with the California Rules of Court. (See Cal. Rules of Court, rule 3.1354(b).) From this, defendants impliedly suggest those objections should be ignored by this court. Whether the objections complied with the rules of court is of no moment at this juncture. The trial court ruled on those objections in its order granting summary judgment, stating ";Plaintiffs'; hearsay objections are overruled."; The wording of the court';s order (drafted by defendants) suggests the ruling was made on substantive evidentiary grounds, not procedural grounds, and there is no evidence in the record to the contrary.

Because defendants failed to present facts to establish that the Bank was beneficiary and CRC was trustee under the 2003 deed of trust, and therefore had authority to conduct the foreclosure sale, triable issues of material fact remain as to the first three causes of action. The trial court erred in granting summary judgment and it would be error to grant summary adjudication as to any of those causes of action.

III. Fourth Cause of Action[*]

DISPOSITION

The judgment is reversed with directions to vacate the order granting summary judgment and to enter a new order denying summary judgment as

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to the first three causes of action, and granting defendants summary adjudication of the fourth cause of action only. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

Raye, R J., and Nicholson, J., concurred.

Notes:

[*] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I. and III. of the Discussion.

[*] See footnote, *ante*, page 1366.

[*] See footnote, *ante*, page 1366.

[1]The name of defendant Deutsche Bank National Trust Company was misspelled ";Deutsch"; by plaintiffs in the complaint and other filings. We use the correct spelling in our opinion.

[2] The recorded documents attached to Brignac';s declaration indicate that the first name of Ms. Kotz is ";Sheryl, "; not ";Shelia.";

[3] Because Brignac later stated in her declaration that the total unpaid debt and costs amounted to $336,328.10, we assume Brignac intended to state that payments were $10,970.50 in arrears, not that $10,970.50 was ";owed.";

[4] The affidavits of mailing attached to Brignac';s declaration showed the Notice of Default and the Notice of Trustee';s Sale were mailed to plaintiffs at a post office box and at the address of the subject property by both first-class and certified mail.

[5] Brignac stated the following in her declaration concerning the foundational elements for the business records exception: ";1. I am a Vice President of California Reconveyance Company (';CRC';). I am also a custodian of records for CRC and am one of the custodians of records for the loan which is the subject of plaintiffs'; Complaint in this case. These records include computer records and written correspondence. I make this declaration based on my review of these records, as well as plaintiffs'; Complaint. If called as a witness in this case, I am competent to testify of my own personal knowledge, to the best of my recollection, as to the matters set forth in this Declaration. [¶] 2. The CRC loan records were made in the ordinary course of business by individuals who had a business duty to make such entries and records, and were made at or about the time of the events reflected in the records.

No further attempt was made to establish the foundational elements for the business record exception.

[6] Indeed, contrary to defendants'; assertion in the respondents'; brief that ";Ms. Brignac attested to the validity of the documents attached as exhibits to her declaration... -- documents which she declared under penalty of perjury were true and correct copies, "; there is no statement by Brignac anywhere in her declaration that the documents were true and correct copies.

[7] The only description she provided in her declaration concerning the business records upon which she relied was that ";[t]hese records include computer records and correspondence."; (See fn. 5, *ante*.) This statement is ambiguous in that it could mean only computer records and correspondence were relied upon or that the records she reviewed included, *but were not limited to,* computer records and correspondence. In any event, she did not identify the recorded documents as business records.

Appendix C

Caution
As of: Nov 13, 2012

U.S. BANK NATIONAL ASSOCIATION, trustee[1] vs. ANTONIO IBANEZ (and a consolidated case[2],[3]).

1 For the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.
2 Wells Fargo Bank, N.A., trustee, vs. Mark A. LaRace & another.
3 The Appeals Court granted the plaintiffs' motion to consolidate these cases.

SJC-10694

SUPREME JUDICIAL COURT OF MASSACHUSETTS

458 Mass. 637*; *941 N.E.2d 40*; *2011 Mass. LEXIS 5

October 7, 2010, Argued
January 7, 2011, Decided

SUBSEQUENT HISTORY: Related proceeding at *Ibanez v. United States Bank Nat'l Ass'n, 2011 U.S. Dist. LEXIS 136632 (D. Mass., Nov. 29, 2011)*

PRIOR HISTORY: [***1]

Suffolk. Civil actions commenced in the Land Court Department on September 16 and October 30, 2008. Motions for entry of default judgment and to vacate judgment were heard by Keith C. Long, J. The Supreme Judicial Court granted an application for direct appellate review.

United States Bank Nat'l Assoc. v. Ibanez, 2009 Mass. LCR LEXIS 134 (2009)
United States Bank Nat'l Assoc. v. Ibanez, 2009 Mass. LCR LEXIS 41 (2009)

DISPOSITION: Judgments affirmed.

HEADNOTES

Real Property, Mortgage, Ownership, Record title. Mortgage, Real estate, Foreclosure, Assignment. Notice, Foreclosure of mortgage.

COUNSEL: R. Bruce Allensworth (Phoebe S. Winder & Robert W. Sparkes, III, with him) for U.S. Bank National Association & another.

Paul R. Collier, III (Max W. Weinstein with him) for Antonio Ibanez.

Glenn F. Russell, Jr., for Mark A. LaRace & another.

The following submitted briefs for amici curiae.

Martha Coakley, Attorney General, & John M. Stephan, Assistant Attorney General, for the Commonwealth.

Kevin Costello, Gary Klein, Shennan Kavanagh & Stuart Rossman for National Consumer Law Center & others.

Ward P. Graham & Robert J. Moriarty, Jr., for Real Estate Bar Association for Massachusetts, Inc.

Marie McDonnell, Pro se.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ. [4] CORDY, J. (concurring, with whom Botsford, J., joins)

4 Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

OPINION BY: GANTS

OPINION

[**44] [*638] GANTS, J. After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National [***2] Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 (plaintiffs) filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied.[5]

5 We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts, Inc.; Marie McDonnell; and the National Consumer Law Center, together with Darlene Manson, Germano DePina, Robert Lane, Ann Coiley, Roberto Szumik, and Geraldo Dosanjos.

Procedural history. On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the [***3] Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under *G. L. c. 240, § 6*, which authorizes actions "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto." The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) in the property was extinguished [*639] by the foreclosure; (2) a declaration that there was no cloud on title arising from publication of the notice of sale in the Boston Globe; and (3) a declaration that title was vested in the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made after the foreclosure sale.

In both cases, the mortgagors -- Ibanez and the LaRaces -- did not initially answer the complaints, and the plaintiffs moved for entry of default judgment. In their motions for [***4] entry of default judgment, the plaintiffs addressed two issues: (1) whether the Boston Globe, in which the required notices of the foreclosure sales were published, is a newspaper of "general circulation" in Springfield, the town where the foreclosed properties lay. See *G. L. c. 244, § 14* (requiring publication every week for three weeks in newspaper published in town where foreclosed property lies, or of general circulation in that town); and (2) whether the plaintiffs were legally entitled to foreclose on the properties where the assignments of the mortgages to the plaintiffs were neither executed nor recorded in the registry of deeds until after the foreclosure sales.[6] The two cases were heard [**45] together by the Land Court, along with a third case that raised the same issues.

6 The uncertainty surrounding the first issue was the reason the plaintiffs sought a declaration of clear title in order to obtain title insurance for these properties. The second issue was raised by the judge in the LaRace case at a January 5, 2009, case management conference.

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation [***5] of *G. L. c. 244, § 14*, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRace foreclosure) as the mortgage holders where they had not yet been assigned the mortgages.[7] The judge found, based on each plaintiff's assertions in its complaint, that the plaintiffs acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales.[8]

7 The judge also concluded that the Boston Globe was a newspaper of general circulation in Springfield, so the foreclosures were not rendered invalid on that ground because notice was published in that newspaper.

8 In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure "was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time [***6] of the foreclosure, it truthfully claimed that status in the notice, and it

could have produced proof of that status (the unrecorded assignment) if asked."

[*640] The plaintiffs then moved to vacate the judgments. At a hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs leave to produce such documents, provided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted. In response, the plaintiffs submitted hundreds of pages of documents to the judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRace mortgages were purportedly included.[9]

9 On June 1, 2009, attorneys for the defendant mortgagors filed their appearance in the cases for the first time.

The judge denied the plaintiffs' motions to vacate [***7] judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

Factual background. We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate.[10]

10 The LaRace defendants allege that the documents submitted to the judge following the plaintiffs' motions to vacate judgment are not properly in the record before us. They also allege that several of these documents are not properly authenticated. Because we affirm the judgment on other grounds, we do not address these concerns, and assume that these documents are properly before us and were adequately authenticated.

The Ibanez mortgage. On December 1, 2005, Antonio Ibanez took out a $103,500 [**46] loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage [*641] executed an assignment of this [***8] mortgage in blank, that is, an assignment that did not specify the name of the assignee.[11] The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

11 This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez . . . ."

According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation,[12] which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that can be bought [***9] and sold by investors -- a process known as securitization.

12 The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:

Rose Mortgage, Inc. (originator)

Option One Mortgage Corporation (record holder)

Lehman Brothers Bank, FSB

Lehman Brothers Holdings Inc. (seller)

Structured Asset Securities Corporation (depositor)

U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z

[*642] According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions [***10] of the trust agreement, including the representation that mortgages "will be" assigned into the

trust. According to the PPM, "[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to [**47] be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively." The PPM also specifies that "[e]ach Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement." However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act (Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services. See *50 U.S.C. Appendix §§ 501, 511, 533 (2006 & Supp. II 2008)* [13] In the complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the mortgage given [***11] by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston Globe the notice of the foreclosure sale required by *G. L. c. 244, § 14*. The notice identified U.S. Bank as the "present holder" of the mortgage.

13 As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St. 1943, c. 57, as amended through St. 1998, c. 142.

At the foreclosure sale on July 5, 2007, the Ibanez property [*643] was purchased by U.S. Bank, as trustee for the securitization trust, for $94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser) and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after [***12] recording of the sale, American Home Mortgage Servicing, Inc., "as successor-in-interest" to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust.[14] This assignment was recorded on September 11, 2008.

14 The Land Court judge questioned whether American Home Mortgage Servicing, Inc., was in fact a successor in interest to Option One. Given our affirmance of the judgment on other grounds, we need not address this question.

The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a $103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as [***13] trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA).

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

[**48] Option One Mortgage Corporation (originator and record holder)

Bank of America

[*644] Asset Backed Funding Corporation (depositor)

Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed Certificates, Series 2005-OPT 1

Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, "does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date . . . all of its right, title and interest in and to each Mortgage Loan." The agreement makes reference to a schedule listing [***14] the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as

trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed. The PSA provides that the depositor "does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust . . . all the right, title and interest of the Depositor . . . in and to . . . each Mortgage Loan identified on the Mortgage Loan Schedules," and "does hereby deliver" to the trustee the original mortgage note, an original mortgage assignment "in form and substance acceptable for recording," and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of [***15] mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip [*645] code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for $120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure [**49] deed until May 7, 2008. That [***16] same day, Option One, which was still the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

Discussion. The plaintiffs brought actions under *G. L. c. 240, § 6*, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. *Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc., 401 Mass. 267, 269, 516 N.E.2d 144 (1987)*. To meet this burden, they were required "not merely to demonstrate better title . . . than the defendants possess, but . . . to prove sufficient title to succeed in [the] action." Id. See *NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 730, 733 N.E.2d 557 (2000)*. There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which [***17] their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain [*646] judicial authorization to foreclose on a mortgaged property. See *G. L. c. 183, § 21*; *G. L. c. 244, § 14*. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See *Beaton v. Land Court, 367 Mass. 385, 390-391, 393, 326 N.E.2d 302*, appeal dismissed, *423 U.S. 806, 96 S. Ct. 16, 46 L. Ed. 2d 27 (1975)*.

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRace mortgages, it includes by reference the power of sale set out in *G. L. c. 183, § 21*, and further regulated by *G. L. c. 244, §§ 11-17C*. Under *G. L. c. 183, § 21*, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, "and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or [***18] in equity." Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure.[15] See *Beaton v. Land Court, supra at 393*.

15 An alternative to foreclosure through the right of statutory sale is foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. See *G. L. c. 244, §§ 1, 2*; *Joyner v. Lenox Sav. Bank, 322 Mass. 46, 52-53, 76 N.E.2d 169 (1947)*. A foreclosure by entry may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale. See, e.g., *Grabiel v. Michelson, 297 Mass. 227, 228-229, 8 N.E.2d 764 (1937)*. Because the plain-

tiffs do not claim clear title based on foreclosure by entry, we do not discuss it further.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under [***19] [**50] a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void." *Moore v. Dick, 187 Mass. 207, 211, 72 N.E. 967 (1905)*. See *Roche v. Farnsworth, 106 Mass. 509, 513 (1871)* (power of [*647] sale contained in mortgage "must be executed in strict compliance with its terms"). See also *McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 484, 2 N.E.2d 543 (1936)* [16]

16 We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See *Williams v. Resolution GGF Oy, 417 Mass. 377, 382-383, 630 N.E.2d 581 (1994)*, quoting *Seppala & Aho Constr. Co. v. Petersen, 373 Mass. 316, 320, 367 N.E.2d 613 (1977)*. Because the issue was not raised by the defendant mortgagors or the judge, we do not consider whether the plaintiffs committed a breach of this obligation.

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised [***20] by "the mortgagee or his executors, administrators, successors or assigns." *G. L. c. 183, § 21*. Under *G. L. c. 244, § 14*, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. *Chace v. Morse, 189 Mass. 559, 561, 76 N.E. 142 (1905)*, citing *Moore v. Dick, supra*. See *Davenport v. HSBC Bank USA, 275 Mich. App. 344, 347-348, 739 N.W.2d 383 (2007)* (attempt to foreclose by party that had not yet been assigned mortgage results in "structural defect that goes to the very heart of defendant's ability to foreclose by advertisement," and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in *G. L. c. 244, § 14*. That statute provides that "no sale under such power shall be effectual to foreclose a mortgage, [***21] unless, previous to such sale," advance notice of the foreclosure sale has been provided to the mortgagor, to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. Id. "The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a [*648] strict compliance with it is essential to the valid exercise of the power." *Moore v. Dick, supra at 212*. See *Chace v. Morse, supra* ("where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure"). See also *McGreevey v. Charlestown Five Cents Sav. Bank, supra*. Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void.[17] See *Roche v. Farnsworth, supra* [**51] (mortgage sale void where notice of sale identified original mortgagee but [***22] not mortgage holder at time of notice and sale). See also *Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 483-484, 434 N.E.2d 667 (1982)* (foreclosure void where holder of mortgage not identified in notice of sale).

17 The form of foreclosure notice provided in *G. L. c. 244, § 14*, calls for the present holder of the mortgage to identify itself and sign the notice. While the statute permits other forms to be used and allows the statutory form to be "altered as circumstances require," *G. L. c. 244, § 14*, we do not interpret this flexibility to suggest that the present holder of the mortgage need not identify itself in the notice.

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of *G. L. c. 183, § 21*, and *G. L. c. 244, § 14*, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez [***23] and LaRace mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. See *In re Schwartz, 366 B.R. 265, 269 (Bankr. D. Mass. 2007)* ("Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute").[18] See also *Jeff-Ray Corp. v. Jacobson, 566 So.*

2d 885, 886 (Fla. Dist. Ct. App. 1990) (per curiam) (foreclosure [*649] action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

> 18 The plaintiffs were not authorized to foreclose by virtue of any of the other provisions of *G. L. c. 244, § 14*: they were not the guardian or conservator, or acting in the name of, a person so authorized; nor were they the attorney duly authorized by a writing under seal.

The plaintiffs claim that the securitization documents they submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of [***24] a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See *G. L. c. 183, § 3*; *Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175, 177, 116 N.E. 407 (1917)*. In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See *Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6, 933 N.E.2d 918 (2010)*. Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See *Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753, 277 N.E.2d 690 (1972)*, quoting *Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 316 (1880)* (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); *Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88, 90, 557 N.E.2d 756 (1990)*. Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, [***25] but the mortgages securing [**52] these notes are still legal title to someone's home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not [*650] proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish any evidence that the entity assigning the mortgage -- Structured Asset Securities Corporation -- ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that [***26] Option One ever assigned the mortgage to anyone before the foreclosure sale.[19] Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

> 19 Ibanez challenges the validity of this assignment to Option One. Because of the failure of U.S. Bank to document any preforeclosure sale assignment or chain of assignments by which it obtained the Ibanez mortgage from Option One, it is unnecessary to address the validity of the assignment from Rose Mortgage to Option One.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S. Bank's PPM, uses the language of a present assignment ("does hereby . . . assign" and "does hereby deliver") rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) [***27] held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at [*651] the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under *G. L. c. 183, § 21*, and *G. L. c. 244, § 14*. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See *In re Schwartz, supra at 266* ("When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and de-

spite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them"). See also *Bayview Loan Servicing, LLC v. Nelson, 382 Ill. App. 3d 1184, 1188, 890 N.E.2d 940, 322 Ill. Dec. 21 (2008)* [***28] (reversing [**53] grant of summary judgment in favor of financial entity in foreclosure action, where there was "no evidence that [the entity] ever obtained any legal interest in the subject property").

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. See *In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009)*. A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See *In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)* ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it [***29] from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under *G. L. c. 183, § 21*, and *G. L. c. 244, § 14*).

[*652] The judge did not err in concluding that the securitization documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments.[20]

> 20 The plaintiffs have not pressed the procedural question whether the judge exceeded his authority in rendering judgment against them on their motions for default judgment, and we do not address it here.

We now turn briefly to three other arguments raised by the plaintiffs [***30] on appeal. First, the plaintiffs initially contended that the assignments in blank executed by Option One, identifying the assignor but not the assignee, not only "evidence[] and confirm[] the assignments that occurred by virtue of the securitization agreements," but "are effective assignments in their own right." But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment. See *Flavin v. Morrissey, 327 Mass. 217, 219, 97 N.E.2d 643 (1951)*; *Macurda v. Fuller, 225 Mass. 341, 344, 114 N.E. 366 (1916)*. See also *G. L. c. 183, § 3*.

Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry [**54] with it the assignment of the mortgage. [***31] *Barnes v. Boardman, 149 Mass. 106, 114, 21 N.E. 308 (1889)*. Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . . [*653] This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See *Young v. Miller, 72 Mass. 152, 6 Gray 152, 154 (1856)*. In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors [***32] or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. *G. L. c. 183, § 21*, inserted by St. 1912, c. 502, § 6.

Third, the plaintiffs initially argued that postsale assignments were sufficient to establish their authority to foreclose, and now argue that these assignments are sufficient when taken in conjunction with the evidence of a presale assignment. They argue that the use of postsale assignments was customary in the industry, and point to

Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts, which declares: "A title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee."[21] To the extent that the plaintiffs rely on this title standard for the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is misplaced because this proposition is contrary to *G. L. c. 183, § 21*, and *G. L. c. 244, § 14*. If the plaintiffs did not have their assignments to the [***33] Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under *G. L. c. 183, § 21*, and *G. L. c. 244, § 14*, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment be treated as a pre-foreclosure assignment simply by declaring an [*654] "effective date" that precedes the notice of sale and foreclosure, as did Option One's assignment of the LaRace mortgage to Wells Fargo. Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer. See *In re Schwartz, supra at 269*.

> 21 Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts continues: "However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court," citing *In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007)*.

However, we do not disagree with Title Standard No. 58 (3) that, where an assignment is confirmatory of [***34] an earlier, [**55] valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless whether the assignment has been recorded. See *G. L. c. 183, § 21*; *MacFarlane v. Thompson, 241 Mass. 486, 489, 135 N.E. 869 (1922)*. Where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded. See *Bon v. Graves, 216 Mass. 440, 444-445, 103 N.E. 1023 (1914)*. A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. See *Scaplen v. Blanchard, 187 Mass. 73, 76, 72 N.E. 346 (1904)* (confirmatory deed "creates no title" but "takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made"). Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory [***35] assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs' request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. See *Papadopoulos v. Target Corp., 457 Mass. 368, 384, 930 N.E.2d 142 (2010)* (noting "normal rule of retroactivity"); *Payton v. Abbott Labs, 386 Mass. 540, 565, 437 N.E.2d 171 (1982)*. We have not [*655] done so here. The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

Conclusion. For the reasons stated, we agree with the judge that the plaintiffs did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, [***36] and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

Judgments affirmed.

CONCUR BY: CORDY

CONCUR

CORDY, J. (concurring, with whom Botsford, J., joins). I concur fully in the opinion of the court, and write separately only to underscore that what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massa-

chusetts law has always required that it proceed strictly in accord with the statutes [**56] that govern it. As the opinion of the court notes, such strict compliance [***37] is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgaged-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought [*656] these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated.

What is more complicated, and not addressed in this opinion, because the issue was not before us, is the effect of the conduct of banks such as the plaintiffs here, on a bona fide third-party purchaser who may have relied on the foreclosure title of the bank and the [***38] confirmative assignment and affidavit of foreclosure recorded by the bank subsequent to that foreclosure but prior to the purchase by the third party, especially where the party whose property was foreclosed was in fact in violation of the mortgage covenants, had notice of the foreclosure, and took no action to contest it.

No. 68832-4-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

RYAN SANTWIRE, an individual,
Appellant

vs.

UMPQUA BANK, an Oregon Bank,
Respondent/Appellee

DECLARATION OF SERVICE

I, Lili Cervantes-Patel, declare under the penalty of perjury that I caused Ryan Santwire Appellant Reply Brief to be filed in the Court above, and served a copy of upon the following attorneys by giving said documents to ABC Legal Messenger Service for delivery to the following individuals:

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DATED this 14th day of November, 2012 in Arlington, Washington.

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