CONSUMER FINANCIAL SERVICES LAW REPORT

FOCUSING ON SIGNIFICANT CASELAW AND EMERGING TRENDS

JUNE 27, 2017 | VOLUME 21 | ISSUE 4

LITIGATION STRATEGIES

ANOTHER ARROW IN THE QUIVER: DEFENDING AGAINST HOMEOWNERS' CHALLENGES TO RESIDENTIAL FORECLOSURES

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The housing crisis spawned a tidal wave of foreclosures nationwide. It was felt particularly in California, where homeowners flooded the courts with wrongful foreclosure litigation.

Plaintiffs' lawyers have been creative and opportunistic in using a vast arsenal of litigation tactics and theories to challenge foreclosures. Aided by California's consumer-friendly laws — in particular California's Homeowner Bill of Rights, California Civil Code § 2920 *et seq*., enacted effective Jan. 1, 2013 — thousands of homeowners have successfully delayed their foreclosures and sought damages and injunctions, citing every possible technical violation of HBOR and other California laws.

This has placed an incredible burden on lenders, servicers, trustees and foreclosure counsel. Homeowners' theories have varied and evolved, aided in substantial part by the occasional court decision that seemingly supports their latest challenge.

One of the more recent tactics plaintiffs have used involves an overly expansive interpretation of the California Supreme Court's 2016 decision in *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016). The approach at first was discredited, then later honed by creative plaintiffs' counsel.

A recent decision by the U.S. District Court, Central District of California has made a difference with its decision in *Beverly v. Bank of New York Mellon*. *See Beverly v. Bank of New York Mellon*, No. 16-1928 (C.D. Cal. 03/29/17). The *Beverly* court provided the latest weapon for lenders and servicers' that can be used to further respond to *Yvanova*-type challenges to residential foreclosures.

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The *Yvanova* decision

As a general proposition, a mortgagor may not sue for wrongful foreclosure on the basis of purported procedural defects in the original assignment or securitization of his or her secured debt. Most procedural defects would merely make the assignment or securitization ***voidable*** not void. But even if the transaction is voidable, it is the financial institution (not the homeowner) that has the standing and ability to opt to void the transaction or both institutions may ratify the transaction, making it fully enforceable.

The homeowner lacks standing to challenge the assignment because the rights and interests in the secured debt belong to the lender or owner of the loan, not the borrower. This makes sense because if there were a defect in the assignment or securitization, it impacts the owner of the loan, not the borrower.

The California Supreme Court's narrow holding in *Yvanova* did not displace or alter this general framework, nor did it ever purport to do so:

> Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly ***void*** assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts.

There were essentially two steps to the Court's reasoning:

- First, a void assignment does not effectively assign the right to foreclose on the property from one mortgagee to another. This is because a void transaction, unlike a voidable transaction, never legally existed from the start.
- Second, a foreclosure by someone other than the mortgagee directly violates the terms of the mortgage contract, which provides only that the *mortgagee* may foreclose upon default.

"The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security," the Court wrote. Far from providing a silver bullet for defeating any foreclosure, the *Yvanova* decision simply reinforced the well-established scope of borrower and lender rights under the typical mortgage contract.

The Court's decision ultimately made no difference in the final outcome of the *Yvanova* dispute. On remand, the trial court again concluded and the appellate court again affirmed that the plaintiff had not sufficiently pled that the assignment and subsequent securitization of her mortgage were void.

Plaintiff argued that the assignment of her deed of trust from New Century to a Morgan Stanley investment trust was invalid because New Century had been liquidated years before and thus had no power to transfer any asset. Ocwen had been granted power of attorney and thus had the authority to assign on behalf of New Century, which it did.

More importantly, "[e]ven if Ocwen . . . had no authority to assign plaintiff's deed of trust to the Morgan Stanley investment trust, as plaintiff theorizes, that would still mean the assignment was merely voidable, not void, because a bankruptcy trustee enjoys discretion to ratify transfer of bankruptcy estate assets." (*Yvanova v. New Century Mortg. Corp.*, No. B247188, 2016 WL 4098718 (Cal. Ct. App. 07/29/16, *review denied* 10/12/16).)

Plaintiff further argued that the assignment of her deed of trust was void because it came years after the closing date of the Morgan Stanley investment trust. Under New York law, however, which typically applies and governs these trusts, including the one at issue in the case, an unauthorized act by a trustee may generally be ratified by the trust beneficiary and is thus merely *voidable*.

Plaintiff's challenge ultimately fell flat and was unsuccessful. Thereafter, as discussed below, subsequent cases involving similar challenges relying upon the narrow *Yvanova* decision have reached the same conclusion.

Post-*Yvanova* decisions rejecting homeowners' arguments

The front line of post-*Yvanova* cases continue to be litigated as plaintiffs' lawyers hone their challenges to loan assignments and securitization. The most recent such opinion was issued by Judge David O. Carter in *Beverly*, which reaffirms *Yvanova*'s limited reach and provides lenders and mortgage servicers with their latest weapon to defeat *Yvanova*-based foreclosure challenges.

The facts were fairly straightforward and presented a typical post-*Yvanova* homeowner strategy. The homeowner took out a loan to purchase her home in 2005 from Ocwen and executed the promissory note and deed of trust secured by the property. The deed of trust provided that Ocwen was the lender, Mortgage

Electronic Registration Systems, Inc., was the beneficiary, and Recon Trust Company, NA was the trustee. Countrywide was initially the loan servicer until it was acquired by Bank of America around 2009.

MERS transferred trustee status to Bank of New York Mellon as trustee for the CWABS Inc. REMIC trust in 2011, and transferred its beneficiary status to Recon. Sometime thereafter, Bank of America transferred the servicing of plaintiff's loan to Green Tree Servicing LLC. Then, in 2014, BONY named MTC Financial Inc., d/b/a Trustee Corps. as trustee on plaintiff's deed of trust.

The homeowner defaulted on the loan and in 2015 the defendants, including BONY, foreclosed. In response, the homeowner brought a putative class action on behalf of herself and similarly situated homeowners alleging that the 2011 and 2014 transactions were void. In *Beverly,* Judge Carter rejected three of the most common post-*Yvanova* arguments made by plaintiffs when arguing their loan transactions are void.

Rejected argument #1

Assignment void because mortgagee had no authority to assign mortgage. Beverly appeared to argue that the 2011 assignment of her loan was void because MERS was not the true beneficiary of the deed of trust. However, the court found that this argument was inconsistent with Plaintiff's other allegations and with the actual language of the deed of trust, which explicitly granted MERS the right, "if necessary to comply with law or custom ... to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

The court recognized that California "courts have held that regardless of whether MERS is an economic beneficiary or not, this language grants MERS the power to . . . assign its beneficial interests under the deed of trust." (*Beverly*, quoting *Germon v. BAC Home Loan Servicing, L.P.,* No. 10-2482, 2011 WL 719591 (S.D. Cal. 02/22/11).

At least conceptually, the plaintiff's first line of argument is most consistent with the basic principles set out in *Yvanova*, including the principle that "only the person or institution entitled to payment may enforce the debt by foreclosing on the security." Yet, it is difficult to imagine an assignment of a mortgage that a court would render void on the ground that the assignor had no authority to assign it.

In most cases, the assignor will explicitly have such authority, as was the case in *Beverly*. In other cases, the assignor's lack of authority would simply mean that the assignment is merely *voidable*, as was the case in *Yvanova* upon remand.

Traditionally, contracts have been found void when they are illegal in nature, violate fairness or public policy, or take advantage of those incapable of fully comprehending the agreement. An assignment between two sophisticated lenders that in no way alters the obligations of the borrower surely would not fall into this category.

The *Sciarratta* case suggests one narrow path for a plaintiff to prevail on a "no authority to assign" argument. (*Sciarratta v. U.S. Bank Nat'l Ass'n*, 247 Cal. App. 4th 552 (Cal. Ct. App. 2016) (reversed trial court's decision to sustain demurrer without leave to amend). There, the plaintiff alleged and publicly recorded documents confirmed that when Chase purported to assign the promissory note and deed of trust to Bank of America, it had already assigned the same note and deed of trust to Deutsche Bank.

The assignment to Bank of America was void because Chase simply had nothing to assign. Not only is such a situation extremely rare, but a plaintiff's allegations must comport with the public record. (*See Kalnoki v. First Am. Tr. Servicing Sols., LLC*, 8 Cal. App. 5th 23 (Cal. Ct. App. 2017, *reh'g denied* 02/22/17, *review denied* 05/10/17).)

Rejected argument #2

Assignment and securitization was void because it occurred after the trust closing date. Plaintiff further argued that she had standing to assert a wrongful foreclosure claim because the 2011 assignment and securitization occurred after the Trust's closing date provided in the pooling and servicing agreement (PSA). Under New York law, however, which governs most PSAs, including the one at issue in *Beverly*, assignments that do not comply with the terms of the PSA are merely *voidable*, not void.

A number of California decisions have reached this exact conclusion. (*See, e.g., Halajian v. Deutsche Bank Nat'l Trust Co.*, No. 15-15236, 2017 WL 1505319 (9th Cir. 04/27/17); *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802 (Cal. Ct. App. 2016, *review denied* 03/22/17); *Yhudai v. Impac Funding Corp.*, 1 Cal. App. 5th 1252 (Cal. Ct. App. 2016, *review denied* 10/26/16.).)

Indeed, the 9th Circuit similarly found only recently that the weight of New York authority holds that the post-closing assignment of a loan into a trust merely renders that assignment voidable, not void. (*Halajian v. Deutsche Bank Nat'l Trust Co.*, No. 15-15236, 2017 WL 1505319 (9th Cir. 04/27/17).

Rejected argument #3

The assignment was void because of mistakes in documentation. The plaintiff's third and final argument was another common contention employed by plaintiffs challenging their foreclosures — that the 2014 assignment was void because the notary robo-signed the assignment and the signature did not match the previous notary's signature on record. In other words, it was a hypertechnical challenge to one aspect of the documentation.

This challenge, too, was rejected by Judge Carter who recognized that, a notary's unauthorized signature may be ratified by the person on whose behalf it was made, making the transfer *voidable*, not void. Judge Carter noted that the homeowner lacked standing to allege defects with minor incidents like "robo-signing" of the documents, holding that such an error (if it was one) "does not itself constitute harm to the borrower because it does not affect the foreclosure, which is the only injury suffered by the homeowner." (*Beverly,* citing *Sepehry-Fard v. Nationstar Mortg. LLC*, No. 14-03218, 2015 332202 (N.D. Cal. 01/26/15)).

Lenders and mortgage servicers should continue to raise the defense that purely technical errors that do not cause a homeowner's default are inadequate to confer standing. The *Beverly* decision is entirely consistent with a parallel phenomenon emanating from the U.S. Supreme Court's decision in *Spokeo*.

There the Supreme Court reiterated that, in order to have standing to sue, a plaintiff must show that he or she has suffered an "injury in fact." (*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized, and not merely hypothetical.

A bare procedural violation of a statute, a minor irregularity in a securitization process, or even (as in the case of *Beverly*) an allegation of a notary's robo-signing, is likely insufficient to meet that threshold. Any of these types of violations likely do not result in actual harm to a plaintiff.

Applicability to preemptive wrongful foreclosure claims

Not only is the path forged by *Yvanova* narrow, it clearly does not apply to preemptive wrongful foreclosure lawsuits brought before the foreclosure sale. The *Yvanova* Court explicitly stated that it did "not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed."

A number of courts have taken this language at face value. (*See, e.g., Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (Cal. Ct. App. 2016), *reh'g denied* 04/11/16, *review denied* 07/13/16); *William E. Hellmuth v. Bank of America, N.A.*, No. H042544, 2017 WL 1880969 (Cal. Ct. App. 05/09/17).)

Moreover, one court recognized that while the *Yvanova* holding was limited to the post-sale context, "its determination that borrowers have standing after a foreclosure sale to allege that the assignment of a deed of trust was void raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations before the sale." (*Brown v. Deutsche Bank Nat'l Trust Co.*, 247 Cal. App. 4th 275, 281 (Cal. Ct. App. 2016) (affirming demurrer without leave to amend on the ground that the plaintiff clearly failed to identify why the bank lacked authority to initiate foreclosure proceedings).

Of course, if a court applies the *Yvanova* standard to pre-foreclosure claims, plaintiffs will still face the same challenges they do in establishing personal standing to bring wrongful foreclosure claims after the foreclosure sale.

A look ahead

Residential mortgage practices remain under a high degree of scrutiny — from federal and state regulators and lawmakers to the courts themselves.

Yvanova is only the most recent salvo by the California Supreme Court in determining how permissive the judiciary will be to sympathetic plaintiffs pursuing legal options to stymie foreclosures.

While *Beverly* and other decisions are positive precedent for lenders and mortgage servicers, at least in California, the landscape is far from settled. However, there are good options with proper legal counsel to head off costly litigation at the pleadings stage.

