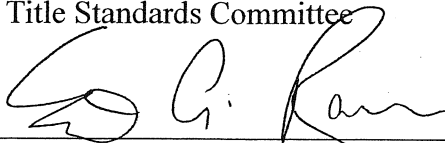


foreclosures. As such, REBA has a substantial interest in the issues presented in these cases, as set forth in the accompanying Statement of Interest.

Respectfully submitted,

The Real Estate Bar Association for Massachusetts

by its Title Standards Committee



Edward A. Rainen, Esq., member
BBO # 411020
Rainen Law Office, P.C.
315 Main Street, Suite 101
North Reading MA 01864
(978) 664-6815

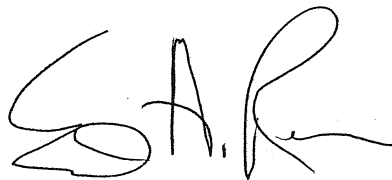
CERTIFICATE OF SERVICE

I, Edward A. Rainen, hereby certify that on this 16th day of June 2009, a copy of the foregoing Motion and Statement of Interest were served via first class mail postage prepaid to:

Walter Harley Porr
Coleen Hayes
Ablitt Law Offices, P.C.
304 Cambridge Road
Woburn, MA 01801

Paul Rodney Collier
Attorney At Law
Central Plaza, 12th Floor
675 Massachusetts Avenue
Cambridge, MA 02139

Glenn F. Russell
Law Office of Glenn F. Russell, Jr.
38 Rock Street, suite 12
Fall River, MA 02720



Edward A. Rainen

practicing throughout the Commonwealth. Many of its members practice extensively in other areas of law, but all of them practice in real estate to such a degree as to motivate them to belong to REBA. Through its meetings, educational programs, publications and committees, REBA members keep current with developments in the field of real estate law and practice and share in the effort to improve that practice. REBA works toward the improvement of real estate law and practice through educational programs, and to that end promulgates title standards, practice standards, ethical standards and real estate forms. REBA also drafts and sponsors legislation to address problems arising in real estate law and practice that can be cured or alleviated by appropriate legislation.

The Title Standards Committee is a standing committee of REBA comprised of thirteen (13) members who are all real estate lawyers with many years of experience. They review current statutes, practices and issues of consequence to conveyancers and draft and recommend standards to the general membership of REBA. All Committee members serve without compensation.

This Statement of Interest is submitted by the Title Standards Committee of the Real Estate Bar Association for Massachusetts (“the Committee”) on behalf of REBA and its members who are practicing attorneys in the Commonwealth of Massachusetts. REBA wishes to convey to the Court its concern with the implications of certain aspects of the decision rendered by the Court in the consolidated cases of U. S. Bank National Association, as trustee v. Ibanez, L. C. Misc. Case 384283 (KCL), LaSalle Bank, National Association, as trustee v. Rosario, L. C. Misc. Case 386018 (KCL), and Wells Fargo Bank, N.A., as trustee. v. Larace, L.C. Misc. 386755 (KCL) (collectively, hereinafter “Ibanez”).

The Committee initially wishes to make known to the Court that the version of Title Standard 58 that was submitted to and discussed by the Court in its decision was not the most recently revised standard. A copy of the most recent version of the Standard is attached hereto as Exhibit A. This revised standard was adopted in May, 2008 and (i) added the second sentence to subparagraph 3 and (ii) added the Caveat. This amendment to the Standard was drafted and adopted following consideration of a number of recent Massachusetts Bankruptcy cases, including In Re Sima Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007) and the cases cited therein. The revised Title Standard 58 provides for reliance on assignments with effective dates prior to commencement of the foreclosure but prospectively cautions about reliance on assignments that are dated after the occurrence of a foreclosure without a recitation of an earlier effective date in the case of foreclosure sales held after the date of the Schwartz decision.

The Committee recognizes that the plaintiffs in these matters have been afforded an opportunity to submit additional materials to the Court and these materials may be ultimately dispositive of the cases. Nevertheless, the Court’s analysis in deciding Ibanez and Larace has received widespread note

in the community and will continue to have unfortunate implications for real estate practitioners and for the many consumers in the Commonwealth who have previously purchased foreclosed properties, the titles to which were presumed to have been good, clear record and marketable, based upon the current understanding of the law, the Title Standard, and the customary practices that have evolved over many years. Under the logic of the Court's decision, those titles have been rendered unmarketable if not defective. It is for this reason that REBA, acting by its Title Standards Committee has taken the extraordinary step of submitting this Statement of Interest with the hope that, even if the Court should amend its decision based upon facts or evidence later submitted to it, the Court should consider a further clarifying decision that will be of assistance and guidance to the conveyancing bar and to the numerous owners and mortgagees of previously foreclosed properties.

ARGUMENT

I. ONE IS ENTITLED TO BE TREATED AS THE HOLDER OF A MORTGAGE IF ONE IS THE HOLDER OF THE UNDERLYING DEBT SECURED BY THE MORTGAGE

A. THE MORTGAGE FOLLOWS THE DEBT

REBA in particular wishes to express its concern with the discussion in footnote 19 of the decision which states that a lender may only be the "holder of a mortgage" by being the holder of a fully executed assignment, in recordable form, that complies with the Statute of Frauds at the time that a determination is made as to whether or not the entity claiming to be a holder, is a holder. It appears to the Committee that this statement forms the basis for the Court's rejection of the assignment in the Larace and Ibanez decisions and for the Court's rejection of REBA's Title Standard 58.

It is clear that, under Massachusetts law, the mortgage follows the note. This principle is succinctly stated in Eno & Hovey, 28 Mass. Prac. §9.49 (4th Ed., 2004): "In summary, the rule is that the mortgage follows the note and the record holder of the mortgage holds it in trust for the holder of the note." Put another way, "[T]he debt,' as the venerable maxim puts it, 'is the principal and the mortgage an incident....' Morris v. Bacon, 123 Mass. 58, 59 (1877), General Ice Cream Corp. v. Stern, 291 Mass. 86, 89, 195 N.E. 890 (1935)", Maglione v. BancBoston Mortgage Corp., 28 Mass. App. Ct. 88, 90, 557 N.E.2d 756, 757 (1990) (Kass, J.). The record holder of a mortgage who does not hold the underlying debt holds the mortgage in a resulting trust for the benefit of the holder of the note, and a transferee holder of a mortgage note is entitled to compel a formal assignment of the mortgage securing it at any

time and such an assignment is confirmatory of what the note transferor should have done when the note was originally transferred.

B. THE COURT SHOULD RECOGNIZE THE EFFECTIVE DATE OF ASSIGNMENTS

The REBA Title Standards Committee believes that the subsequently dated assignments in both Ibanez and Larace are valid and effective for purposes of G.L. c. 244 § 14. It is understandable that the Court might reject the Ibanez assignment where it contains neither an earlier effective date nor an indication that it was confirmatory or intended to have effect as of an earlier date and, therefore, require the plaintiff to submit additional information to support its claim of mortgage holder status at the commencement of the foreclosure. The Committee submits, however, that, even if the Court finds the Ibanez assignment insufficient to sustain the foreclosure in that case, the Larace assignment is distinguishable as it contains an earlier “effective date” and thus should be recognized as a valid confirmatory assignment on its face without a requirement for additional information.

The circumstances of modern day securitized lending and the packaging and sale of residential and commercial loans prompt REBA to request that the Court reconsider its decision in Larace and affirm the foreclosure on the basis of the “effective date” assignment that is in the record of the proceedings in that matter. On a practical level, it is the experience of the members of the Committee that the “effective dates” recited in assignments of this ilk are reflective of the actual dates on which the underlying notes were transferred, either initially to the custodian as part of the pooling and servicing agreements, or subsequently as part of a package of notes in a bulk sale. These transfers of notes are ordinary and customary business transactions that should be afforded credence in the absence of evidence to the contrary. Put another way, the effective date recited in an assignment should be accepted as *prima facie* evidence of the date that the underlying note was transferred absent evidence to the contrary.

The Committee suggests that it is well within the legal right of the assignor, as was done in the Larace case, to state when the assignment effectively occurred, *i.e.*, when the debt was transferred, and was effective, and thereby confirm that the assignee has been the legal holder of the note and therefore the beneficial holder of the mortgage since that date. If the assignee, as the party who received and recorded the assignment, wishes to dispute the effective date for any reason, it can do so. However, by accepting and recording the assignment, the assignee ratifies the stated “effective date”.

While not binding on this Court as precedent, the Committee, in revising Title Standard No. 58 with respect to “effective date” assignments, found persuasive the apparent acceptance by the

Bankruptcy Court of the ‘retroactive effectiveness’ of such an assignment in cases discussed in In Re Maisel, 378 B.R. 19 (Bankr.D.Mass 2007), in the context of whether a foreclosing lender had a sufficiently “colorable claim” and standing as a mortgagee or one acting on behalf of the mortgagee, to seek relief from the automatic stay. As in Schwartz, the moving party in Maisel was unable to produce the requisite evidence that it was the holder of the debt or mortgage or the holder of servicing rights sufficient to enable the moving party to act on behalf of the mortgagee.

Although not cited in the Comments to REBA Title Standard No. 58, a further rationale for being able to rely on assignments that are dated after the foreclosure is that they are, in effect, confirming or ratifying an act that had already occurred between the parties. Support for this position can be found in cases that discuss the ability to ratify and confirm a previously forged instrument, DiLorenzo v. Atlantic National Bank of Boston, 278 Mass. 321, 325-326, 180 N.E. 148, 150-151 (1932), or a defective deed, Bon v. Graves, 216 Mass. 440, 445, 103 N.E. 1023, 1025 (1914).

II. AN EXISTING RECORDABLE ASSIGNMENT IS NOT NECESSARY FOR COMPLIANCE WITH c. 244, §14.

Ibanez and Larace would establish a bright line standard that a fully executed, recordable assignment of mortgage must actually exist and be in the possession of the foreclosing lender prior to auction sale publication in order to have a valid mortgage foreclosure pursuant to G.L. c. 244, § 14. In establishing such a bright line, the Court has stretched the holdings of Bottomly v. Kabachnick, 13, Mass.App.Ct. 480, 434 N.E.2d 667 (1982) and Roche v. Farnsworth, 106 Mass. 509 (1871) to lengths that have not been previously contemplated. In Bottomly and Roche, no one was identified as the holder of the mortgage. The complete lack of any identification of the holder of the mortgage led the Court to determine, “[I]t is not an unreasonable strictness to require [the party acting under the power of sale] to state what property he proposes to sell, and who proposes to make the sale, and who advertises it for sale.” Such is not the situation in the cases before the Court. In both of these cases, the notices appropriately identified the party who intended to make the sale, the party who was the holder of the debt in default and to whom a formal assignment of the mortgage could be executed and delivered for recording upon request. It is unreasonable strictness in these cases to invalidate otherwise properly conducted foreclosures simply because the party conducting the sale had not yet received the formal assignment of the mortgage even though it was entitled to the assignment at any time, particularly where

there is no evidence that anyone was detrimentally misled or harmed in any manner by the lack of pre-publication receipt of the assignment, let alone the recording of it.

This bright line standard also places an undue emphasis on record title to the mortgage as opposed to the true ownership of the debt. It is the debt that shapes the relationships of parties involved in a foreclosure and not the status of the record holder of the security therefor. The relationship between the borrower and the holder in the debt collection and foreclosure process is grounded in both federal and state mandated servicing and default notices that must be sent to the borrower well before a foreclosure occurs. The holder of the debt (or one acting properly on its behalf) is the party that has access to the borrower and the right to engage in the debt collection process culminating in the customary mortgage foreclosure by entry and power of sale. Considering the various demands and notices provided to the debtor, including notice of the filing of the Servicemembers Civil Relief Act action as part of virtually every residential foreclosure proceeding, there can be no doubt that the borrower is fully aware of the identity of either the holder of the debt or its duly appointed servicing agent or both by the time the G.L. c. 244, §14 notices are published and sent.

III. LACK OF AN EXISTING RECORDABLE ASSIGNMENT DOES NOT CHILL A SALE.

The Court appears to have placed significant weight on the possibility that chilling of a sale, resulting in harm to the mortgagor, might result where a notice required by Chapter 244 is published by one that is not the record holder of the mortgage. The Court appears to be concerned that a prospective bidder would, as part of its pre-auction due diligence, search the records of the registry of deeds and not attend an auction if it could not determine that the party publishing the notice of sale was actually the record holder.

The Committee suggests that there does not appear to be any evidence before the Court that such is in fact the case. Further, this is not a situation that any of the long-time practitioners and title insurance counsel on the Committee has experienced. It is the experience of the Committee members that prospective bidders do not inquire as to these matters unless there is some extraordinary reason to do so and instead routinely presume that the party conducting the sale will produce the requisite documents to establish its title to the mortgage at the time of the closing of the auction sale, generally some thirty (30) or more days after the auction. As the District Court Appellate Division has noted in Bank of New York v. Apollos, 2009 WL 1111198 (Mass. App. Div.) at 2, “To the prospective purchaser, the assignment is part of clear title. But Apollos does not assert that a lack of reference

dissuades those bidding from attending or otherwise harms the sale by negatively influencing the potential bidder pool. There is no suggestion that the sale was conducted in a commercially unreasonable manner.”

The Court’s concern with potential chilling in Ibanez and Larace appears to be inconsistent with its findings and holding in validating the Rosario foreclosure, to the effect that it is sufficient for the party conducting the sale to only hold the physical assignment at the time of the auction sale. If such were the case, a person concerned with the status of the record title would be no more likely to appear at the auction in the circumstances that the Court approved in Rosario than he or she would in the circumstances of Ibanez. It is the experience of the members of the Committee that if a potential bidder were concerned that the published notice did not show a connection between the original mortgagee and the foreclosing mortgagee, the bidder’s likely course of action would be to contact the identified foreclosure counsel and inquire. At such point, foreclosure counsel would assure the potential bidder that, as is routinely the case and accepted by foreclosure bidders as such, the appropriate assignment would be produced at or before closing to confirm the foreclosing mortgagee’s right to foreclose and convey the resulting title. This curative methodology has been accepted in practice by foreclosure and “real estate owned” purchasers as a routine part of purchasing titles coming out of foreclosures of secondary market mortgages.

REBA condemns, whenever and wherever it finds it, any lack of attention to care and detail in the preservation of the record title to mortgages, but nevertheless believes that, when it does occur as it has in all three of these cases, it neither chills a sale nor prejudices the mortgagor. The lack of an existing recordable assignment can be remedied by simply obtaining and recording the requisite assignment post-foreclosure, without harm to the mortgagor or to the purchaser at the foreclosure sale, in a commercially reasonable manner that has been the custom and practice of the conveyancing bar.

CONCLUSION

Unlike the recent series of Massachusetts Bankruptcy Court standing cases, exemplified by Schwartz where, upon challenge by debtors or bankruptcy trustees, individual lenders were properly chastised and punished for sloppy or non-existent paper work by barring them access to the Court in each individual proceeding, the decision in Ibanez creates a pre-existing class of non-parties harmed by the unintended result of invalidating titles to properties now owned by new consumers and financed by lenders other than those who should bear the burden of the bad acts defined in Ibanez. Such innocent

parties should also be among the consumers to be protected by a more specific and carefully tailored decision in these cases.

Ibanez creates a justifiably high bar for foreclosing lenders, but in doing so may create significant new classes of unintended victims, whose rights are of equal importance. In the litigation context of the Bankruptcy Court, a decision highlighting the importance of the identity of the mortgagee affects only the standing of that litigant. As the coda to a decision denying lender access to the Court, Judge Feeney wrote in In Re Robin Hayes, 393 B.R. 259 (Bkrcty.D.Mass., 2008).

The Court notes that the Debtor may have won a battle, but she still may lose the war. ... Although the holder of the mortgage may be in doubt, the Debtor's inadequate income and questionable ability to make mortgage and plan payments from self-employment is not.

The decision in Ibanez has the potential to cause thousands of innocent homeowners to find that they now have unmarketable titles, that they live in homes that legally belong to another, that they may be subjected to a new public auction and, perhaps most damaging of all, even if they are the successful bidder, that they may no longer qualify for financing to purchase the homes in which they live. Even the classic suspenders – the foreclosure by peaceable entry and possession – may not save them as arguably the same frailty the Court perceives with respect to the notice and resulting exercise of the power of sale may exist with respect to the entry.

For the reasons stated above, REBA respectfully requests that the Court find that the notices in

both the Ibanez and Larace cases are legally sufficient notwithstanding the lack of an executed, recordable assignment in the physical possession of the party conducting the auction sale where there has been no evidence of prejudice to the borrower nor commercially unreasonable chilling of any of the subject sales.

Respectfully submitted,
REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS

By members of its Title Standards Committee:



Dated: June 16, 2009

Edward A. Rainen, Esq.
BBO # 411020
Rainen Law Office, P.C.
315 Main Street, Suite 101
North Reading MA 01864
(978) 664-6815

Ward P. Graham, Esq.
BBO # 206560
First American Title Insurance Company
101 Huntington Avenue, 13th Floor
Boston MA 02199
(617) 772-9264

Martin R. Haller, Esq.
BBO # 217795
Old Republic National Title Insurance Company
Three Center Plaza
Boston MA 02108
(617) 573-9902

Robert J. Moriarty, Jr., Esq.
BBO # 354680
Marsh, Moriarty, Ontell & Golder, P.C.
18 Tremont Street, Suite 900
Boston, MA 02108
(617) 778-5100

EXHIBIT A

**REBA Title Standard No. 58
Out Of Order Recording of Mortgage
Discharges and Assignments**

A title is not defective by reason of:

1. The recording of a discharge executed by a Mortgagee who holds record title to the mortgage notwithstanding the subsequent recording of an assignment by the discharging Mortgagee to a third party, regardless of whether the assignment was dated prior, or subsequent, to the discharge;
2. The recording of a discharge executed by a Mortgagee who did not hold record title to the mortgage at the time of the discharge, where Assignment(s) of Mortgage to the discharging Mortgagee, whether executed prior, or subsequent, to the recorded discharge, are subsequently recorded;
3. The recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee. 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, see In re Sima Schwartz, 366 B.R. 265 (Bankr.D.Mass. April 19, 2007).

Comments

- (a) *Subsection 1 summarizes the "conclusiveness" clause of M.G.L. c 183, § 54.*
- (b) *Subsection 2 is only intended to cover the situation where the record plainly shows a pattern of assignments, or discharges, which appear to be dated, or recorded, out of sequence.*
- (c) *Subsection 3 is based on Montague v. Dawes, 12 Allen 397 (1866). Further, where a note has been transferred to Endorsee, Endorsor holds mortgage in a Resulting Trust for Endorsee, even if there is no assignment of it. Weinberg v. Brother, 263 Mass. 61, 160 N.E. 403 (1928), Young v. Miller, 26 Gray 152, 154 (1856). Purchaser of the note can thereafter enforce in equity an assignment of the mortgage. First National Bank of Cape Cod v. North Adams Hoosac Savings Bank, 7 Mass. App.Ct. 790, 391 N.E. 2d 689 (1979); Wolcott v. Winchester, 15 Gray 461, 465 (1860).*

The subsequent recorded assignment of mortgage has the effect of a decree in equity, confirming rights of the note holder under the resulting trust. It further serves as an estoppel by deed validating the actions taken by note holder prior to recording of assignment. See also 28 Massachusetts Practice Series, Park (2d ed.) § 492, Eno & Hovey (3d ed.) §9.49.

Caveat

Neither M.G.L. c.183, s.21 (Statutory Power of Sale) nor M.G.L. c.244, ss. 1 and 14 (foreclosures by Entry and Power of Sale) require record title as a condition to foreclosure. The Bankruptcy Court for

the District of Massachusetts, however, in In re Sima Schwartz, supra, held that where the Assignment was not signed until after the foreclosure sale, the foreclosure was invalid.

Adopted May 8, 1995

Amended May 5, 2008 to add second sentence to Subsection 3 and Caveat

REBA Title Standard No. 58