

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

S.J.C. NO. 10880

A.C. NO. 2010-P-1912

FRANCIS J. BEVILACQUA, III

Petitioner-Appellant

V.

PABLO RODRIGUEZ

Respondent-Appellee

ON APPEAL FROM MASSACHUSETTS LAND COURT
CIVIL ACTION NO. 10 MISC 427157

AMICUS CURIAE BRIEF OF
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I. Statement of Interest of Amicus Curiae

We are professors of law at Georgetown University Law Center in Washington, D.C., Harvard Law School in Cambridge, Massachusetts, the University of Utah S.J. Quinney College of Law in Salt Lake City, Utah, and the University of Michigan School of Law in Ann Arbor, Michigan. We teach courses in commercial law, contracts, structured finance, consumer law and finance, and bankruptcy. We have written extensively on mortgage servicing and testified before Congress repeatedly on problems in the foreclosure process. We have no affiliation with any party in this case and have had no contact with any party to the case. We write to the Court as *amici* concerned with the case's implications for commercial law and the foreclosure process and urge the affirmation of the Land Court's opinion.

II. Statement of the Issue

Whether a Land Court judge correctly dismissed a petition under M.G.L. c. 240, § 1, to "try title", where the plaintiff held a quitclaim deed conveyed after an invalid foreclosure sale of the property by

U.S. Bank National Association, which did not hold the mortgage at the time of the sale.

III. Argument

A. The Principle of Nemo Dat Must Prevail Over The Rights of a Good Faith Purchaser

This case presents an unusually stark contest between two of the most fundamental principles of commercial law: the principle of *nemo dat* and the principle of the *bona fide* purchase. The principle of *nemo dat quod non habet*—that you can't give what you don't have—is the bedrock principle on which all commercial law is built. See, e.g., JOHN F. DOLAN ET AL., CORE CONCEPTS OF COMMERCIAL LAW: PAST, PRESENT, AND FUTURE: CASES AND MATERIALS 2 (Thompson West, 2004) ("The First Rule of Conveyancing—Nemo Dat").

Nemo dat means that a sale of the John Adams Courthouse is ineffective, unless the seller holds title to the Courthouse. So too, under the *nemo dat* principle, one cannot convey good title to a neighbor's house in a sale. As the Circuit Court for the District of Massachusetts noted 135 years ago, "No person can sell a thing he does not own, unless as the duly authorized agent of the owner. *Nemo dat quod non*

habet." Barnard v. Norwich & W.R. Co., 2 F. Cas. 841, 845 (Cir. Ct. D. Mass. 1876).

The *bona fide* purchaser principle protects parties who take for value in good faith. In this case, it is not clear whether Mr. Bevilacqua was a good faith purchaser; no finding of fact was made in this regard.¹

For the purposes of this *amicus curiae* brief, however, it is irrelevant whether Mr. Bevilacqua was a good faith purchaser, as the *nemo dat* doctrine trumps the *bona fide* purchase doctrine. It is well-established, black letter law that the "good faith purchaser from a thief or a mere bailee took subject to claims of ownership". William Warren, Cutting Off Claims of Ownership Under the Uniform Commercial Code, 30 U. CHI. L. REV. 469, 470 (1963). This case fits squarely within that description.

There is no contention in this case that U.S. Bank, N.A., the trustee of the securitization trust

¹ Leaving aside the possibility of actual knowledge of title defects, it is questionable whether, as a matter of law, a purchaser of a quitclaim deed at a nonjudicial foreclosure sale can ever be a good faith purchaser. Nonjudicial foreclosure sales are subject to legal requirements beyond those of regular private sales, and absent due diligence, a foreclosure sale purchaser cannot be sure that the sale complied with the law and therefore was capable of passing good title.

that claimed to hold the Rodriguez note and associated security instrument did not properly foreclose on the Rodriguez property. U.S. Bank, N.A. failed to show that it was the mortgagee, just as it did in United States Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637 (Mass. 2011). Accordingly, U.S. Bank, N.A., was no more capable of passing on good title to the Rodriguez property than a common thief.²

B. The Recording of a Deed Is a Ministerial Act that Cannot Create Title

Mr. Bevilacqua argues that the filing of a recorded quitclaim deed gives him record title to the property and therefore the ability to petition to try title under M.G.L. c. 240, §§ 1-5. Mr. Bevilacqua's argument places too much importance on the existence of a recorded deed. There is nothing magical about a

² This conclusion is not altered by the use of a quitclaim deed. M.G.L. c. 183 § 2 provides that "A deed of quitclaim and release shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." In other words, a quitclaim deed, such as the one conveyed from U.S. Bank, N.A. to Mr. Bevilacqua at the nonjudicial foreclosure sale could only convey such title as U.S. Bank, N.A. could have conveyed through a regular deed of sale. Thus, if U.S. Bank, N.A. lacked the ability to convey through a regular deed of sale, it also lacked ability to convey through a quitclaim deed.

deed, however. The recording of a deed does not make a deed valid. Recording is a ministerial rather than an adjudicative function. See M.G.L. c. 183 §§ 4-5B; M.G.L. c. 185 §§ 6, 10, 68.

Thus, Professor Levitin could type up a quitclaim deed on his computer and convey Fenway Park to Professor Pottow, which Professor Pottow could then record, making him the "record title holder." All a recorded title does is provide notice to third parties of a possible claim to a property; it does not confer ownership.

Accordingly, Mr. Bevilacqua's argument simply proves too much. By its logic, Professor Pottow could record the quitclaim deed to Fenway Park from Professor Levitin and then use that recorded deed as the basis for bringing a "try title" petition under M.G.L. c. 240 § 1. By his logic, if the Boston Red Sox failed to answer his petition, for whatever reason, he could take title to Fenway Park. The effect would be to short circuit the adverse possession provisions of the Massachusetts General Laws, M.G.L. c. 240 §§ 6-10, and enable Professor Pottow (in connivance with Professor Levitin) to use

the courts to effectively steal Fenway Park.³

Interpreting the law as Mr. Bevilacqua would have it would permit "try title" plaintiffs to create good legal title out of thin air.

C. Enabling the Laundering of Bad Title to Good Title Via Try Title Actions Would Eviscerate This Court's Ruling in Ibanez and Would Encourage Frivolous and Inequitable Litigation

Adopting Mr. Bevilacqua's position would also seriously undermine this Court's recent ruling in Ibanez, 458 Mass. 637. If the purchaser of a property at an invalid foreclosure sale can conjure up good title through a "try title" petition, it will make the strictures of Ibanez meaningless by permitting financial institutions and foreclosure sale purchasers to "launder" title through invalid foreclosures and try title petitions.⁴ The "try title" statute is meant

³ Mr. Bevilacqua's position would similarly mean that we professors could engage in a self-help repossessions of the cars of every Justice on the Supreme Judicial Court and then sell them in a commercially reasonable manner, pursuant to M.G.L. c. 106 § 9-610(a) (Massachusetts version of the Uniform Commercial Code) and thereby pass good title to the cars to their purchasers. Such a result would be patently ridiculous.

⁴ In this case, Mr. Bevilacqua knowingly bought into the clouded title via a quitclaim deed at a nonjudicial foreclosure sale, and presumably purchased at a steep

to be used defensively, as a shield, not offensively as a sword to deprive others of their property.

Indeed, the concern about "try title" petitions being used offensively is also a concern for mortgagees. If anyone can record a deed and bring a try title action and win by mere default, it creates an incentive for legitimately foreclosed homeowners to file try title actions after foreclosure and hop that the foreclosure sale purchaser (frequently the foreclosing mortgagee) will fail to answer the petition for whatever reason, resulting in the homeowner getting his or her house back. Opening up try title to those without a colorable claim could flood the courts with actions.

There is also a particular equity concern that arises if "try title" actions are used in an attempt to kosher otherwise illegitimate foreclosures.

Defending against a "try title" action creates a particular burden for homeowners who are in default on their mortgages, but where a proper foreclosure has not yet taken place. These homeowners still have title to their home until a proper foreclosure is

discount from the price in a normal arms-length sale. U.S. Bank, N.A., received the proceeds of the sale in exchange for transferring dubious title.

completed. Often, however, they lack the funds to effectively defend against a "try title" petition.

Permitting "try title" petitions via invalid foreclosure sales would have the effect of permitting indirectly what is forbidden directly—the deprivation of a homeowner's property without proper procedure.

It is particularly troubling if this could be done solely because the homeowner lacks the funds to defend his or her title. Homeowners in default on their mortgages are among the most vulnerable of populations and should be protected from costly and vexatious litigation such as "try title" petitions by opportunistic foreclosure sale purchasers.

The Land Court sensibly interpreted the "try title" provision to apply only to colorable claims to title, not to the recording of quitclaim deeds from faulty foreclosures.⁵ Affirmation of the Land Court might chill the market in foreclosure sales in Massachusetts.⁶ But reversal would have a far more

⁵ At worst, the Land Court "jumped the gun" by ruling on standing rather than by formally trying title. It is possible, however, to read the Land Court's ruling on standing as being the actual trying of title. Moreover, in light of this Court's ruling in *Ibanez*, 458 Mass. 637, Mr. Bevilacqua cannot prevail in a formal trial of title.

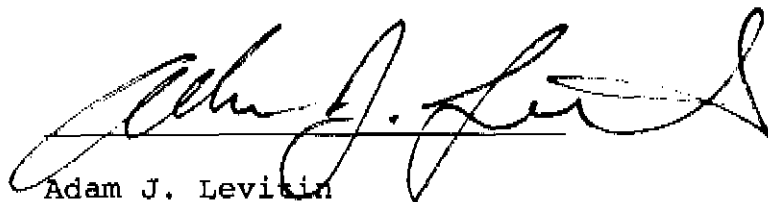
⁶ Affirmation might also have the salutary effect of encouraging lenders to attempt negotiated

deleterious impact on the legal and economic system, as parties' confidence in their tenure in their property would be impaired. Whatever the effect on the Massachusetts foreclosure sale market, affirmation of the Land Court's opinion is essential in order to avoid doing serious harm to the fundamental principles of commercial law and from undermining the Court's recent ruling in Ibanez, 458 Mass. 637.

IV. Conclusion

For the reasons set for above, the judgment of the Land Court dismissing Mr. Bevilacqua's action, dated August 26, 2010, should be affirmed.

Respectfully submitted,



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restructurings of defaulted mortgages instead of proceeding to foreclosure.

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