
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

No. 10880

FRANCIS J. BEVILACQUA, III,

Plaintiff-Appellant,

v.

PABLO RODRIGUEZ,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

**BRIEF OF THE ATTORNEY GENERAL ON BEHALF OF THE
COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE**

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Issues Presented

1. Whether a party whose interest in real property derives from an invalid foreclosure sale of the property may file a petition to try title under G. L. c. 240, § 1, where a claim to legal title is a prerequisite to have standing under the statute.

2. Whether a party may file a petition under G. L. c. 240, § 1, where it is apparent from the face of the petition

state from an entity that does not hold legal title to the property due to a prior, invalid foreclosure sale.

Interests of the Amicus Curiae

The Attorney General has "broad common law and statutory powers to represent the public interest." Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984). She has both a general statutory mandate and, in many instances, a specific statutory mandate, to protect the public interest. Id. In addition, the Attorney General has a common law duty to represent the public

interest and to enforce public rights. Lowell Gas Co. v. Attorney General, 377 Mass. 37, 48 (1979).

The Attorney General is "an elected official charged with the duty of protecting the public interest." Commonwealth v. Adams, 416 Mass. 558, 566-67 (1993). As the chief law enforcement officer, the Attorney General has a profound interest in the enforcement of statutory requirements. Moreover, as the Commonwealth's attorney-in-chief, the Attorney General has an interest in ensuring that real property interests are conveyed in accordance with the laws of the Commonwealth. This is particularly so where Massachusetts law permits the transfer of real property without judicial involvement. In the absence of this supervision, strict compliance with the statutory requirements is the only means to ensure the accuracy of public land records and the integrity of the public recording system for the transfer of real property.

Statement of the Case

This action originated in the Land Court, where the plaintiff filed a Petition to Compel Adverse Claimant to Try Title pursuant to G. L. c. 240, § 1.

[A3] In that action, the plaintiff, Mr. Bevilacqua, sought an order summoning the defendant, Mr. Rodriguez, to show cause why he should not be required to bring an action to try title. [A5]

On August 26, 2010, the Land Court issued a Memorandum and Order dismissing plaintiff's petition, holding Mr. Bevilacqua had no plausible claim to record title and had not shown that the record title was clouded. [A26] Judgment entered against Mr. Bevilacqua on August 26, 2010. [A29]

On September 17, 2010, plaintiff filed a notice of appeal of the Land Court's entry of Judgment against him. [A30] The Supreme Judicial Court granted direct appellate review on December 20, 2010.

Statement of the Relevant Facts

The relevant facts are set forth in the Land Court's Memorandum and Order dismissing plaintiff's petition [A24-28] and in the plaintiff's Petition to Compel Adverse Claimant to Try Title [A3-5].

On March 18, 2005, respondent Pablo Rodriguez granted a mortgage securing 126-128 Summer Street, Haverhill, Massachusetts (the "Property") to Mortgage

Electronic Registration Systems, Inc. ("MERS"), as nominee for Finance America, LLC. [A4]

In or around April 2006, U.S. Bank, N.A. ("U.S. Bank") initiated foreclosure proceedings without first obtaining a valid, written assignment of the mortgage from Finance America, LLC or its nominee, MERS. [A4] Indeed it was not until after the foreclosure sale, on July 21, 2006 that MERS assigned the mortgage to U.S. Bank. Id. On October 17, 2006, Mr. Bevilacqua acquired a quitclaim deed from U.S. Bank. [A3-A4]

Argument

This case exemplifies the continuing harms caused by the securitization of mortgage loans and a secondary mortgage market that ignored state law in an effort to sell and resell mortgages and securities backed by mortgages. As this Court so recently observed in U.S. Bank, N.A. v. Ibanez, 458 Mass. 637 (2011), some participants in the secondary mortgage market ignored longstanding requirements of Massachusetts law concerning when and how a mortgage holder may exercise its right to foreclose, resulting in numerous invalid foreclosures.

In this case, because U.S. Bank did not hold a valid assignment of the mortgage at the time it initiated foreclosure proceedings, it failed to acquire title through the foreclosure deed. Thus, U.S. Bank's subsequent conveyance of the Property by quitclaim deed in favor of Mr. Bevilacqua failed to transfer title to the Property to Mr. Bevilacqua. Accordingly, Mr. Bevilacqua has no claim to title to the Property.

I. Mr. Bevilacqua may not maintain an action under G. L. c. 240, § 1 because he cannot show that his interest in the Property is clouded nor can he show any plausible claim to legal title to the Property.

A. Requirements for a try title petition under G. L. c. 240, § 1.

The try title statute is codified at G. L. c. 240, § 1. Through it the holder of legal title to real estate may petition the court for an order compelling possible adverse claimants to initiate an action to determine who has the superior claim to title.

Chapter 240, section 1 provides, in pertinent part:

If the record title of land is clouded by an adverse claim, or by the possibility thereof, a person in possession of such

land claiming an estate of freehold therein or an unexpired term of not less than ten years . . . may file a petition in the land court stating his interest, describing the land, the claims and the possible adverse claimants so far as known to him, and praying that such claimants may be summoned to show cause why they should not bring an action to try such claim.

G. L. c. 240, § 1. Thus, three things are required for a valid petition: (1) the record (i.e., legal) title must be clouded by at least the possibility of an adverse claim; (2) the petitioner must have possession of the property in question; and (3) the petitioner must claim either an estate of freehold therein or an unexpired term of possession of at least ten years.¹

Despite Mr. Bevilacqua's possession of the property, the complaint and evidence fail to demonstrate that there is a cloud on the record title, nor does Mr. Bevilacqua claim a freehold estate in the Property or claim possession of the Property for at least ten years.

¹ Chapter 240, section 1 also grants standing to those persons "who by force of the covenants in a deed or otherwise may be liable in damages, if such claim should be sustained." There is no contention that Bevilacqua is such a person.

B. Because Mr. Bevilacqua has no plausible claim to legal title to the Property, he lacks standing.

1. Legal title is required for standing to bring a try title petition.

This Court has consistently held that a plaintiff must have a claim to legal title for the property at issue in order to have standing to maintain a petition under G. L. c. 240, § 1. "A petition to remove a cloud from the title to land affected cannot be maintained unless both actual possession and the legal title are united in the petitioner." Daley v. Daley, 300 Mass. 17, 21 (1938). See also First Church of Sharon v. Harper, 191 Mass. 196, 209 (1906) ("[T]he general doctrine is well settled that a bill to remove a cloud from the land affected cannot be maintained unless both actual possession and the legal title are united in the plaintiff."). A petitioner must allege that he holds a fee simple interest in the property, unless he alleges that he has held the property for a period of ten years. Blanchard v. Lowell, 177 Mass. 501, 504 (1901). Moreover, where it is apparent from the face of the petition that the petitioner holds no title to the property, no try title action can be

maintained. See Arnold v. Reed, 162 Mass. 438, 440-441 (1894).

2. **Mr. Bevilacqua lacks legal title to the Property.**

Indeed, Arnold v. Reed is strikingly similar to the case at bar. In Arnold, this Court examined whether a try-title petitioner "allege[d] and show[ed] a 'record title' to real property described in the petition." Id. at 439. The Court found that, while the deeds on record purported to convey good title, an examination of the records revealed that "the sale was absolutely void." Id. at 440.

Whatever may be true of deeds in which the grantor purports to convey his own land, we think that the statute cannot be held to extend to deeds in which the grantor purports to convey the land of others, when no authority to make the conveyance appears of record, in the registry of deeds or elsewhere.

Id. (emphasis added). From this, the Court concluded that the plaintiff could not show a freehold estate in the property and thus, "th[e] petition is not within the purview of the [try title] statute, and must be dismissed." Id. at 441.

This is precisely the situation here. At the time U.S. Bank initiated foreclosure of the Rodriguez

mortgage, it had yet to receive a valid, written assignment of the mortgage, a fact Mr. Bevilacqua acknowledges in his complaint. [A4] Because U.S. Bank lacked a valid assignment, it was not the assignee of the mortgage upon which it purported to foreclose. Thus, the foreclosure U.S. Bank conducted was invalid. See Ibanez, 458 Mass. at 651. Accordingly, U.S. Bank had no legal interest in the title to the Property when it issued the quitclaim deed to Mr. Bevilacqua. Thus, Mr. Bevilacqua cannot make a valid claim to hold legal title to the Property. Holding no title, Mr. Bevilacqua cannot assert that his title is clouded by any adverse claim and thus, cannot bring a claim under G. L. c. 240, § 1.

3. ***There is no support for Mr. Bevilacqua's contention that "record title" is sufficient to grant standing under G. L. c. 240, § 1.***

Mr. Bevilacqua acknowledges that he lacks legal title to the Property, yet claims that the interest he holds is sufficient to give him standing to bring a try title action. This argument relies on a contention that the "record title" interest required

under the try title statute is something less than legal title.

Unfortunately for Mr. Bevilacqua, Massachusetts law does not necessarily recognize a distinction between legal title and record title. Indeed, Massachusetts courts have frequently used the terms interchangeably when discussing rights afforded the holder of legal title to property.²

Mr. Bevilacqua's citations to the contrary are inapposite. Neither Dion v. Board of Appeals, 344 Mass. 547 (1962), nor Pineo v. White, 320 Mass. 487 (1946), concerns a petition under G. L. c. 240, § 1;

² See, e.g., Kirby v. Board of Assessors, 350 Mass. 386, 390 (1966) ("[A]part from the question to be decided (i.e., whether he must be the holder of record legal title) Kirby met all other requirements of the exemption clause."); Berry v. Gates, 175 Mass. 373, 373 (1900) ("The return of the officer states, in the beginning, that he 'seized and took all the right, title, and interest which the within named John R. Rooke has in and to the following described parcels of real estate, the record or legal title to which stands in Mehitable Gates.'"); Moscatiello v. Board of Assessors, 36 Mass. App. Ct. 622, 625 (1994) ("[W]e conclude that if the holder of the record (i.e., legal) title does not qualify for the exemption, it is unavailable to the beneficial owner."); Sanguinetti v. Nantucket Constr. Co., 5 Mass. App. Ct. 227, 237 (1977) ("Sanguinetti now holds the record legal title to the locus as Sanguinetti's successor trustee...."); First Nat'l Bank of Boston v. Sullivan, 4 Mass. App. Ct. 414, 418 (1976) ("The record legal title to the securities in question had vested in Colbert....").

neither supports a distinction between "record" and "legal" title; and neither supports Mr. Bevilacqua's contention that something less than a claim to hold legal title is sufficient for standing under G. L. c. 240, § 1.

In Dion, one Mr. Maynard purchased property as a straw for a Mr. Connolly. 344 Mass. at 549. Maynard deeded the property to Connolly, but that deed was not recorded. Id. Connolly found a buyer for the property, on the condition that a gas station could be constructed on the property. Id. Connolly, through Maynard, then sought a variance to permit a gas station on the property and abutters and others opposed the variance before the Board of Appeals. On appeal, the abutters challenged Maynard's standing to apply for a variance given that he was not the holder of legal title. The Court held that Maynard had standing because he was "a 'straw' for Mr. Connolly, the holder of an unrecorded deed from Maynard covering the locus." Id. at 554. Thus, Maynard "in effect held the record title as fiduciary for Mr. Connolly." Id.

It was this fiduciary interest that permitted Maynard, as the owner of record, to apply for a variance, even though the unrecorded deed had passed legal title to true owner. Id. at 555. The Court's ruling was based not on the record owner's status as the holder of record title, but rather on his status as a fiduciary for the true owner.

The facts are distinctly different in this case. Where Maynard was acting in the true owner's interest as a fiduciary, here Mr. Bevilacqua has no fiduciary relationship to the true owner, i.e., Mr. Rodriguez, whom he is attempting to divest of legal title through the try title process.

Mr. Bevilacqua's reliance on Pineo is similarly misplaced. In Pineo, the plaintiff granted a mortgage to a husband and wife, jointly. After the plaintiff obtained a release from the wife, he sued to obtain a release from the husband, or, in the alternative, a ruling that the discharge was effective as to both. 320 Mass. at 488-489.

The Pineo Court held that the mortgage to the husband and wife jointly created a tenancy by the entirety, which could not be dissolved by the wife's

action alone. Id. at 491. In its opinion, the Court noted the general rule that "[u]pon the fulfillment of the conditions of the mortgage, the mortgagor is entitled to the note and a discharge of the mortgage in order to remove a cloud upon the record title to his premises." Id.

This appears to be the only point for which this case is cited, as the facts of Pineo bear no relation to the facts of this case. The conditions of the Rodriguez mortgage have not been fulfilled, nor has the note been paid. Certainly, the language cited does not support that Mr. Bevilacqua, as the grantee of a void deed from U.S. Bank, has any plausible claim to legal title.

Nor does the Pineo case support a distinction between legal title and "record title," despite the Court's use of the phrase "record title." Upon payment of a mortgage, the mortgagor has full legal title to the subject property. Id. It is that interest - not something less - that is clouded by the un-discharged mortgage.

C. Even if this Court determines that Mr. Bevilacqua's acquisition of the quitclaim deed constitutes an assignment of the mortgage, such an assignment is insufficient to give him standing to bring a try title action.

While Mr. Bevilacqua concedes that U.S. Bank's quitclaim deed is insufficient to transfer legal title to him, he contends that the deed nonetheless granted him ownership of the Rodriguez mortgage. Mr. Bevilacqua claims that he holds the mortgage because U.S. Bank obtained an assignment of the mortgage before it executed the quitclaim deed in his favor. This argument is incorrect for several reasons.

First, neither the foreclosure deed that U.S. Bank generated upon completion of the invalid foreclosure, nor the so-called confirmatory foreclosure deed it created after receiving the mortgage assignment from MERS, nor the quitclaim deed by which U.S. Bank purported to transfer the Property to Mr. Bevilacqua are in the record on appeal. Furthermore, there is no evidence in the record on appeal to establish that these deeds contain language sufficient to assign the mortgage. See Ibanez, 458 Mass. at 649-650 (assignment of mortgage is transfer of legal title to property and, as such, must be in

writing and sufficiently detailed as to the property transferred).

Nor does Brown v. Smith, 116 Mass. 108 (1874), support Mr. Bevilacqua's contention that U.S. Bank's invalid quitclaim deed assigns the mortgage to him. In Brown, it was undisputed that the foreclosing mortgagee held the mortgage at the time the foreclosure was initiated. Id. at 110-111. Thus, the mortgagee in Brown was in a position to convey good title by a foreclosure deed. This is not the case here.

Moreover, a mortgage holder does not have standing to bring a try title action because, in Massachusetts, a mortgagee holds contingent title to the property that is the subject of the mortgage. The mortgagee's title is defeasible upon the mortgagor's satisfaction of the conditions of the mortgage. See Murphy v. Charlestown Sav. Bank, 380 Mass. 738, 747 (1980). While, in Massachusetts, "[a] mortgage of real estate is a conveyance of the title or of some interest therein" that interest is only "defeasible upon the payment of money or the performance of some other condition." Id.

Third, it is improvident to give to mortgage holders standing to bring try title actions, for if a mortgage holder had standing to bring a try title action, it could avoid the legal requirements associated with exercising the power of sale under G. L. c. 244, § 14, or the foreclosure-by-entry process under G. L. c. 244, §§ 1-2. A mortgage holder could simply record a false mortgage against an absentee homeowner, obtain possession of the property, and file a try title action to obtain clear title if and when the homeowner failed to respond to the petition.

While Mr. Bevilacqua cannot use the try title process set forth in G. L. c. 240, §§ 1-5 to obtain clear title, he and other similarly situated third-party purchasers are not without other adequate remedies, however, including remedies holding parties accountable for all harm resulting from foreclosures conducted in violation of Massachusetts law.

II. Third-party purchasers in situations similar to Mr. Bevilacqua's have other adequate remedies at law.

As the Land Court took pains to state, Mr. Bevilacqua's position engenders great sympathy.

Fortunately, he has recourse for harm resulting from U.S. Bank's failure to deliver clear title to the Property.

There are, in fact, several potential remedies, under both law and equity, for third-party purchasers who purchased property from an entity that wrongfully foreclosed without holding a valid assignment of the mortgage. These include:

- commencing suit against the foreclosing entity for damages resulting from its failure to deliver clear title as promised;
- the mortgage holder, voluntarily or pursuant to a court order, can foreclose on the mortgage through the foreclosure-by-entry process set forth in G. L. c. 244, §§ 1-2, and thereafter transfer clear title to the third-party purchaser;
- the mortgage holder may conduct a second, valid foreclosure of the mortgage under G. L. c. 244, § 14, and thereafter transfer clear title to the third-party purchaser; and

- the third-party purchaser may obtain a release deed from the title holder as well as discharges from junior lien holders.
- A. Third-party purchasers may seek rescission and damages from the entity that wrongfully foreclosed for failing to deliver clear title to the property.**

As the Land Court observed, third-party purchasers who bought property following invalid foreclosures have a legitimate cause of action against the wrongfully foreclosing entities for failing to deliver clear title.³

Such an action could restore Mr. Bevilacqua, and others in his situation, to pre-purchase status. The relief available may include rescission of the transaction, damages to cover the purchaser's out-of-pocket costs, treble damages arising under G. L. c. 93A for the entity's failure to transfer clear and valid title to Mr. Bevilacqua, as well as indemnifying the third-party purchaser for any claims resulting from its lack of clear title in the property. See

³ This is in addition to the action that the wrongfully-foreclosed borrower may have against the foreclosing entity for foreclosing without having the legal authority to do so. Although this issue is not before the Court, the Commonwealth believes that such borrowers have an action under G. L. c. 93A.

e.g., Zimmerman v. Kent, 31 Mass. App. Ct. 72, 76-77 (1991) (trial judge's order of rescission plus out-of-pocket losses was appropriate means of compensating purchaser of real estate for material misrepresentations).

Such an action is all the more appropriate because it holds accountable the party most responsible for the third-party purchaser's lack of title to the property. Mr. Bevilacqua, and others in his position, should not bear the costs of obtaining clear title. It was not Mr. Bevilacqua who foreclosed without the legal right to do so; it was U.S. Bank. Equity dictates that U.S. Bank be required to make Mr. Bevilacqua whole. The Superior Court has broad equitable powers to fashion a remedy to make Mr. Bevilacqua and similarly-situated purchasers whole. See Judge Rotenberg Educ. Ctr. v. Commissioner of the Dept. of Mental Resources, 424 Mass. 430, 463 (1997).

B. Third-party purchasers may be able to obtain clear title from a mortgage holder who complies with the foreclosure-by-entry process set forth in G. L. c. 244, §§ 1-2.

In addition to suing the foreclosing entity, Mr. Bevilacqua and other third-party purchasers may be able to obtain clear title from the mortgage

holder through the foreclosure-by-entry process set forth in G. L. c. 244, §§ 1-2.

The foreclosure-by-entry process permits a mortgage holder to recover possession of the mortgaged property if it: (1) makes an open and peaceable entry on the property; (2) records a certificate of that entry; and (3) maintains possession of the property for three years from the date the certificate is recorded. See G. L. c. 244, §§ 1-2; Joyner v. Lenox Sav. Bank, 322 Mass. 46, 52-53 (1947).

If a mortgage holder can show that the statutory requirements for foreclosure by entry have been met, then the mortgagor's right of redemption will be terminated by operation of the statute, and junior liens will be discharged, enabling the mortgage holder to convey clear title to the property. Thus, if U.S. Bank made a peaceable and open entry and recorded a valid certificate of that entry, then, once three years from the recording date had passed, if its possession of the Property remained unchallenged, it could then convey clear title to a third party.

C. A second, valid foreclosure could yield clear title to the property at issue.

In addition to pursuing legal action for the failure to deliver clear title to property, a third-party purchaser who lacks clear title as the result of an invalid foreclosure sale could obtain clear title following a second, valid foreclosure of the mortgage. Specifically, the present holder of the mortgage - in this case, either U.S. Bank or Mr. Bevilacqua⁴ - may be able to foreclose the mortgage in accordance with the power of sale contained therein. G. L. c. 244, §14. A valid foreclosure would terminate the mortgagor's right of redemption in the mortgage and title to the property would then transfer to whomever purchased the property at the foreclosure sale.

Because there is no guarantee that the initial third-party purchaser would be the winning bidder at a second, public foreclosure sale, the parties or the Superior Court could fashion a remedy whereby the third-party purchaser acquires title to the property

⁴ As noted above, Bevilacqua claims to hold an assignment of the mortgage by operation of the foreclosure deed he received from U.S. Bank. Whoever presently holds the mortgage holds it for the benefit of, and acts as a fiduciary to, the note holder. Ibanez, 458 Mass. at 652.

and is compensated for its costs resulting from the original, invalid foreclosure and subsequent sale.

For example, using the facts of this case, the parties could agree or the Superior Court could order that U.S. Bank bid an amount at the auction equal to the total value Mr. Bevilacqua has spent in acquiring the Property. If that amount is sufficient for U.S. Bank to acquire title, thereafter U.S. Bank would transfer the title to Mr. Bevilacqua. If that amount were insufficient for U.S. Bank to acquire title, U.S. Bank would be required to pay Mr. Bevilacqua for all his costs incurred in the maintenance, acquisition, and improvement of the Property, together with all litigation costs incurred in Mr. Bevilacqua's attempt to clear title, including interest.

D. Third-party purchasers may be able to obtain a release from the mortgagor and any junior lien holders of record.

In addition, Mr. Bevilacqua and others in his situation may be able to obtain clear title to the subject property by obtaining a quitclaim deed from the mortgagor and discharges from all lien holders of record. Lien holders may require some payment for the discharge; however, the wrongfully-foreclosing entity

could surely agree to facilitate the process and pay any required sums.

The Commonwealth acknowledges that this approach is not always feasible, particularly when the prior mortgagor cannot be located, but it remains a means for a third-party purchaser to acquire clear title.

There are myriad variations that the parties could consider either in the context of litigation or by agreement. Absent the creation of a legislative remedy, these appear to be the best of several possible options.

Conclusion

For the reasons stated above, the Commonwealth respectfully urges the Court to affirm the decision of the Land Court.

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS

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