

Rulings May Hinder Trustees' Foreclosure Actions

Thursday, Dec 06, 2007 --- Two recent decisions by federal district court judges in the Northern District of Ohio have dismissed foreclosure actions filed by mortgage securitization trustees because the trustees failed to demonstrate they were the owners and holders of the notes and mortgages upon which the suits were filed.

Because the trustees did not satisfy this requirement, the courts found they lacked standing to pursue the foreclosure actions and dismissed the cases without prejudice.

The decisions are garnering particular attention by borrower defense counsel, who are anxious to use the rulings as a tool to forestall or--according to some rhetoric--prevent foreclosures.

Although the decisions present a cautionary message, they do not appear to present an overwhelming hurdle to trustees' foreclosure actions.

Ohio has one of the highest foreclosure rates in the country, and mortgage servicers and owners of notes and the attendant mortgages have increasingly brought foreclosure actions in federal, rather than state, court based on diversity jurisdiction.

In light of the increased number of private foreclosure actions and the time-consuming nature of the proceedings, the United States District Court for the Northern District of Ohio adopted a general order to create uniform procedures for all pending and future foreclosure actions based on the court's diversity jurisdiction.[i]

The order sets out a comprehensive set of procedures the parties must follow in any foreclosure action in the court. As relevant to the two decisions, the order requires the complaint to be accompanied by "[a]n affidavit documenting that the named plaintiff is the owner and holder of the note and mortgage, whether the original mortgagee or by later assignment, successor in interest or as a trustee for another entity." [ii]

In the first decision, issued on October 31, 2007, Judge Christopher Boyko dismissed 14 foreclosure actions filed by mortgage securitization trustees for failure to fulfill this requirement.[iii]

The trustees attached to their complaints the original promissory notes and mortgages securing the same, each of which identified the mortgagee and promisees as the original lending institution--not the securitization trustee.

Also attached to the complaint was an affidavit by an employee of the loan servicing agent for the trustees, averring that the notes and mortgages had been assigned to the trustees and that the trustees are the owners and holders thereof.

No actual assignments accompanied the complaint. A month later, the trustees filed assignments--dated as of that date--related to each of the mortgages at issue.

Not satisfied, on Oct. 10, Judge Boyko ordered the trustees to file "a copy of the executed Assignment demonstrating plaintiff was the holder and owner of the Note and Mortgage as of the date the Complaint was filed, or the Court will dismiss the Complaint."

Apparently, the trustees filed no additional documents. Consequently, Judge Boyko ruled that the trustees had not satisfied the requirements of Amended General Order No. 2006-16, and therefore had not satisfied their "burden of demonstrating standing at the time of the filing of the Complaint."

The judge observed that "none of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint.

The assignments, in every instance, express a present intent to convey all rights, title and interest in the Mortgage and the accompanying Note to the Plaintiff...upon receipt of sufficient consideration on the date the Assignment was signed and notarized" (i.e., after the Complaint was filed).

Judge Boyko concluded, "[t]hese proffered documents belie Plaintiff's assertion they own the Note and Mortgage by means of a purchase which pre-dated the Complaint by days, months or years." The Judge also noted that Ohio law requires that when a mortgage is assigned, the assignment must be recorded in order to be effective.[iv]

In an unusually direct footnote, Judge Boyko expressed his apparent frustration: "Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through.

Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens.

The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate."

In the most recent decision, issued November 14, 2007, Judge Kathleen O'Malley of the same court dismissed 32 foreclosure actions brought by

securitization trustees.[v]

Consistent with Judge Boyko's ruling, Judge O'Malley concluded that "[i]t is reasonably clear from Section 1.2.5 [of the Court's General Order No. 2006-16] that an affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient to comply with Section 1.2.5's 'documentation' requirement."

Rather, the court held, "[t]o the extent a note and mortgage are no longer held or owned by the originating lender, a plaintiff must appropriately document the chain of ownership to demonstrate its legal status vis-à-vis the items at the time it files suit on those items.

Appropriate 'documentation' includes, but is not limited to, trust and/or assignment documents executed before the action was commenced, or both as circumstances may require."

The court added in a footnote that it is "only concerned with the date on which the documents were executed, not the dates on which they were recorded (if recorded) with the county recorder's office."

Because the plaintiff-trustees had failed to file the necessary timely dated assignments, Judge O'Malley dismissed the complaints with prejudice.

Observations Regarding The Decisions

Contrary to the broad claims of some defense counsel, the courts did not hold that the securitization trustees were not the true owners and holders of the promissory notes and related mortgages. Rather, the courts held simply that the trustees had not adequately fulfilled their burden of proof in demonstrating that fact.

The trustees are not prevented from pursuing these foreclosure actions. The cases were dismissed without prejudice. Any new suits brought in this federal court would have to be accompanied by adequate timely dated documentation.

It is clear that the federal District Court for the Northern District of Ohio will be meticulous in requiring compliance with its Procedures for Foreclosure Actions Based on Diversity Jurisdiction.

Particularly as it relates to a securitization trustee's action where the trustee is not identified on the note and/or mortgage at issue, the trustee's complaint must be accompanied by "trust and/or assignment documents executed before the action was commenced, or both as circumstances may require."

Because this is couched as a jurisdiction matter, plaintiff-trustees can expect the court to raise this issue on its own, regardless of whether the defendant questions the adequacy of the documentation.

It is unclear whether other federal courts, which have not adopted rules similar to the Northern District of Ohio's Procedures, will take a similar view as to the documentation necessary to demonstrate a securitization trustee's standing to bring a foreclosure action where it is not identified on the promissory note and mortgage.

It is even less clear whether state courts, which may have different standing and jurisdictional requirements--and which have far greater track records with foreclosure actions--will follow these decisions.

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[i] Fifth Amended General Order No. 2006-16, In re: Procedures for Foreclosure Actions Based on Diversity Jurisdiction (N.D. Ohio, Oct. 10, 2007).

[ii] Id. at 1.2.5.

[iii] In re Foreclosure Cases, Case No. 1:07cv2282 et al. (N.D. Ohio, Oct. 31, 2007).

[iv] Citing R.C. sec. 5301.25.

[v] In re Foreclosure Actions, Case No. 1:07cv1007 et al. (N.D. Ohio, Nov. 14, 2007).