Work in Progress: Next Steps after *Bank of America v. Greenleaf*

— *Gayle Middleton, gaylem@mainelawyersreview.com*

In 2014, the Law Court issued a decision holding that an assignee of a mortgage from the Mortgage Electronic Registration System (MERS) as nominee for the original lender has no standing to foreclose on the mortgage.[1] This is because, the Court found, MERS only held the right to record the mortgage. It had no ownership interest to convey.

This has caused much difficulty for plaintiffs in foreclosure cases. As the Law Court noted in 2015, "[t]he financial services industry, through the practice of securitization, spawning a byzantine mass of assignments, transfers, and documentation, has made it difficult for subsequent assignees to demonstrate that they have standing to bring foreclosure claims. … In this process, some entities in the chain of assignments disappear, or their records are lost, making it difficult or impossible to acquire necessary records that qualify for admission under the business records exception to the hearsay rule. …"[2]

The statute governing foreclosures has since been amended to provide that the complaint must be accompanied by a certification of proof of ownership of the mortgage note.[3] So the question arises — what happens when an "entity in the chain of assignments" has disappeared or doesn't appear in the action?

In the Fall 2014 issue of the *Maine Bar Journal*, John J. Aromando described *Greenleaf* as creating "obvious problems for lenders and a windfall for borrowers." In his view, the solution would need to come from the legislature. Others disagreed.

In the Winter 2015 issue, Thomas A. Cox and L. Scott Gould responded to Aromando's suggestion by arguing that "[t]he Maine Legislature should not be persuaded to devise new laws to reduce existing protections for Maine homeowners, nor should it be led by national banks and mortgage servicers into legislative fixes that will dilute Maine rules of evidence and procedure." They suggested that current law provided the appropriate remedy: "Declaratory judgments and quiet title actions might also [in addition to permitting evidence from MERS records or the use of indemnity bonds] overcome problems of proof when mortgage assignors have gone out of business."

Attempts to obtain declaratory judgments have not been successful to date. In *Bank of America NA v. Metro Mortgage Co., Inc.* (Cumberland Dkt. No. RE-14-355), plaintiff attempted to effectuate service on the now-defunct lender by delivering a copy of the summons and complaint to "defendant's registered agent" — the mortgagor. The Court noted that irregularity, and went on to point out that there also might be shareholders of the dissolved corporation whose interests could be affected by the outcome of the action. The declaratory judgment could not issue until all necessary parties were joined in the case.

In *US Bank, NA v. Barclay's Bank PLC, f/k/a Equifirst Corporation* (Androscoggin Dkt. No. AUBSC-RE-15-52), plaintiff finally moved to dismiss its action for declaratory judgment as moot because it had obtained a quitclaim assignment from Equifirst, an entity it had at times (though not always) represented as no longer in existence.

In *Deutsche Bank National Trust Co. v. Decision One Mortgage Co. LLC* (Cumberland Dkt. No. RE-15-301), the Court went so far as to suggest plaintiff might be entitled to a judgment declaring it to be the holder of the mortgage, but not until plaintiff demonstrates that it is, in fact, the holder of the note. A hearing had to be scheduled for that purpose.

Now, in *US Bank, NA v. Decision One Mortgage Company, LLC* (Oxford Dkt. No. CV-15-65), MLR/SC#266-16, summarized in this issue at p. 5, the Superior Court has again rejected a request for a declaratory default judgment, noting that plaintiff had failed to provide admissible evidence supporting its claim, and that with only a default judgment, it would still be required to affirmatively prove ownership of the mortgage in the foreclosure action to follow.

As the Court stated in the latter case, the Law Court has not yet spoken on the question of whether a declaratory judgment action is a proper strategy in these cases, and it won't until someone obtains a judgment and tests it. Why has that not happened?

According to Cox, "[t]hese are only some of the fundamental errors that we are seeing in these declaratory judgment cases." Often, in cases like *Barclays' Bank*, plaintiff has simply not done sufficient investigation to determine if there is an original lender entity that can provide the assignment, or has failed to make a demand for an assignment. That was apparently true in the *Decision One* case, as defendant in that case still exists in North Carolina, and was able to be served.

Another problem arises when the original lender is truly dissolved. The proper procedure, according to Cox, would be to research who now holds any of the corporation's residual assets. Plaintiff should make a demand on that entity for an assignment, and should sue that entity if the demand is refused or ignored. Homeowners need not be named parties in these actions, as they have no say regarding who owns the mortgage.

Aromando has no doubt the banks will be willing to do whatever they need to do, as soon as it becomes clear what that is. "They will have to do their title research, and they will have to do their corporate law research regarding predecessor entities," but if they "follow the breadcrumbs," he believes it will still be possible to overcome the *Greenleaf* standing issue through a declaratory judgment action.

Cox agrees, saying that he "remain[s] of the opinion that, if done properly, a declaratory judgment action can resolve the *Greenleaf* issues for a potential foreclosure plaintiff, and …, in a properly pled and proved case, the Law Court will sustain a trial court's granting of a declaratory judgment having the legal effect of placing ownership of the mortgage in the hands of the owner of the note."

See also, "Sanctions Ordered in Foreclosure Action" in *MLR*, 4/4/16 issue. The opinion in *Deutsche Bank National Trust Co., as Trustee v. Decision One Mortgage Co. LLC, et al.*, MLR/SC#244-16, was summarized in *MLR*, 8-26-16 issue.

REFERENCES

[1] *Bank of America, NA v. Greenleaf* (ME 2014).

[2] *Homeward Residential Inc. v. Gregor* (ME 2015).

[3] 14 M.R.S. § 6321.