

Lending Liability and Litigation Update: Five Recent Cases that Every Secured Lender Should Know

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Presented by

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I. Lenders Must Strictly comply if they want to Utilize Minnesota’s Mortgage by Advertisement Foreclosure Statute.

Ruiz v. 1st Fidelity Loan Servicing, LLC, 829 N.W.2d 53 (Minn. 2013).

Facts: In 2005, mortgagor executed a mortgage in favor of Chase Bank, NA, which was properly recorded with the Hennepin County recorder. In 2006, Chase Bank, NA assigned the mortgage to JP Morgan Chase Bank, NA. The assignment was also properly recorded. The mortgagor defaulted in September 2008. A second assignment of the mortgage was executed in September 2009. But the second assignment, which was recorded in November 2009, listed the assignee as “1st Fidelity,” rather than “1st Fidelity Loan Servicing, LLC.” In 2010, 1st Fidelity Loan Servicing, LLC commenced proceedings to foreclose the mortgage by advertisement, and eventually purchased the property in question at a sheriff’s sale. The mortgagor did not redeem, but subsequently brought a claim against 1st Fidelity Loan Servicing, LLC for, among other things, failure to comply with the assignment, which she maintained is required under Minn. Stat. § 580.02(3). The district court granted 1st Fidelity Loan Servicing, LLC’s dispositive motion, but the Minnesota Court of Appeals reversed.

Holding: The Minnesota Supreme Court found “the plain meaning of section 580.02(3) requires all assignments of the mortgage to be recorded *before* the mortgagee has the right to engage in the process of foreclosure by advertisement.” Thus the Court found that “in light of the statutory language that recording all assignments of the mortgage is ‘requisite’ to make such foreclosure ‘by advertisement,’ the statute unambiguously mandates strict compliance.” (*citing* Minn. Stat. §§ 580.01–.02).

II. To Avoid Dismissal Under Minn. Stat. § 513.33, a Borrower Must Plead a Plausible Basis for Detrimental Reliance.

Stumm v. BAC Home Loans Servicing, LP, 2012 WL 5250560 (D. Minn. Oct. 24, 2012).

Facts: Following a default, the borrowers entered into a series of negotiations with BAC Home Loans Servicing regarding potential HAMP modifications. One week before the sheriff's sale, the borrowers asserted that a representative of the lender advised the borrowers over the phone that they had been preapproved for a HAMP modification and that the sheriff's sale would be postponed. The sheriff's sale proceeded as scheduled. Borrowers sued, asserting claims of breach of contract, fraud, negligent misrepresentation, and promissory estoppel.

Holding: Detrimental reliance for purposes of fraud, negligent misrepresentation, promissory and equitable estoppel claims must be plausible. In evaluating the plausible nature of claimed reliance, a court can look to, among other things, the nature and duration of the uncured default, inability to obtain other funds, and payment histories. Merely pleading that alternatives to foreclosure may have existed and were not pursued does not suffice and does not state a plausible basis for detrimental reliance. A borrower cannot be harmed by failing to pursue alternatives to foreclosure if those alternatives were not in fact available. Equitable estoppel is a basis to prevent application of Minn. Stat. § 513.33, but to avoid dismissal a borrower must plead facts to support equitable estoppel with particularity.

Honorable Mention: *Cox v. MERS*, 685 F.3d 663 (8th Cir. 2012) (duty of good faith under Minn. Stat. § 580.11 relates only to the fairness of the sheriff's sale; borrower can assert a breach of an implied covenant of good faith and fair dealing claim against lender based on mortgage but only where they can "plead plausible factual allegations indicating that they would have been able to pay the mortgage absent reliance on instructions"); *Brisbin v. Aurora Loan Services, LLC*, 679 F.3d 748 (8th Cir. 2012) (promise to postpone a foreclosure sale falls squarely within the plain meaning of a forbearance agreement because foreclosure is a means of enforcing debt and is therefore a "credit agreement" within the meaning of Minn. Stat. § 513.33).

III. Although Powerful, the Minnesota Credit Agreement Statute of Frauds (Minn. Stat. § 513.33) Does Not Bar Every Claim or Defense.

Peterson v. Carrington Mortg. Servs, Inc., 2012 WL 6969870 (D. Minn. Oct. 11, 2012).

Facts: On April 7, 2011, Plaintiffs, husband and wife, entered into a forbearance agreement. Upon breach of the forbearance agreement the parties agreed that the foreclosure proceeding would be reinstated. Under the agreement, a monthly payment was due on May 1, 2011. After the Plaintiffs failed to make the payment, on May 3, 2011, a representative of Defendant Carrington Mortgage Services, Inc. (“CMS”) sent an email message to Plaintiff Marilyn Peterson stating “that the payment had to be made by May 5, 2011 or the forbearance agreement would be cancelled.” Plaintiffs sent the payment via U.S. Mail on May 4, 2011 and CMS cashed the check on May 6, 2011. Nonetheless, Plaintiffs were served with a notice of foreclosure on May 26, 2011 and the sheriff’s sale was held on June 14, 2011, when the property at issue was sold for substantially less than the fair market value. Plaintiffs asserted five separate theories of recovery. They (1) sought a declaratory judgment that the foreclosure is invalid; (2) asserted a claim for negligent and fraudulent misrepresentation; (3) asserted a claim for a private right of action under Minnesota’s mortgage servicer standards of conduct statute; (4) alleged a violation of RESPA; and (5) alleged a claim for breach of contract. Defendants moved for dismissal under Rule 12(b)(6).

Holding: While the court dismissed four of the five claims, it found “it is reasonable to infer from the alleged facts that CMS had a pecuniary interest in the forbearance agreement.” The court further held that the falsity of CMS’s representation and the reasonableness of Plaintiffs’ reliance were adequately alleged. The failure of CMS’s representative “to exercise reasonable care in making the representation may be reasonably inferred from the substance of the representation itself, the subsequent cancelation of the agreement, and Plaintiffs’ allegations of CMS’s intent and knowledge.” Thus the court held that Plaintiffs adequately alleged claims for negligent and fraudulent misrepresentation.

IV. Lenders Should Prosecute Priority Disputes Sooner Than Later.

Infinity Trading Inc. v. Rukamp, 2013 WL 490762 (Minn. Ct. App. Feb. 11, 2013).

Facts: On February 6, 2006, borrowers obtained a home equity line of credit secured by a second mortgage on their residential property. The second mortgage was recorded on March 3, 2006. Two days before the second mortgage was recorded, on March 1, 2006, borrower refinanced the indebtedness secured by the first mortgage with a new lender. The new “first” mortgage was recorded on March 23, 2006. At the time the new first mortgage was pledged in early March 2006, borrower represented that no unrecorded mortgages existed on the residential property. After the borrower defaulted on both loans, the holder of the HELOC mortgage started a foreclosure proceeding that resulted in the winning bid in the amount of \$20,391.00 on September 17, 2009. A few months later, the new first mortgagee held its foreclosure sale. The new first mortgagee never asserted an equitable subrogation claim during the redemption period following the September 17, 2009 foreclosure sale. The trial court held equitable subrogation was appropriate, that the appellant was not a bona fide purchaser or innocent third party, and that the lender providing the take-out loan should step into the shoes of the original lender in equity.

Holding: The Minnesota Court of Appeals reversed on the basis that the refinancing lender could have discovered the priority dispute for a number of years and, instead, sat on its priority claim until the expiration of the redemption period. Because the lender sat on the priority issue for too long, and since “equity aids the vigilant, and not the negligent” the Minnesota Court of Appeals held that there was no “justifiable or excusable mistake that allows equitable subrogation.”

Honorable Mention: *Wells Fargo Bank, N.A. v. Gakin*, 2013 WL 869942 (Minn. Ct. App. Mar. 11, 2013) (A first mortgage dated May 8, 2006, in favor of Wells Fargo was recorded on June 6, 2006. The loan secured by that mortgage was not funded until May 30th. On May 16, 2006, borrower granted second and third mortgages in favor of TCF, which were recorded on June 1, 2006. TCF conceded actual knowledge of the Wells Fargo refinancing, but argued that TCF was not a “subsequent purchaser” because Wells Fargo had no security interest in the property until the loan actually funded. The Minnesota Court of Appeals rejected the argument, holding that for priority purposes the date of disbursement of funds does not alter the provisions of the Minnesota recording act.)

V. The “Show-Me-the-Note” cases are still shown no respect.

Karnatcheva v. JPMorgan Chase Bank, N.A., 704 F.3d 545 (8th Cir. 2013).

Johnson v. Deutsche Bank Nat. Trust Co., 513 Fed.Appx. 632 (8th Cir. 2013)

Blaylock v. Wells Fargo Bank, N.A., 502 Fed.Appx. 623 (8th Cir. 2013)

Welk v. GMAC Mortg., LLC, 720 F.3d 736 (8th Cir. 2013)

Kent v. Bank of America, N.A., 518 Fed.Appx. 514 (8th Cir. 2013)

Murphy v. Aurora Loan Services, LLC, 518 Fed.Appx. 511 (8th Cir. 2013)

Facts: Over the last few years, homeowners have prosecuted “show-me-the-note” cases vigorously. While the efforts by the plaintiffs have not been successful, namely because of *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009), plaintiff’s counsel attempted to rebrand their claims to avoid the holding of *Jackson*, including novel theories such as quiet title, slander of title, fraud, and negligence. In *Karnatcheva*, and other recent cases, the mortgagors argued that they could maintain a claim for quiet title because the lender/mortgagee had an adverse interest that clouded title.

The other development over the past year is that counsel for many of these cases, William Butler, has been assessed a significant amount of sanctions and attorneys’ fees. Mr. Butler sought to address what he maintains are “punitive measures.”

Holding: The *Karnatcheva* court has set the standard and district court and appellate courts have followed (*see Johnson*) and rejected the slander of title-type claims regardless of the legal theory or pleaded claim for relief, as long as the underlying facts in support of such claim are based on an assignment of a mortgage to a different entity that holds the note.

In *Blaylock*, *Welk*, *Kent*, and *Murphy*, the Eighth Circuit upheld the district court’s sanctions against Mr. Butler. In all told, Mr. Butler has been assessed in excess of \$350,000.00 in sanctions. In July, U.S. District Court Judge Michael Davis appointed former federal judge James Rosenbaum to investigate the actions of Mr. Butler. At the same time an investigation by the Minnesota Lawyers Professional Responsibility is underway.