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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Boiling Point Of Wrongful Foreclosure Litigation

Law360, New York (October 18, 2013, 11:34 AM ET) -- California's wrongful foreclosure litigation had been simmering for a while. Borrowers threatened with foreclosure were running to court with the goal of stopping — or at least stalling — the taking of their homes. Few of their arguments stuck. On July 31, 2013, however, the Court of Appeal for the Fifth District turned up the heat.

In Glaski v. Bank of America NA, the Fifth District held that borrowers had standing to challenge an assignment that is void rather than voidable.[1] The court found that Glaski had alleged sufficient facts demonstrating that the subject loan had not been properly transferred into a securitized trust. As a result, Glaski's claims should have survived the pleading stage since he adequately pleaded that the successor trustee derived its authority from a void assignment.

Before Glaski, courts had routinely held that a borrower did not have standing to challenge an assignment that failed to comport with a securitized trust's pooling and servicing agreement.[2] Courts reasoned that a borrower could not argue improper securitizations since the borrower was neither a party nor a third-party beneficiary of the pooling and servicing agreement.

The Glaski court distinguished these prior decisions, reasoning that the plaintiffs in those cases filed lawsuits to investigate whether the foreclosing party had authority to foreclose. Glaski, on the other hand, had alleged specific facts demonstrating that there was no way the foreclosing party had authority before initiating the foreclosure process.

In its petition for rehearing, the successor trustee in Glaski argued that the appellate court made a significant incorrect assumption in its reasoning. The trust at issue was not governed by New York law, as the Fifth District assumed. Instead, the subject trust was subject to Delaware law, under which there is no provision "that would render an allegedly belated assignment to a trust void."[3]

The appellate court denied the petition for rehearing on Aug. 29, 2013. On Oct. 4, 2013, counsel for JP Morgan Chase sent a letter to the California Supreme Court, asking the Supreme Court to depublish Glaski. On Oct. 7, 2013, another request was sent by Deutsche Bank National Trust Company. A third letter was sent by the California Bankers Association three days later.

To date, Glaski has not been depublished and there has been no indication from the Supreme Court about which side of the issue the court will likely fall.[4] Still, plaintiffs' attorneys and borrower-friendly

websites are hailing Glaski to be the landmark victory upon which borrowers (and their counsel) will hang all their hopes. Others, including two California district courts, are taking more pragmatic approaches.

On Oct. 3, 2013, the United States District Court for the Southern District of California rejected one plaintiff's attempt to rely on Glaski in support of plaintiff's argument that the purported assignments of the loan did not comply with the rules of the relevant pooling and servicing agreement.[5]

The court in Diunugala v. JP Morgan Chase Bank NA found "the reasoning in [cases such as Gomes v. Countrywide] to be more persuasive than that in Glaski."[6] It concluded that the complaint "fail[ed] to adequately allege that plaintiff has standing to challenge the assignments."

The court also added the prophylactic reasoning that "even if Glaski were correctly decided, and the plaintiff [in Diunugala] alleged that the foreclosing defendant did not receive a valid assignment of the debt in any manner, the California appeals court has held that plaintiffs must 'allege ... facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process.'"[7]

Absent adequate allegations that the plaintiff suffered prejudice from the allegedly invalid assignments, the Southern District had no choice but to dismiss the claim.

In another case, Newman v. Bank of New York Mellon, the United States District Court for the Eastern District of California likewise refused to follow Glaski, opting instead to wait for other courts to take the first bite: "[N]o courts have yet followed Glaski and Glaski is in a clear minority on the issue. Until either the California Supreme Court, the Ninth Circuit or other appellate courts follow Glaski, this court will continue to follow the majority rule."[8]

Until that day, borrowers, lenders and everyone else involved in wrongful foreclosure litigation will sit around the table, sharpening their knives, waiting for dinner to be served.

--By Annette F. Mijanovic, Haight Brown & Bonesteel LLP

Annette Mijanovic is an attorney in the firm's Los Angeles office.

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[1] 218 Cal.App.4th 1079 (2013).

[2] See, e.g., Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal.App.4th 497 (2013); Gomes v. Countrywide Home Loans, Inc., 192 Cal.App.4th 1149 (2011).

[3] Letter from JPMorgan Case Bank, N.A., et al to the Supreme Court of California dated Oct. 4, 2013, Glaski v. Bank of America (Supreme Court No. S213814), case initiated Oct. 4, 2013.

[4] Glaski v. Bank of America (Supreme Court No. S213814), supra.

[5] Diunugala v. JP Morgan Chase Bank, N.A., Case No. 12-cv-02106-WQH-NLS, 2013 WL 5568737, *8-9

(S.D. Cal. Oct. 3, 2013).

[6] Id.

[7] Id. (citing Siliga v. Mortg. Elec. Reg. Sys., Inc. 161 Cal.Rptr.3d 500 ("The Siligas do not dispute that they are in default under the note. The assignment of the deed of trust and the note did not change the Siligas' obligations under the note, and there is no reason to believe that Accredited as the original lender would have refrained from foreclosure in these circumstances. Absent any prejudice, the Siligas have no standing to complaint about any alleged lack of authority or defective assignment.") (2013)).

[8] Case No. 1:12-cv-1629 AWI GSA, 2013 WL 5603316, *3, fn. 2 (E.D. Cal. Oct. 11, 2013).
