

Financial Institutions Law Blog

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Presented By **SheppardMullin**

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MORE TEETH FOR THE TENDER RULE

In the current flood of mortgage litigation, the so-called "tender rule"—that a borrower generally cannot set aside a foreclosure unless he or she tenders the full amount owed on the loan—poses a significant obstacle for many plaintiffs. The rationale behind this rule is that a borrower should not be able to avoid foreclosure when the borrower cannot pay his or her debt and any procedural errors could be cured. In *Ferguson v. Avelo Mortgage, LLC* (Cal.App. 2 Dist. Jun. 1, 2011) --- Cal.Rptr.3d ---, 2011 WL 2139143, the Court of Appeal again affirmed the tender rule and, by doing so, took an additional step favorable to lenders.

In *Ferguson*, the plaintiffs attempted to avoid the tender rule by arguing it did not apply. In particular, they challenged the authority of Avelo Mortgage, LLC to foreclose. Mortgage Electronic Registration Systems (MERS), the original beneficiary under the deed of trust, assigned its interest in the property to Avelo. The plaintiffs sued to quiet title and set aside the foreclosure. The trial court sustained Avelo's demurrer on the ground the plaintiffs failed to tender.

On appeal, the plaintiffs argued MERS did not have the authority to foreclose because MERS never held the original promissory note. The court disagreed. Relying on *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, it held that possession of the original note was unnecessary. It reasoned that because MERS unquestionably had the authority to assign its beneficial interest, Avelo thus had the right to foreclose under the deed of trust. The court then applied *Gomes* to the tender rule, holding that "it does not follow that a beneficiary may initiate non-judicial foreclosure proceedings under a deed of trust without the original promissory note, but cannot seek tender from a defaulting borrower attempting to set aside the foreclosure."

The court's decision, which is consistent with several recent federal court decisions, thus upholds a beneficiary's authority to foreclose and invoke the tender rule even when the beneficiary is not the holder of the original promissory note—a significant holding that cuts off the argument that plaintiffs have been making in courts throughout California to avoid the tender rule.

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