

Expect More Litigation in Massachusetts Evictions

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The Massachusetts Supreme Judicial Court recently issued an opinion in an eviction (a.k.a. Summary Process) matter that is likely to result in increased challenges by former mortgagors against parties that acquire properties by foreclosure. In *Bank of New York v. Bailey*, 460 Mass. 327 (2011), the Supreme Judicial Court clarified that in post-foreclosure actions for possession, the Housing Courts have the authority to hear claims and defenses of former mortgagors that the foreclosure is invalid. The Court also clarified what plaintiffs in post-foreclosure eviction actions must show in the complaint seeking possession.

While the *Bailey* decision details the historical context of evictions actions to illustrate that the Housing Courts have always had subject matter jurisdiction over defenses and claims concerning the underlying foreclosure, prior to *Bailey*, many Housing Courts routinely dismissed defenses and counterclaims of former mortgagors that were premised on the legality of a foreclosure sale for lack of subject matter jurisdiction. Typically, wrongful foreclosure claims brought in an eviction action by former mortgagors were stayed or consolidated with a corresponding Superior Court case filed by the former mortgagor challenging the foreclosure. As a result of the *Bailey* case, it is expected that Housing Courts will substantially change their practices and now entertain claims and defenses in eviction actions that relate to wrongful foreclosure.

In addition to clearing a path for former mortgagors to contest the underlying foreclosure sale in an eviction action, *Bailey* expounds upon the *prima facie* showing that a plaintiff acquiring property through foreclosure must

make in order to bring an eviction action. The Court reaffirms long-standing Massachusetts precedent that legal title by way of foreclosure must be demonstrated by strict adherence to the power of sale provided in the mortgage. See, e.g., *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775 (1966); *Lewis v. Jackson*, 165 Mass. 481 (1896). The Court in *Bailey* held that establishing such compliance is to be made by: (1) obtaining a deed to the property at issue; and (2) providing copies of the recorded foreclosure deed and affidavit of sale. Further, the Court made clear that the affidavit of sale not only must be recorded and provided as evidence by the plaintiff, but that the language of the affidavit must show compliance with statutory foreclosure requirements. The failure of the plaintiff to submit an affidavit of sale showing that the requirements of the power of sale and of the statute have in all respects been complied with can be fatal to plaintiff's action.

In today's foreclosure environment, it is likely that *Bailey* will prompt consumer attorneys representing former mortgagors in eviction actions to seize upon the opportunity to defend actions for possession in the Housing Courts on the basis of wrongful foreclosure thus making the prosecution of these actions more complicated, lengthy and expensive for creditors. For example, in clarifying the subject matter jurisdiction of the Housing Court over such defenses, those cases that would have been dismissed or stayed pending the identical Superior Court challenge can now continue. It is uncertain how the Massachusetts courts will handle issues of priority in the event duplicate challenges to foreclosure sales are brought in two different forums. Additionally, former mortgagors and consumer attorneys are well aware of national foreclosure issues such as so-called "robo-signing" and Massachusetts title issues under the *U.S. Bank Nat'l Assoc. v. Ibanez* case. It is likely that the defenses and claims to eviction actions based on the legitimacy of the underlying foreclosure will increase, even without supporting evidence, with the intention of attempting to develop invalid foreclosure claims through discovery. The Uniform Rules of Summary Process require the

production of all discovery within 10 days of service. While foreclosing entities have always had challenges complying with this impractical deadline, it remains to be seen how the courts will address discovery issues as former mortgagors and their attorneys file expansive discovery requests designed to identify challenges to the entire chain of title from the loan origination. The assertion of wrongful foreclosure defenses and broad discovery requests may also hinder plaintiffs' attempts for early resolution by way of Motions for Summary Judgment since former mortgagors will likely claim that discovery must be completed before it can be determined that there are no disputed issues of fact. In fact, in this author's experience this is already occurring. In a pre-*Bailey* hearing where the former mortgagor's motion to compel discovery from the bank/foreclosing entity was denied, a motion to reconsider this denial post-*Bailey* was granted and discovery was allowed back to the loan origination, including pooling and servicing agreements and assignments. While the original denial was based on the fact that the former mortgagor had no basis for the invalid title claim nor had he any evidence, the Court granting the motion to reconsider did so on the willingness of the Court under the *Bailey* decision to allow the former mortgagor to now look for the same.

These and other issues will have to be resolved by each Housing Court going forward.