Financial Institutions Law Blog
Up-to-date Information on Financial Institutions
Presented By SheppardMullin

THE CALIFORNIA COURT OF APPEAL AGAIN REJECTS A CLAIM FOR WRONGFUL FORECLOSURE AT THE PLEADING STAGE

September 1, 2011

The recent published decision of *Fontenot v. Wells Fargo Bank, N.A.* (Cal.App.1 Dist., August 11, 2011) --- Cal.Rptr.3d ----. 2011 WL 3506177, adds several more arrows to a secured lender's quiver of arguments challenging wrongful foreclosure claims at the pleading stage. First, the Court explains in detail how and why publicly recorded documents can be judicially noticed to defeat contradictory allegations. Second, the Court holds MERS properly has all the authority to act on behalf of a lender or beneficiary under the terms of the agency agreement between MERS and the lender. Third, plaintiffs must plead "actual prejudice" to set aside a foreclosure sale based on irregularities in the foreclosure process. Here, even if MERS lacked authority to assist with the foreclosure, the only prejudice would be to the lender or the beneficiary, not the borrower. Fourth, if a plaintiff pleads breach of contract, it cannot also plead promissory estoppel based on that contract. If the contract claim fails, the estoppel claim must also fail.

In *Fontenot*, the plaintiff alleges that she obtained a $1 million promissory note, secured by a deed of trust on real property. MERS was the nominee of the lender in the deed of trust. After the plaintiff defaulted, Wells Fargo (the servicer on the plaintiff's loan) foreclosed on the property and sold it. Wells Fargo and MERS filed demurrers, which the trial court sustained without leave to amend.

The Court of Appeal affirmed. To begin with, it explained in detail how publicly recorded documents may be judicially noticed in a wide variety of contexts. A court "may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language." Accordingly, despite the allegations, the publicly recorded documents showed beyond a doubt that MERS was the beneficiary of the Deed of Trust and the authorized assignee of the lender.

The Court also rejected the plaintiff's contention that MERS lacked the authority to assign the note because it had no interest in the note. It is not necessary for MERS to have a possessory interest in the note to have the power to assign the note. Instead, MERS's authority to assign the note is limited only by the terms of the agency agreement between MERS and the lender.

The Court held the complaint failed to show that the assignee did not receive a proper assignment of the debt. To proceed with this theory, the plaintiff must plead that the assignee did not receive a valid assignment of the debt *in any manner*. Unlike an assignment of the security interest underlying the debt, the lender could have assigned the promissory note to assignee in an unrecorded document.

Even if MERS lacked the authority to transfer the note, the plaintiff would have to plead some prejudice to proceed with her cause of action for wrongful foreclosure. ***"If MERS … lacked the authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note."***

The Court also held that Wells Fargo did not breach a forbearance agreement because the plaintiff did not comply with its terms. Further, if a plaintiff's allegations regarding promissory estoppel show that there was a contract between the parties, then the plaintiff is limited to suing on a breach of contract claim.

Fontenot v. Wells Fargo Bank, N.A. (Cal. App.1 Dist., August 11, 2011) --- Cal.Rptr.3d ----. 2011 WL 3506177

Authored by:

Alejandro E. Moreno
(619)-338-6664
amoreno@sheppardmullin.com

Shannon Z. Petersen
(619) 338-6656
spetersen@shepparmullin.com