

How the *Eaton* decision applies to future cases and why legal arguments need to be presented carefully.

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Massachusetts Lawyers Weekly contains a column titled *THIS WEEK'S DECISIONS* that presents a summary of recent court decisions. This author was recently reading the March 11, 2013, edition (a regular and usual activity) and came upon two apparently conflicting decisions that each applied a new rule handed down in the now well known *Eaton* decision. In *Eaton*, the Massachusetts Supreme Judicial Court ruled that a party foreclosing by way of a power of sale (through Mass. Gen. Laws c. 244 § 14) must hold both the mortgage and the note or be the note holder's authorized agent prior to the notice of sale/foreclosure in order to foreclose. *Eaton v. Federal Nat'l. Mort. Ass'n*, 462 Mass. 569 (June 22, 2012). In each case, the homeowner raised the *Eaton* rule and argued that the foreclosure was (or going to be) invalid. The real issue was whether the *Eaton* rule applied to their case. This is because contrary to how cases are usually to be applied, the legal rule established in the *Eaton* decision is to apply prospectively, that means only after the *Eaton* case was decided, which was on 22 June 2012.

In both cases, the notices of sale/foreclosure were made before the *Eaton* case was decided on 22 June 2012, and presumably, the foreclosing party did not hold the note and mortgage, so it would appear that the foreclosing party was violating the *Eaton* rule that said the foreclosing party needs to have both the note and mortgage. The first case, *HSBC Bank USA, N.A. v. Norris*, applied the *Eaton* rule and found in favor of the homeowner. *HSBC Bank USA, N.A. v. Norris*, Mass. App. Ct. No. 11-P-1916, decided Feb. 28, 2013 (unpublished). The bank argued that *Eaton* did not apply because it was to only apply prospectively, but the court rejected the bank's argument and applied the *Eaton* rule.

The second case, *Kitner v. Mortgage Lenders Network USA, Inc.*, decided in favor of the bank and found, in part, that the *Eaton* rule did not apply because *Eaton* was only to apply prospectively (after 22 June 2012). *Kitner v. Mortgage Lenders Network USA, Inc.*, Docket No. MICV 2001-02078, Mass. Sup. Ct., decided Feb. 8, 2013).

Keep in mind that these decisions seem to conflict as they were issued just about the same time (hence they appeared in the same issue of *Massachusetts Lawyers Weekly*). It would also seem that *Norris* was decided incorrectly and the *Kitner* case was decided correctly because in both cases the notices of sale/foreclosure occurred prior to when *Eaton* was decided, so the *Eaton* rule requiring the bank to hold the note would not apply to it.

However, like many legal issues it takes a closer look to see the differences and not leave the matter with a mistaken understanding. Only after this author probed further and accessed the entire *Norris* decision from a different source, and was not just operating with the summary that appeared in *Massachusetts Lawyers Weekly*, was the significant difference discovered. The timing was different. In the *Norris* case the homeowner was making the same argument in his appeal as the argument made in the appeal process in *Eaton*. For this reason, although *Eaton* was decided first and was to be applied prospectively, the Appeals Court ruled it would be unfair to treat *Norris* any differently than *Eaton* simply because *Norris*' case was issued by an appellate court later. And in *Eaton*, although it was applied prospectively, the new rule was applied to *Eaton* himself. With this in mind, the Appeals Court decided, it should apply to *Norris* himself as well. This is different than the *Kitner* case where the legal argument was being made after the *Eaton* decision was issued. The initial take away is that *Eaton* applies prospectively and unless your legal argument has already been made, for a foreclosure that occurred prior to 22 June 2012 the foreclosing party did not need to have the note in addition to the mortgage.

The rationale expressed in the *Norris* decision may seem somewhat esoteric. But it is not just these cases and the *Eaton* rule and how it applies that this post is about. The last and more important point is about what is necessary to avoid a legal misunderstanding. A misunderstanding is likely to occur when someone is not able to see the differences between factual situations and legal decisions or between factual situations a person is experiencing and the factual situations that were at hand in certain legal decisions. Not seeing the differences occurs for various reasons, including failure to put the time and energy into studying the issue (like what would of happened to this author today if further investigation was not undertaken) and unfamiliarity with the legal system. What happens frequently is a person observes a legal result and assumes that the same result will occur for them and fails to recognize or appreciate the aforementioned differences.

In the event that you are facing a legal matter and seek help in discerning such differences or want to know how a certain rule or law will apply in your case, feel free to give us a call.

Contact: George E. Bourguignon, Jr., Attorney at Law

Phone: (508) 769-1359 or (413) 746-8008

Email: gbourguignon@bourguignonlaw.com

Website: <http://www.bourguignonlaw.com>