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Foreclosure Foiled in Court

By Jeff Haynes

QUESTIONS OF OWNERSHIP HAVE AGAIN HALTED a foreclosure proceeding – this time in Connecticut.

The Connecticut Superior Court last week dismissed a foreclosure action brought by Vienna, Va.-based Mortgage Electronic Registration Systems on a Madison property. MERS registers mortgage loans electronically, and is used by lenders as well as secondary market entities such as Fannie Mae, Freddie Mac and Wall Street investment banks. In dismissing the foreclosure, the court determined that MERS could not prove that it had ownership of the mortgage when the company initiated the foreclosure.

“We were very happy, and somewhat surprised,” said Michael Miller, who owns the Madison single-family property with his wife, Anna Miller. “Even though you go into these battles expecting to win, of course, in some battles [a win] seems more unlikely than others.”

The Millers’ attorney was a little more confident.

“I thought that if the court followed what the law actually said, then we would win,” said Christopher Brown, a partner in the Westport-based law firm Begos, Horgan and Brown. “But it does, in some respects, open a can of worms.”

“The secondary market [investors], they all have servicers, and most of them use the MERS system,” Brown said. “Any mortgage that’s in that secondary market is going to be subject at least to an inquiry – or should be subject to an inquiry – whether the person who commenced the [foreclosure] actually had the right to do so.”

The Millers purchased their home in November 2003, and the foreclosure process

began in November in 2004, Brown said. Normally the foreclosure do not take that long, he added.

“We had some good defenses, and it was in the pursuit of those defenses that we ended up getting some good documents and things that led me to the conclusion that MERS doesn’t really know who should be foreclosing on this thing,” Brown said.

While MERS has said it will seek to foreclose on the property again, Brown said the owners of the mortgage may have reason to reconsider.

“Having been dismissed once, three years after they started the action, it may put the person who actually owns it – the secondary market player who owns the loan – it may give them some incentive to say, ‘I just want to be done with this thing. Let’s make a deal,’” Brown said.

This could provide the Millers with the chance for new loan, or to refinance at a lower amount, he said.

Mixed Rulings

The Connecticut Superior Court’s decision echoes a similar ruling by a U.S. district judge in Cleveland late last year. In that case, Deutsche Bank National Trust Co. was denied the right, at least temporarily, to proceed with foreclosures on 14 Ohio properties because the bank could not prove ownership of the mortgages.

Many mortgage loans are sold repeatedly, meaning the institution attempting to foreclose is typically not the institution that made the loan in the first place, Brown said. Because the ownership of the note may change many times very quickly, the servicers may lose track of the actual owner at any point, he said, adding that only the actual owner of the loan is supposed to be able to foreclose on the loan.

In their respective cases, neither MERS nor Deutsche Bank successfully proved in court that they had ownership at the time foreclosure was initiated.

In Florida, however, another case involving MERS had a different outcome.

Florida’s Third Circuit Court of Appeals in Miami ruled that MERS does have the right to initiate a foreclosure, even without being the owner of the mortgage. The company’s own literature describes its electronic loan registry service as “an industry utility that serves as the central location to identify the current controller (holder) and location (custodian) of the Authoritative Copy of an eNote,” which is an electronic promissory note. That function, in the Florida court’s opinion, gave MERS sufficient standing to proceed with a foreclosure.

In Connecticut, the pace of properties headed to foreclosure does not appear to be slowing down.

With statistics still being compiled for March, data from The Warren Group, The Commercial Record’s parent company, shows the statewide first quarter *lis pendens* filings have already hit 4,434. That is up from last year’s first quarter mark of 4,336. Last year’s total number of *lis pendens* filings hit a record high of 18,377, which was up 28 percent from 2006, and up 59 percent from the 2005 total. *Lis pendens*, or legal documents giving notice that an action is pending in the courts affecting the title of real property, most often indicate a foreclosure proceeding has been initiated.

With one court victory in hand, the Millers are hoping to keep their hold on their house.

“We certainly want to stay in the house,” Miller said. “We don’t have a specific plan formulated yet. But we’re obviously trying to formulate one as quickly as we can.” ■