NO NEED TO SUBSTITUTE PLAINTIFF UPON MORTGAGE ASSIGNMENT

By: Bruce J. Bergman*

Because a sale of the note and mortgage – the assignment – during the course of a foreclosure action is so common, the question arises with frequency. Is there a mandate to submit an order or notice a motion to change the caption of the action to reflect the name of the new mortgage holder as the plaintiff?

The answer is no, as a matter of statute (CPLR §1018) and decisional law.[1] Nonetheless, recent case law has revealed a practical, if not a legal, problem on this point. In one action, the trial court ruled correctly, but the foreclosing party suffered the time and expense of an appeal initiated by the chagrined borrower.[2] In two other instances, the trial court stumbled and the bemused lender was constrained to appeal to right the wrong.[3] The lower court decisions even erroneously raised the bugaboo of standing to further complicate what in the end was neither a complex nor a recondite legal principle.

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THE RECENT CASES

In the action where the trial court was on the mark[4], the borrower delivered a mortgage in 1988 to A, immediately assigned to B. In 1994, B assigned to C. In early 2008, C assigned to Citibank which, upon encountering a default, began a foreclosure in July, 2008.

On July 1, 2009 the judgment of foreclosure and sale was signed. Thereafter, and as is not uncommon, in May, 2010, Citibank assigned the mortgage to PennyMac. A sale was scheduled for July, 2010, intercepted by the borrower's order to show cause alleging lack of standing and, most relevant to this review, the charge that the foreclosure could not proceed because PennyMac (plaintiff Citibank's assignee) had not been formally substituted as plaintiff.

Not so ruled the court (based upon established case law and the mentioned CPLR §1018) – although the ultimate real life mischief was that while the foreclosing plaintiff won on this point in the trial court, the borrower appealed. The mortgage holder won there too, but victory came fifteen months after the originally scheduled sale date, together with the

accrual of interest during that hiatus and all the legal expense. Of course here, all the courts were markedly astute.

Such perspicacity at the trial court level was not duplicated, however, in a later case, *Wells Fargo Bank, N.A. v. Hudson,*[5] where an assault on standing torpedoed the assignee. In fact, the foreclosure was dismissed for supposed lack of standing.

There, the note and mortgage were executed and delivered to Wells Fargo Bank. That mortgage holder began a foreclosure in October 2006 and the action proceeded to appointment of a referee to compute as of June, 2007. In November, 2009, more than two years later, the plaintiff (Wells Fargo) assigned the mortgage to EMC which then assigned to yet another entity.

By August, 2010 when the referee's report of amount due was filed, the plaintiff (the action remained encaptioned with Wells Faro as the plaintiff although a new entity held the note and mortgage) moved for judgment of foreclosure and sale. But upon oral argument, the defaulting borrower appeared *pro se*, advised that court that the note and mortgage had been assigned, and called for dismissal of the foreclosure action upon

the ground that the plaintiff had no standing. The trial court agreed and the foreclosure was dismissed.

But of course, such a ruling is clearly violative of the status of the law – and the Second Department so ruled. The latter stated that the plaintiff had standing to begin the action in 2006 as the holder of the note and mortgage and it did not lose that right to continue the action by later assigning the note and mortgage. To be sure, if any party or the court requests that the caption be changed to reflect the new owner of the mortgage, the substitution may issue, but that was not the case here. Accordingly, it was an error to dismiss the complaint.

The mortgage holder won in the end, but at the significant cost of having to pursue an appeal to obtain that to which it was always entitled.

And it happened yet again – in *IndyMac Bank, F.S.B. v. Thompson*.[6] The facts were the usual. The plaintiff bank began a mortgage foreclosure action and then during the course of that action assigned its mortgage. Because of that assignment, though, the trial court, *on its own*, directed dismissal of the complaint – that is, dismissal of the foreclosure action -- founded upon the assignment of the note and mortgage to another entity during the pendency of the action.

But, the rule, repeatedly enunciated by the courts, is that substitution of a party is not required unless the court may direct it,[7] which it didn't do here. Fittingly, the trial court's miscue was reversed on appeal so that the mortgage holder's foreclosure action was reinstated. If anything, the whole episode is more disconcerting because the lower court dismissed the action on its own; it was not led to such a conclusion by bewildering legal citation.

PRACTICALITIES AND CONCERNS

Just to put all this in further perspective, when the mortgage is assigned during a foreclosure, it is reasonable and appropriate to amend the caption -- to substitute a new plaintiff -- at whatever the next stage of the case may be. That avoids a special motion, which incurs fees and can cause delay. Of course, if this occurs after the judgment has issued, there is no next stage and so no substitution is made. (The new foreclosing party advises the referee that it is the mortgage holder bidding at the sale in the stead of the named plaintiff.)

The law on this point comes from the CPLR, as mentioned, section 1018, and has often been affirmed by courts. One would think it would be well understood and widely known. Case law, however, advises to the

contrary. The result of such confusion is that a mortgage holder can incur serious delay -- or worse, dismissal of its action, then eliciting the time and cost of an appeal to have the action rescued or reinstated. It should not happen, but such are among unusual vicissitudes of prosecuting a mortgage foreclosure action in the Empire State.

1. For a more expansive review of the subject, see discussion and case law citation at 2 *Bergman on New York Mortgage Foreclosures* §23.46, LexisNexis Matthew Bender (rev. 2013).
2. *Citimortgage, Inc. v. Rosenthal,* 88 A.D.3d 759, N.Y.S.2d (2d Dept. 2011).
3. *Wells Fargo Bank v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (2d Dept. 2012); *IndyMac Bank v. Thompson*, A.D.3d N.Y.S.2d (2d Dept. 2012).
4. *Citimortgage, Inc. v. Rosenthal, supra.* at note 2.
5. *Supra* at note 3.
6. *Supra* at note 3.
7. CPLR 1018; *CitiMortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 931 N.Y.S.2d 638; *Nations Credit Home Equity Servs. v. Anderson,* 16 A.D.3d 563, 792 N.Y.S.2d 510*; Lincoln Sav. Bank, FSB v. Wynn,* 7

A.D.3d 760, 776 N.Y.S.2d 908; *Central Fed. Sav. v. 405 W. 45th St.,* 242 A.D.2d 512, 662 N.Y.S.2d 489.