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LEGAL TRENDS

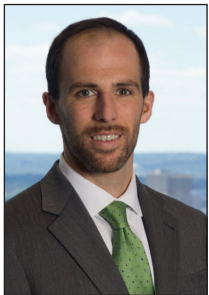
Caution And Care No Longer Enough

Attorneys Warn Lenders: Foreclose With Extreme Caution

BY JIM MORRISON

BANKER & TRADESMAN STAFF

After a handful of relatively recent court decisions that voided and reversed foreclosures, attorneys are advising lenders to be more careful – even go above the letter of the law – as the pace of foreclosure filings on homes in Massachusetts continues to ramp up.



Benjamin Wish

Benjamin Wish is a complex commercial litigator at Todd and Weld LLP. He said even if a lender does all that is required by state law, a court could still invalidate a foreclosure sale under a lesser-known legal

duty called the “duty of good faith and reasonable diligence.”

“The duties of good faith and reasonable diligence are broad,” Wish said. “Courts have said that especially when a lender is selling a foreclosure to itself, it has a duty to the borrower to obtain as high a price as possible,” Wish said.

Wish said the Supreme Judicial Court gave an updated description of the duty of good faith and reasonable diligence in

Williams v. GG FOY.

The decision reads, in part, “The mortgagee must act in good faith and must use reasonable diligence to protect the interests of the mortgagor. The mortgagee’s duty is more exacting when it becomes the buyer of the property. When a party who is entrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal. Consistent with these requirements, the mortgagee has a duty to obtain for the property as large a price as possible.”

Wish also cited a 2003 case, *Snowden v. Chase Manhattan Mortgage Corp.*, where a Superior Court judge invalidated a foreclosure sale and awarded triple damages to the borrower because the lender refused to postpone the sale of the property when the borrowers received a written offer that would have satisfied the debt the couple owed the lender.

Wish stressed that while these cases and a few others don’t yet constitute a trend, lenders should pay attention and go out of their way to show they’re following all the rules and trying to get the highest possible price when selling foreclosed properties.

“Before these cases, it was very difficult to invalidate a foreclosure,” Wish said. “Now, while it’s still an uphill battle, mortgagors have a couple more tools in their toolbox to invalidate a foreclosure and even seek damages.”

Wish said lenders should take note that courts are indicating they are “taking baby

steps toward a willingness to invalidate foreclosure sales.”

“Without clear guidance from appellate level courts, trial courts are left to decide as best they can,” Wish said. “The risk is that there is not a hard and fast rule; it’s a fuzzy principle indicating that courts are willing to invalidate foreclosures. At some point one of these types of cases will make its way up to the appellate level and that will provide clearer guidance.”

Invisible Defects

Richard Serkey, of Winokur, Serkey & Rosenberg PC and co-chair of the title standards committee of the Real Estate Bar Association for Massachusetts, said foreclosure invalidations are definitely more common now than they used to be.

Serkey cited the 2011 Mass. Supreme Judicial Court decision in *U.S. Bank v. Ibanez*, in which the court ruled that a foreclosure could be voided if the foreclosing lender was not the mortgagee of record when the foreclosure process begins.

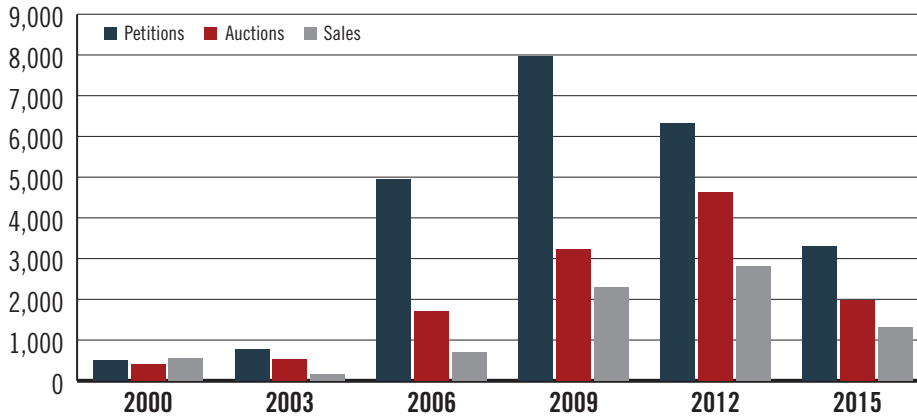
“This was an earthquake in the real estate world,” Serkey said. “This decision had retroactive effect.”

Serkey said that voiding foreclosures because of defects that are “invisible” to buyers even after a careful review of the registry record could make potential buyers of foreclosed homes reluctant to buy them, since there’s no way for the buyer to know if the bank followed the law.

“If the market for foreclosed properties becomes constricted, that’s a problem for lenders,” Serkey said. “It will depress the



Foreclosures Through The Years



values of those properties.”

Worse, Serkey said because the decision also applied retroactively, anyone who owns a previously foreclosed-upon property could one day find out – through no fault of their own – that some small portion of the foreclosure process was mishandled and ownership could revert back to the previous owner.

“The concern is there are a lot of innocent victims who did nothing to cause their plight,” Serkey said.

Serkey said he is hopeful that SB 1937, a bill currently before the state legislature,

will pass and give some relief to owners of properties with what he called “*Ibanez*-tainted titles.” The bill essentially seeks to automatically clear the title to all foreclosed-upon properties three years after foreclosure.

Wish said lenders in Massachusetts should take note that the courts have been showing more sympathy to distressed homebuyers lately.

“At a minimum, some courts have indicated that if the bank doesn’t do everything it can to sell a foreclosed property for as large a price as possible, the court

may void the sale and award damages,” Wish said.

Bankers Weigh In

Many lenders either declined comment or did not respond to requests for comment on this story.

David Lazowski is the branch manager of several Fairway Independent Mortgage offices in New England. He said these court decisions underscore the need for lenders to be compliant.

“The way we originate loans now is with an eye toward compliance,” he said. “It doesn’t take away from the fact that we’re trying to help as many people get into homes as we can. It’s about the borrowers first, but it’s also about compliance. A good loan isn’t just one that the borrower is comfortable with the monthly payment; it also has to be compliant in every way.”

Lazowski said going forward, lenders in Massachusetts will have to be even more careful about following the law and their own rules when foreclosing on properties.

“It’s a very good reminder that things need to be done the right way, and it’s ultimately about serving the consumer and borrower in any way we can,” he said. ■

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