

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC SUPERIOR COURT

JOHN MEDEIROS

VS

PC 09-5191

COLUMBUS CREDIT UNION

HEARD BEFORE THE HONORABLE JEFFREY A. LANPHEAR

ON SEPTEMBER 11, 2009

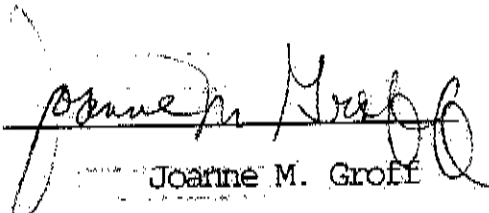
APPEARANCES

GEORGE BABCOCK, ESQ.....FOR THE PLAINTIFF

FRED J. VOLPE, ESQ.....FOR DEFENDANT

CERTIFICATION

I, Joanné M. Groff, hereby certify that the foregoing pages, 1 through 20 are a true and accurate transcript of my stenographic notes according to the best of my stenographic ability.



Joanne M. Groff

Court Reporter

SEPTEMBER 11, 2009

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THE COURT: We'll go to Medeiros vs Columbus Credit Union.

MR. BABCOCK: Good morning Judge. George Babcock for John Medeiros.

MR. VOLPE: Richard Volpe for the defendant.

MR. BABCOCK: Your Honor this is a request for a Temporary Restraining Order. A Temporary Restraining Order was granted nine days ago on this matter. If I may, just a quick factual recount.

THE COURT: Well, before we get the facts is there an agreement as to the facts? Are the facts contained in the Verified Complaint contested?

MR. BABCOCK: All I planned on arguing are the title issues, the issues pertaining to the predatory lending and I don't plan on arguing if my Brother agrees to the facts.

MR. VOLPE: I don't plan on addressing those either Judge.

THE COURT: Just address the facts you're going to argue.

MR. BABCOCK: As you know, we've discussed this matter in chambers. What we can agree to is as follows: That Mr. Medeiros entered into a mortgage agreement with Columbus Credit Union and that was done on June 28th of

1 2005 so the mortgagee - original mortgagee - is Columbus
2 Credit Union. Judge, at some point thereafter there was
3 an assignment from Columbus Credit Union. As a matter
4 of fact, Judge, I believe it was done on the same day
5 from Columbus Credit Union to IndyMac SFB. The issue is
6 that I have raised relates to a third assignment and to
7 the notice of foreclosure that was provided to my
8 client. Given the facts agreed to, Columbus National
9 Bank is the mortgagee.

10 On July 14th Attorneys Bendett & McHugh notified my
11 client that he was being foreclosed upon for breach of
12 mortgage.

13 THE COURT: Is it an issue of fact who holds the
14 assignment now? I think that second assignment isn't in
15 the record. I know you referred to it in conference but
16 I think it was just produced for the first time.

17 MR. BABCOCK: It was. Would you like me to produce
18 a copy?

19 THE COURT: It would make sense.

20 MR. BABCOCK: Plaintiff's 1, if I may, Judge.

21 THE COURT: Sure.

22 MR. BABCOCK: If I may, your Honor?

23 THE COURT: Yes.

24 MR. BABCOCK: Bendett & McHugh on July 14th sent a
25 notice to John C. Medeiros that conditions of the

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mortgage were being broken and that a foreclosure would be held at a date sometime in the future, and I'm not disputing any part of the advertising. I am disputing that the notice from Bendett & McHugh on July 14th was accurate.

If I may, your Honor? The first paragraph reads that: "Please be advised this office represents One West Bank SFB." Now that may be true, your Honor. Bendett & McHugh certainly may have represented OneWest Bank SFB but on the 14th of July when that notice was sent, the assignment that this foreclosure is based upon had not yet been recorded. I just provided your Honor with a copy of that assignment which clearly indicates it was filed on July 16th. I'd ask your Honor to take judicial notice of 34-11-1. The reason I ask you that, your Honor, I had not raised that in conference is because my Brother brought up the fact that the assignment as between IndyMac and OneWest had taken place in June and I don't dispute that. However, 34-11-1 is very clear, your Honor. If I may? 34-11-1 conveyances are required to be in writing and recorded, every conveyance of land. I would argue that the assignment is a conveyance of land as contemplated by 34-11 et seq. "Every conveyance of lands, tenements or hereditament absolutely, by way of mortgage, or on

1 condition, use or trust, for any terms longer than one
2 year, and all declarations of trusts concerning the
3 conveyance, shall be void unless made in writing duly
4 signed, acknowledged as hereinafter provided, delivered
5 and recorded in the records of land evidence." When
6 this foreclosure began that assignment had not been
7 recorded.

8 What's important is Mr. Volpe's position is that it
9 doesn't matter because it had already been delivered.
10 If I may continue, your Honor? It has to be "recorded
11 in the records of land evidence of the town or city
12 where the lands, tenements or hereditaments are
13 situated; provided, however, the conveyance, if
14 delivered, as between the parties and their heirs, and
15 as against those taking by gift or devise, or those
16 having notice thereof, shall be valid and binding though
17 not acknowledged or recorded." Although it's not
18 recorded, my client, Mr. Medeiros, is not a party to any
19 assignment between IndyMac and OneWest, therefore, the
20 fact that this assignment took place two days after the
21 notice indicates that notice is completely
22 inappropriate. I would argue that it's void as a matter
23 of law pursuant to 34-11-1 because it was recorded two
24 days after the notice, after the mailing by certified
25 mail pursuant to 34-11-22. To continue your Honor?

1 MR. VOLPE: Go ahead. I thought you were done.

2 THE COURT: We thought you were done.

3 MR. BABCOCK: I'm sorry.

4 THE COURT: Go ahead.

5 MR. BABCOCK: Judge, further, the assignment that
6 Bendett & McHugh moves forward on in an effort to
7 foreclose, which I have just submitted as an exhibit,
8 reads as follows: "Know all men by these presence that
9 IndyMac Bank, SFB, with a mailing address of 155 North
10 Lake Avenue, Pasadena, California 91101, does hereby
11 grant, bargain, sell, assign and transfer over to
12 OneWest Bank, SFB with a mailing address of 7700 W.
13 Parmer Lane, Building D, Austin Texas 78729, and its
14 successors and assigns all interest under that certain
15 mortgage to IndyMac Bank from John Medeiros."

16 We have an agreement, your Honor, that my client,
17 John Medeiros, never gave a mortgage to IndyMac Bank.
18 He gave a mortgage to Columbus Credit Union, therefore,
19 the assignment on its face is incorrect. It was
20 conferenced, your Honor, and in that conference Mr.
21 Volpe argued that that was scrivener's error. In
22 response to that, your Honor, I went upstairs and I
23 pulled 34-11-12, which I'd ask your Honor to take
24 judicial notice of statutory forms set out. The bottom
25 of the most recent General Laws, the statutory form of

1 assignment of mortgage is set forth. I would argue that
2 given the fact that the legislature has seen fit to
3 provide us with a statutory form, if you plan on
4 assigning a mortgage in the State of Rhode Island that
5 should be used as a guide and if you -- if you provide
6 less than that, that the assignment is invalid. I'd
7 like to read it.

8 THE COURT: Does the statute say that?

9 MR. BABCOCK: What the statute says, your Honor,
10 pardon me?

11 THE COURT: Does it mandate that form?

12 MR. BABCOCK: No. "The statutory forms refer to
13 34-11-11 the forms set forth in 34-11-12 may be used and
14 shall be sufficient for the respective purpose. They
15 shall be known as statutory forms and may be referred to
16 as such. They may be altered as a circumstance require
17 and authorizations of such form by this Chapter does not
18 preclude the use of other forms," and I agree with that.
19 What I would like to point out, however, is in the
20 statutory forms, your Honor, is that it states that the
21 assignment shall read something like this and I would
22 like to read the statutory form. "The holder of a
23 mortgage by blank, John Medeiros, to blank." The blank
24 has to be Columbus Credit Union because the mortgage was
25 to Columbus Credit Union. Your Honor the mortgage was

1 not to IndyMac Bank. It goes on, "dated blank, recorded
2 in the records of deed in" and then it says, "book
3 number at page number." So it doesn't let you pick,
4 your Honor. You have to identify the property. The
5 mortgage being transferred has to be, I think, in line
6 with legislative purposes, identified with
7 particularity. To misidentify the mortgage being
8 assigned, in my opinion, is a fatal error and runs afoul
9 of the General Laws 34-11-1 et seq. and it should be
10 rendered void as a matter of law.

11 We don't just have IndyMac identified as the
12 mortgagor, One IndyMac is identified as, pardon me, as
13 the mortgagee, One IndyMac is identified as the
14 mortgagee in the letter as the mortgagee. It is not.
15 And then, again, it is identified as the mortgagee in
16 the assignment, which it is not. That's not mere
17 scrivener's error; that's a fatal error, your Honor.
18 Those documents should be declared by this Court to be
19 invalid. The assignment does not transfer anything to
20 One West. So, if you couple the reading of the statute
21 together with the fact that the notice was incorrect and
22 coupled finally, with the fact that relative to 34-11-22
23 the statutory power of sale is very, very specific in
24 order to avail yourself to the statutory power of sale
25 in this state you have to follow the letter of the law,

1 and in this case that has not been done. IndyMac Bank
2 has been identified as the mortgagee and IndyMac Bank is
3 not the mortgagee. Thank you.

4 THE COURT: You have you have a concern about the
5 Note. Are you saying that Indy -- that this bank does
6 not have the power to foreclose?

7 MR. BABCOCK: One West, your Honor?

8 THE COURT: Yes.

9 MR. BABCOCK: I'm saying that at this point One West
10 does not have a valid assignment and without that valid
11 assignment, it has not the power to foreclose.

12 THE COURT: Well, wouldn't that question, whether or
13 not the title was proper, isn't that a title question
14 rather than a Court question?

15 MR. BABCOCK: No, I believe it's a question of law
16 whether or not that assignment, which identifies IndyMac
17 as the mortgagee is valid. If it is not valid no
18 foreclosure can go forward and for that --

19 THE COURT: Well, if they record a note, a new
20 assignment prior to foreclosure sale they can go
21 forward.

22 MR. BABCOCK: That is correct, your Honor, but they
23 have to start over and that would give me ample
24 opportunity to conduct discovery relative to the
25 predatory lending issues that I have raised in my

1 Complaint, which will require discovery/ Mr. Medeiros
2 alleges in his Complaint that he was subject to
3 predatory lending practices and I'm not prepared to go
4 forward with a factual argument on that at this point
5 because I don't have discovery and Mr. Medeiros, in my
6 question this morning, was unclear and I'm not going to
7 put him on the stand and have him take the chance of
8 perjuring himself. So, it comes down to a legal
9 argument. That statute is very clear, 34-11-1 et seq.
10 are very clear. You have -- you have to follow the
11 specific conveyances and --

12 THE COURT I know and whether it's -- whether the
13 conveyance is proper is a title question. The question
14 here is whether the bank can go forward and foreclose.

15 MR. BABCOCK: Given the factual and legal issues
16 that I raised, because if you determine that the
17 assignment, which has been submitted as the only exhibit
18 which identifies Indy Mac as the mortgagee, when clearly
19 --

20 THE COURT: I just asked you about that. That can
21 be corrected before the foreclosure?

22 MR. BABCOCK: It cannot be, Judge. They would have
23 to start the foreclosure over.

24 THE COURT: Why?

25 MR. BABCOCK: Because One West --

1 THE COURT: It's not a foreclosure that's the
2 problem. The foreclosure is for sale; correct? Start
3 the foreclosure?

4 MR. BABCOCK: They would have to renotice, your
5 Honor.

6 THE COURT: All right. Now attached to your
7 Complaint with a foreclosure notice and the foreclosure
8 notice doesn't contain this letter. It only contains
9 the ad. The ad makes no reference to One West, Indy
10 Bank. It just refers to the original mortgage book and
11 page and that's the standard foreclosure ad that I see
12 in the Providence Journal. Is there some mystery as to
13 which mortgage Mr. Medeiros gave, which one is being
14 foreclosed here?

15 MR. BABCOCK: Perhaps if Bendett & McHugh had not
16 sent a letter saying that it was a mortgage to IndyMac
17 then I would accept your Honor's argument, but given
18 that they did send the letter by certified mail to my
19 client who is a construction worker, not a lawyer, not
20 an MBA, not a philosopher or teacher or student at any
21 college or institution of higher learning.

22 THE COURT: And not paying his mortgage.

23 MR. BABCOCK: The law is the law. He still has due
24 process rights. He's been --

25 THE COURT: Due process rights?

1 MR. BABCOCK: Yes, your Honor.

2 THE COURT: We're talking about statutory notice,
3 right? He was sent a letter. That doesn't affect
4 anything under the United States constitution of due
5 process rights; correct?

6 MR. BABCOCK: It was misleading.

7 THE COURT: That was a statutory right.

8 MR. BABCOCK: It was misleading and the assignment
9 is wrong. The assignment is not good. It's wrong.
10 It's wrong. It contains erroneous information, your
11 Honor, that does not square with the mortgage. You can
12 not read the mortgage or read the document.

13 THE COURT: Well, he has knowledge that it can be
14 corrected, that a new assignment could be recorded
15 correcting the error prior to the day of the
16 foreclosure.

17 MR. BABCOCK: Absolutely cannot. I object to that.
18 It cannot be because One West is not on the paper or as
19 far as I know the Note at the date that the foreclosure
20 was mentioned. They didn't -- the assignment is very
21 clear, if you read the assignment given its common
22 meaning pursuant to the statutory rules.

23 THE COURT: Well, the sale is correct, not the event
24 leading up to the sale providing notice of the sale.

25 MR. BABCOCK: That is correct.

1 THE COURT: He does have notice that a sale is going
2 to be held; correct?

3 MR. BABCOCK: Incorrect information, but yes.

4 THE COURT: Well, he has the mortgagee sale, the
5 advertisement?

6 MR. BABCOCK: He also has a letter that's wrong,
7 your Honor, that's misleading to my client. It's
8 misleading. Fairness would dictate that these attorneys
9 that prepared the assignments, that prepared the
10 notices, that prepared the advertisements, would do it
11 right, your Honor. That's what's contemplated by the
12 statute. If not, we can just throw the statute out, let
13 them just do it whatever way they want. That's not the
14 way the statute should be read. It should be read,
15 specifically - particularly this is IndyMac Bank - I ask
16 the Court to take judicial notice there's thousands of
17 articles about IndyMac, thousands, if not millions of
18 people they are put out of their homes with their
19 terrible lending practices and sloppy work.

20 THE COURT: Counsel, counsel, you got to reference
21 it. Do you want me to take judicial notice? Did you
22 make copies of all of that?

23 MR. BABCOCK: I can't copy the Internet.

24 THE COURT: Neither can I take judicial notice.

25 MR. BABCOCK: I respectfully disagree with that.

1 THE COURT: You asked me to take judicial notice of
2 two statutes I don't have in front of me which you
3 didn't give me copies --

4 MR. BABCOCK: I have copies for your Honor.

5 THE COURT: -- Mr. Babcock which you didn't give me
6 copies of. I'm trying to keep up with you and now
7 you're asking me to take judicial notice of the
8 Internet.

9 MR. BABCOCK: Yes, your Honor, I am.

10 THE COURT: I know you're better than that. The
11 Court refuses to take judicial notice of everything that
12 has been stated against IndyMac on the Internet.

13 MR. BABCOCK: I'm obviously going to a reply to the
14 Court.

15 THE COURT: I'm having a hard time reading your
16 notice. You said in your Verified Complaint the problem
17 with the foreclosure ad was, "Please be advised that
18 this office represents OneWest Bank, holder of the
19 mortgage."

20 MR. BABCOCK: That is correct.

21 THE COURT: Isn't that fair warning to him?

22 MR. BABCOCK: No. He doesn't know who One West Bank
23 is and he doesn't --

24 THE COURT: They're telling him they're the holder
25 of the mortgage.

1 MR. BABCOCK: He never received a bill, a notice,
2 anything. He doesn't know who One West is and if he
3 reads it, it says the mortgagee does know who his
4 mortgagor was; it's Columbus Credit Union. He knows
5 it's not IndyMac Bank.

6 THE COURT: Counsel.

7 MR. VOLPE: Yes, your Honor. I believe in chambers
8 Mr. Babcock stated that Mr. Medeiros was paying bills to
9 IndyMac. He knew who IndyMac was. There are a couple
10 of issues.

11 THE COURT: Well, I have a question about that. I
12 don't know who he was paying and I have been told
13 different things. Now Mr. Babcock just said Columbus.

14 MR. BABCOCK: Right

15 THE COURT: You said Indy Bank. The real question
16 is whether or not he knew of One West; correct?

17 MR. VOLPE: Correct, correct, your Honor. There are
18 a couple of issues here that I think that Mr. Babcock
19 raised one was to the validity of the assignment and
20 whether or not the recording, when it was recorded, if
21 that's operative. I don't believe the Rhode Island
22 Foreclosure Statute, which Mr. Babcock I don't think
23 made reference to in his argument, specifically mentions
24 the fact that the assignment has to be recorded prior to
25 the notices being sent out. The assignment was dated in

1 June almost a month prior to the notice going out, so
2 the mortgage was assigned prior to us commencing the
3 action. The recording of the statute, the recording of
4 the assignment simply puts them on notice of that
5 transfer. The assignment of -- the assignment itself,
6 even though it does incorrectly state the original
7 mortgagee, which I certainly admit, does have more than
8 enough sufficient information on it to correctly
9 identify the mortgage that's being foreclosed. The
10 mortgagor is correct. The date of the mortgage is
11 correct. The book and page of the mortgage is correct
12 and it is executed by the last assignee of record. So,
13 by any standard anybody can go into the title records
14 and certainly identify, correctly identify, who holds
15 this mortgage and what mortgage is being foreclosed.

16 So, and now as to the notice sent to Mr. Medeiros,
17 attached to our cover letter, which is not required as
18 part of the foreclosure statute, is a notice of sale
19 which your Honor pointed out earlier is correct and does
20 have all the correct recording information attached, so
21 I would certainly submit that to the Court that our
22 notices of sale were correct, were accurate. We
23 followed the statute. The only issue that may come up,
24 I think with the assignment, is one of indexing because
25 of the -- of IndyMac. That can be corrected as I said

1 in chambers either by a scrivener's affidavit or a
2 corrected assignment of mortgage. If a corrected
3 assignment of mortgage is recorded, it relates back to
4 the original date of the assignment, of the original
5 assignment. I don't think there would be any issue as
6 to when that assignment was recorded.

7 THE COURT: Once you solve all your problems of
8 title and of law, if you just start over.

9 MR. VOLPE: Perhaps, your Honor, but our position is
10 that there's a foreclosure. We're bound by the statute
11 and that's something we need to address later. That's
12 something we need to address later.

13 THE COURT: Okay. I interrupted you.

14 MR. VOLPE: I'm all set. Thank you.

15 MR. BABCOCK: Judge, may I reply?

16 THE COURT: Yes.

17 MR. BABCOCK: 34-11-1, which I pointed out,
18 indicates that assignment has to be in writing as
19 between the parties. The relation back or reference to
20 June 25th and whatever date IndyMac, OneWest did their
21 thing, is irrelevant as to my client because as to my
22 client he's not a party to that transaction. If I may,
23 your Honor, and I apologize, may I submit for your
24 review Chapter 11-34-1?

25 MR. VOLPE: And if I may respond to that? Of course

1 Mr. Medeiros wouldn't be a party to that assignment.
2 The parties are the assignor and the assignee. Mr.
3 Medeiros or any mortgagor is not required to re-execute
4 a mortgage when a loan is transferred from one bank to
5 another, even not being a party.

6 MR. BABCOCK: I agree with that Judge and I thank
7 Mr. Volpe for pointing that 34-11-1 is clear for that
8 assignment to be valid as to my client it has to be in
9 writing and recorded - very clear - acknowledged and
10 recorded and it was not at the time the foreclosure was
11 commenced.

12 Relative to scrivener's affidavits or index issues

13 --

14 THE COURT: Why don't we just agree the foreclosure
15 was the auction itself? That's the actual foreclosure.

16 MR. BABCOCK: Yes, it is.

17 THE COURT: Foreclosure commenced and you're talking
18 when he seen advertisements.

19 MR. BABCOCK: Yes, your Honor. The entire process
20 is set forth in 34-11-22, your Honor, which if I may,
21 I'll provide to the Court.

22 THE COURT: Well, first off, the advertisement is
23 proper; correct?

24 MR. BABCOCK: No, your Honor, it's not. The
25 advertisement is, in my opinion, rendered a nullity by

1 virtue of the fact that cover letter from the attorney
2 foreclosing is incorrect. He was --

3 THE COURT: The cover letter isn't running in the
4 newspaper?

5 MR. BABCOCK: Well, perhaps they shouldn't have sent
6 a cover letter.

7 THE COURT: Mr. Babcock, what's wrong with the ad
8 that's running in the paper?

9 MR. BABCOCK: It's -- the problem with the ad is One
10 West does not have title because the assignment as a
11 matter of law is no good.

12 THE COURT: However, they refer to the ad.

13 MR. BABCOCK: There you go.

14 THE COURT: Does it need to be?

15 MR. BABCOCK: Well One West is the party
16 foreclosing.

17 THE COURT: Right, a mortgage.

18 MR. BABCOCK: That is correct.

19 THE COURT: Recorded in Book 1219, page 10.

20 MR. BABCOCK: Yes, but they're doing it by way of
21 assignment, your Honor.

22 THE COURT: There's nothing wrong with the ad.

23 MR. BABCOCK: No, there's nothing wrong with the ad
24 except that.

25 THE COURT: The only concern is the notice.

1 MR. BABCOCK: Right. One West has no standing in
2 this case, your Honor. It doesn't have an assignment.
3 The assignment --

4 THE COURT: Why did you sue them?

5 MR. BABCOCK: Because they're suggesting my client,
6 they're alleging, had a lack of standing. If I didn't
7 sue them I wouldn't be able to seek relief against them.
8 It's that party that's seeking to foreclose on my
9 client. They started a foreclosure on July 14th.
10 There's no record of the assignment until July 16th and
11 the assignment is wrong.

12 And finally, Judge, may I submit to you for your
13 consideration 34-11-12 statutory forms, which again
14 clearly provides that you have to indicate who the
15 mortgagee is and in this situation they do not. They
16 cite the wrong party. If perhaps if they just left the
17 party out, as Mr. Volpe said, they could rely on --

18 THE COURT: Mr. Babcock you acknowledge you come up
19 with a lot more arguments than you did at the
20 conference.

21 MR. BABCOCK: Yes, because I went to the law
22 library.

23 THE COURT: Okay. So here's my ruling. The
24 foreclosure is stayed an additional two weeks. During
25 these two weeks there's nothing to prevent any mortgagee

1 or holder of a mortgage from continuing to advertise the
2 foreclosure sale and to continue that foreclosure sale
3 out. There is also nothing in this that the holder of
4 the mortgage or any assignee from commencing any
5 foreclosure. All of those options remain available to
6 the mortgagee, but at this point it doesn't do justice
7 to either of you to come out with a quick ruling on what
8 amounts to a permanent injunction as to whether or not
9 this foreclosure is going to go forward and rather than
10 addressing more and more issues you're both allowed to
11 submit additional briefing to me by the close of the
12 day, Tuesday September 15, 2009. I'm trying to keep a
13 short schedule because this has already been continued
14 out before. The foreclosure sale cannot commence until
15 on or after 11 a.m., September 28, 2009 and so it's
16 clear.

17 MR. BABCOCK: Thank you Judge.

18 MR. VOLPE: Thank you, your Honor.

19 THE COURT: Thank you.

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