Massachusetts High Court: Mortgage Does Not Follow The Note

Posted: 16 Jan 2011 09:09 PM PST

One of the key points from the recent Massachusetts Supreme Judicial Court ruling in ***U.S. Bank Nat'l Ass'n v. Ibanez***, was that (unbeknownst to me, the Wall Street securitization wizards, the mortgage industry, and maybe a couple of other people) the long-standing principal of common law that a mortgage or deed of trust is a mere incident to the promissory note and that these security agreements automatically "***follow the note***" upon assignment of the latter does not hold in Massachusetts,**(1)** as Justice Gants, writing for a unanimous court, tells us in this excerpt (***bold text*** is my emphasis, not in the original text):

- Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, ***where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage***. Barnes v. Boardman, 149 Mass. 106, 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, ***who has an equitable right to obtain an assignment of the mortgage***, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law.... ***This doctrine has not prevailed in Massachusetts***, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G.L. c. 183, § 21, inserted by St.1912, c. 502, § 6.

For the ruling, see ***U.S. Bank Nat'l Ass'n v. Ibanez***, No. SJC-10694 (January 7, 2011). See also *Lexology:* ***Massachusetts Supreme Judicial Court foreclosure decisions*** (requires subscription; if no subscription, ***TRY HERE***):

- The Court did not address the question of whether U.S. Bank and Wells Fargo were the holders and owners of the notes, but held that, under Massachusetts real property law, ***the mortgage does not automatically follow the note and must also be assigned to the foreclosing lender prior to the foreclosure sale***.

(1) Contrast with the laws of:

- **Connecticut**: The Appellate Court of Connecticut, in ***LaSalle Bank, N.A. v. Bialobrzeski***, AC 30911, 123 Conn. App. 781; 3 A.3d 176 (September 21, 2010), discussing the applicable state statute (***bold text*** is my emphasis, other alterations in the original):

  "[Section] § 49-17 permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him. . . . The statute codifies the ***common-law principle of long standing that the mortgage follows the note***, pursuant to which only the rightful owner of the note has the right to enforce the mortgage. . . . Our legislature, by adopting §49-17, has provide[d] an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him." (Citations omitted; internal quotation marks omitted.) ***Chase Home Finance, LLC v. Fequiere***, 119 Conn. App. 570, 576-77, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).
- **Arkansas**: ***Leach v. First Cmty. Bank***, CA07-05, 2007 Ark. App. LEXIS 671 (Ct. App., Div II, 2007) (unpublished) (***bold text*** is my emphasis):

  Arkansas has long followed the rule that, in the absence of an agreement or a plain manifestation of a contrary intention, ***the security of the original mortgage follows the note*** or renewal thereof, i.e., instead of there being a presumption of payment or settlement of the original indebtedness by the execution of the renewal note, and thereby a release of the security, the presumption is that, upon the execution of the new note or bond, the same security is available for its payment. Simpson v. Little Rock North Heights Water District No.18, 191 Ark.

451, 86 S.W.2d 423 (1935). This is in keeping with the weight of authority holding that, because the renewal of a note does not change the identity of the debt represented by the obligation, the validity or operation of an assignment as security is not affected by the circumstance that a renewal note is executed to replace the original note. See generally 3 LEE R. RUSS ET AL., COUCH ON INSURANCE § 37.50 (3d ed. 2005).

- **Minnesota**: ***Jackson v. Mortg. Elec. Registration Sys.***, A08-397770 N.W.2d 487 (2009):

  We have held that, absent an agreement to the contrary, an ***assignment of the promissory note operates as an equitable assignment of the underlying security instrument***. First Nat'l Bank of Mankato v. Pope, 85 Minn. 433, 434-35, 89 N.W. 318, 318-19 (1902).

- **Texas**: ***Nicholson v. Washington Mut.***, NUMBER 13-00-394-CV, 2001 Tex. App. LEXIS 6119 (Tex. App.-Corpus Christi [13th Dist.], 2001) (***bold text*** is my emphasis).

  The ***mortgage of a property is an incident of the debt; and as long as the debt exists, the security will follow the debt***. J.W.D., Inc. v. Federal Ins. Co., 806 S.W.2d 327, 329-30 (Tex. App.-Austin 1991, no writ); Lawson v. Gibbs, 591 S.W.2d 292, 294 (Tex. Civ. App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.). Accordingly, while the deed of trust may never have been assigned to Lehman, ***it followed the debt***. Because the Nicholson note was indorsed in blank by American and delivered into Lehman's constructive possession, Lehman became the holder of both the note ***and the deed of trust which followed the note***.

- Florida: ***WM Specialty Mortg., LLC v. Salomon***, 874 So. 2d 680 (Fla. App. 4th DCA, 2004): A Florida appeals court, quoting from the state Supreme Court ruling in Johns v. Gillian, 134 Fla. 575, 184 So. 140, 143 (Fla. 1938) (***bold text*** is my emphasis):

  However, it has frequently been held that ***a mortgage is but an incident to the debt***, the payment of which it secures, and its ***ownership follows the assignment of the debt***. If the note or other debt secured by a mortgage be transferred without

any formal assignment of the mortgage, or even a delivery of it, ***the mortgage in equity passes as an incident to the debt***, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties.