

TENANT HAS STANDING TO CHALLENGE THE VALIDITY OF A FORECLOSURE WITHIN THE CONTEXT OF AN EVICTION ACTION

On October 24, 2019, the Massachusetts Appeals Court issued a decision holding that any tenant in possession of the property post-foreclosure has standing to challenge the validity of the foreclosure. *U.S. Bank Trust, N.A. as Trustee v. Kelly A Johnson et al.*, No. 19-P-317, Mass. App. Ct. (Oct. 24, 2019) (Green, C.J., Maldonado, & Hand, JJ.). This is in contradiction to the practice of lower courts to find that tenants who are complete strangers to the subject property's title do not have any standing. The Court also held that the timeframe for a motion to waive appeal bond is not jurisdictional and can be extended and that the failure of a foreclosing mortgagee to produce the original promissory note is a non-frivolous issue on appeal.

Background

The foreclosing bank, U.S. Bank National Association as Trustee for the LSF9 Master Participation Trust ("U.S. Bank as Trustee"), brought an eviction action in Housing Court (a "summary process" action) against the former owner of the property and her adult daughter, Kelly Johnson ("Johnson") (Johnson and the former owner collectively, "defendants"). Johnson was not a mortgagor or former owner of the property. Both defendants challenged the validity of the eviction, claiming that the underlying foreclosure was invalid. Specifically, the defendants claimed that U.S. Bank as Trustee's failure to produce the original note for inspection during summary process action rendered the foreclosure invalid.

The Housing Court granted U.S. Bank as Trustee's motion for summary judgment for possession of the property. Defendants timely appealed. U.S. Bank as Trustee filed a motion to set an appeal bond. Twenty days later, 10 days beyond the deadline, the defendants filed a motion to waive the appeal bond, claiming that Johnson was indigent. The Housing Court held that it could not hear the motion to waive appeal bond because the 10-day time limit prescribed by *Mass. Gen. Laws* ch. 239 § 5 had expired. The Judge set a \$20,000 appeal bond, including a use and occupancy payment of \$1,000 per month during the appeal. Defendants then also appealed the court's denial of the appeal bond and its decision denying their motion to waive appeal bond.

Appeal

A single justice of the Appeals Court certified three questions to the Appeals Court panel:

1. Whether the time period prescribed by *Mass. Gen. Laws* ch. 239 § 5 to file a motion for waiver of an appeal bond for an appeal from a judgment for possession in a summary process action is jurisdictional;
2. Whether U.S. Bank as Trustee's failure to produce the original note secured by the mortgage it foreclosed to acquire its title to the property raised a non-frivolous appellate issue, thereby justifying a waiver of an appeal bond for an indigent defendant; and
3. Whether the indigency of one, but not both, defendants in a summary process action may justify a waiver of the appeal bond requirement.

The Appeals Court determined that the 10-day period to file a motion to waive appeal bond is not jurisdictional, and thus a court is not precluded from hearing a late motion. The Court further concluded that the failure to produce the original note was a non-frivolous issue that could serve as a basis to waive the appeal bond. Finally, the Court held that the indigency of one defendant does not excuse a co-defendant from proving that they are also indigent for the purpose of waiving the appeal bond.

The part of the decision most likely to have far-reaching implications was an answer other than to one of the three questions specifically certified to the Court. U.S. Bank as Trustee argued that Johnson, the former owner's daughter, who resided in the property, had no **standing** to request that the appeal bond be waived, because any appeal would be frivolous because a non-mortgagor lacks standing to challenge the validity of the underlying foreclosure in the first place. The Court rejected this argument and held that any tenant in possession of a property obtained through foreclosure (such as the mortgagor's adult daughter here) has standing to challenge the foreclosing mortgagee's right to possession by challenging the underlying foreclosure. The Court went further, wholly outside the facts of this case, to state that even a third-party, unrelated, rent-paying tenant of a mortgagor would be able to challenge the validity of a foreclosure in an eviction action. This is contrary to how lower courts have long treated the standing of a non-mortgagor occupant to challenge a foreclosure. Until now, courts routinely denied standing to challenge a foreclosure to any person not connected to the pre-foreclosure ownership, mortgage or note.

The case was remanded to Housing Court for further proceedings to waive the appeal bond and docket the full appeal.

Implications

Challenges to foreclosures in Massachusetts by way of the eviction process are likely to skyrocket in the wake of this decision. This decision will allow virtually any occupant of a post-foreclosure property to defend an eviction by challenging the validity of a foreclosure, even without involvement by the mortgagor/borrower. This decision also states that the failure to produce an original note constitutes a non-frivolous defense to foreclosure. Defendants' standard discovery requests include demands to view the original note. We can expect more eviction defendants to make this demand, and the foreclosing mortgagee will need to produce the original note and allow for inspection.

Another impact is that personally sensitive financial information of borrowers could become subject to the discovery process. In theory, a tenant could claim the foreclosure was invalid and demand documents and information related to the borrower's default, including the original note, payment histories, default notices, etc.

Clients should consider this decision, and the potential for lengthier and expensive eviction litigation when considering settlement offers to non-mortgagor occupants. In fact, it may be beneficial to make outreach to tenants prior to initiating eviction proceedings. There will likely be an increase in the number of people who claim to be tenants of foreclosed properties in the first instance. Clients should also be prepared to produce original notes if demanded in the discovery process. Locke Lord can assist in keeping the note in a secured setting for viewing in our offices.