Failure To Name A Trustee In A Deed Of Trust

Does Not Invalidate The Power Of Sale Provision

Scott Rogers, ESQ. & **Ted Klaassen**, ESQ., RUTAN & TUCKER, LLP

In a case of first impression in California, the Second District Court of Appeal determined that the failure of a deed of trust securing a home loan to name a trustee did not preclude the non-judicial foreclosure of the home securing the loan. Surprisingly, this was the first time the issue had been considered in California. The case was *Shuster v. BAC Home Loans Servicing, LP*, 211 Cal. App. 4th 505 (2012).

This was another case involving a troubled MERS (Mortgage Electronic Registration System) loan. When WMC Mortgage made the $670,000 loan to the Shusters, although it designated MERS as the beneficiary in the signed, notarized and recorded deed of trust, it apparently did not specify any trustee.

Fast-forward, and the Shusters were in default under the loan to the tune of about $90,000. The successor lender, Arch Bay, completed the power-of-sale foreclosure process and held its non-judicial foreclosure sale, taking the property back. The Shusters filed an action to set aside the foreclosure sale, to recover damages (including punitive damages) for wrongful foreclosure, and to cancel the trustee's deed to Arch Bay. The Shusters claimed that the failure to specify a trustee in the deed of trust precluded exercise of the power of sale in the deed of trust, effectively turning the deed of trust into a mortgage that could only be enforced by judicial foreclosure. The Shusters never tendered to the lender the amounts necessary to cure the defaulted payments and had occupied the home for more than two years without making any payments.

The court noted that this case presented an issue that had not previously been decided in California. The court also note that courts in other jurisdictions had come out on both sides of the issue when considering similar cases. Notwithstanding a wide open opportunity to find in favor of the borrower as most California courts seem to have done in recent times, both the trial court and the appellate court found the Shusters' arguments to be unpersuasive and sustained the defendants' demurrers effectively dismissing the action. The courts reasoned that because the beneficiary under the deed of trust had the power to substitute the trustee under the deed of trust and to commence foreclosure, it also had the power to appoint a trustee and commence foreclosure as had been done by the lender in this case. The courts also found support in prior California probate cases using equitable powers to uphold trusts despite the failure to name a trustee.

The courts at both levels ruled as a matter of law that failure to appoint a trustee in the deed of trust did not invalidate the power of sale provision the deed of trust, did not turn the deed of trust into a mortgage and did not preclude non-judicial foreclosure of a deed of trust. Both courts also held that the Shusters' failure to allege tender, or an offer of tender, of the amounts necessary to cure the loan defaults was an independent basis on which the Shusters' claim failed. The appellate court made specific note that the Shusters had enjoyed more than two years of "rent-free" occupancy of the home and that because of the Shusters' failure and apparent inability to tender payment of the delinquent amounts due, requiring judicial foreclosure would be a futile act, a delay tactic.

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