Glaski Reopens the Standing Debate

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In July 2013, California's Fifth Appellate District issued an opinion holding that a borrower has standing to raise securitization claims to stop or set aside a non-judicial foreclosure. In Glaski v. Bank of America, the borrower argued that the procedure by which his loan was securitized was improper, and therefore, the securitized trust lacked standing to enforce the deed of trust.[1] This question is: Does Glaski open the door to a floodgate of securitization challenges? Fortunately, the answer is no.

Facts and Procedural History

In July, 2005, Borrower Thomas Glaski obtained a loan from Washington Mutual Bank at or around the time the WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Trust (WaMu Trust) was created. In September 2008, Washington Mutual was shuttered by the FDIC. JPMorgan Chase Bank, N.A. (Chase) subsequently purchased the Glaski loan, and other assets and liabilities, from the FDIC as receiver. During this time, Glaski admittedly defaulted on his Loan. On December 9, 2008, Chase recorded an Assignment of Deed of Trust, which stated that JPMorgan transferred and assigned all beneficial interests under the Deed of Trust and the Note to LaSalle Bank, N.A., as trustee for the WaMu Trust.[2] The same day, a Notice of Default was recorded commencing the nonjudicial foreclosure, and eventually a trustee's sale was conducted on May 27, 2009.

After the foreclosure sale, Glaski sued Chase, Bank of America, N.A. (successor trustee to LaSalle Bank, N.A.) and the foreclosure trustee, California Reconveyance Company. Glaski alleged that the operative pooling and servicing agreement required that certain documents, including the promissory note and deed of trust for loans sold to the WaMu Trust, be delivered to the trustee of the WaMu Trust prior to the closing date of the trust. Glaski alleged this was not done, preventing the loan from ever vesting in the WaMu Trust. As a result, Glaski argued that the Assignment was ineffective, leaving Bank of America as trustee of the WaMu Trust with no right to conduct the foreclosure.

The trial court ultimately sustained Defendants' Demurrer to the entire complaint without leave to amend. Glaski timely appealed the trial court's ruling.

In a published decision, the California Court of Appeals held that plaintiff cannot just merely assert that the entity conducting the foreclosure is not the proper beneficiary under the deed of trust. Plaintiffs utilizing this theory must actually allege facts demonstrating that the entity is not the true beneficiary. The Glaski court went on to find that that Plaintiff had met his burden. First, Glaski alleged the Note and Deed of Trust were not transferred to the WaMu Trust prior to the closing date, as required under the pooling and servicing agreement. Under those facts, Bank of America would have no right to conduct the foreclosure. Second, under an alternative theory that Bank of America received its interest in the Deed of Trust through the 2008

Assignment, such transfer would also be ineffective since it was recorded three years after the closing date of the WaMu Trust. In either event, the Glaski court determined that the borrower had alleged sufficient facts to assert his theory that Bank of America, as trustee of the WaMu Trust was not the true beneficiary under the Deed of Trust.

The Glaski court also held that a borrower has standing to challenge the validity of an assignment of deed of trust if doing so would render the assignment void. The Appellate Court turned to case law from other federal districts and even attempted to interpret New York trust law in reaching its conclusion that a post-closing date transfer would render the subsequent Assignment void. Therefore, Glaski could challenge the Assignment's validity.

Glaski's Impact

Prior to the Glaski ruling, defaulted borrowers challenging the beneficiary's standing faced an up-hill battle, arguing that: 1) because the loan was sold to a securitized trust, the loan was paid off and no foreclosure is warranted; 2) credit default swaps protected lenders against defaulting loans and were thus paid off upon default; and 3) since the loan was sold to a securitized trust, either no one owns the promissory note or no one knows who does. California state and federal courts had routinely dismissed cases these allegations. However, with the Glaski ruling, securitization claims have new found appeal.

Fortunately, many federal courts have already begun to reject Glaski. In Diunugala, the borrower filed a lawsuit challenging the foreclosure on grounds similar to Glaski's claims.[3] Specifically, Diunugala alleged that "The note on [Plaintiff]'s loan was not transferred within 90 days or repurchased ... within 180 days as required by the [pooling and servicing agreement] of the MBS trust."

While Diunugala relied upon Glaski to support his claims, the court disagreed, reasoning that any transfer not complying with a pooling and servicing agreement is voidable, not void, as previously held by Glaski. Thus, under Diunugala, an assignment of deed of trust would not susceptible to a borrower's challenge. Moreover, the Diunugala court, citing Fontenot, held that a plaintiff challenging a foreclosure sale cannot merely allege that an ineffective assignment of a note and deed of trust, but must allege that the defendant "did not receive a valid assignment of the debt in any manner."[4] Even then, such plaintiff must show they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process."[5]

In Newman, the borrower challenged the foreclosure based on alleged violations of the pooling and servicing agreement.[6] The borrower again relied on Glaski. Like the Diunugala court, the Newman court rejected Glaski, specifically stating, "no courts have yet followed Glaski and Glaski is in a clear minority on the issue. Until either the California Supreme Court, the Ninth Circuit, or other appellate courts follow Glaski, this Court will continue to follow the majority rule." 2013 WL 5603316 n.2.

On October 4, 2013, Chase filed a petition with the California Supreme Court to depublish Glaski. The Supreme Court has received multiple responses both in support of and in opposition to Chase's depublication request. While there is no time limit on the Supreme Court to decide on a depublication request, it does attempt to rule within 90 days after a proper request is filed. If the California Supreme Court depublishes Glaski, no one can cite the decision and the lower state courts are not required to follow its ruling. In which case, Glaski will become a distant memory. But, even if the California Supreme Court refuses to depublish Glaski, it's clear that many federal court judges are declining to follow the decision, which will severely limit the negative impact of the ruling.

[1] Glaski v. Bank of America, 218 Cal.App.4th 1079.
[2] Bank of America, N.A. (Bank of America) would later succeed by merger with LaSalle Bank, N.A. and become the successor trustee to the WaMu Trust.
[3] Diunugala v. JPMorgan Chase Bank, N.A. (Cal. S.D. Oct. 3, 2013) 2013 WL 5568737
[4] Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256
[5] Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal.App.4th 75.
[6] Newman v. The Bank of New York Mellon (Cal. E.D. Oct. 11, 2013) 2013 WL 5603316.

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