DS news Quick Take

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CALIFORNIA COURT REVISITS HOMEOWNER'S BILL OF RIGHTS

A recent California Court of Appeals finding could give loan servicers the ability to "clean up" any violations before going to sale.

Borrowers regularly sue their loan servicers over alleged violations of the California's complex Homeowner Bill of Rights[1] (HBOR). Generally, the allegations have little merit. However, in the rare case that an actual violation exists, the Court of Appeal for the Second Appellate District recently confirmed that a loan servicer can remedy HOBR violations prior to the actual foreclosure sale, avoiding having to restart the entire foreclosure. While the industry has been making this argument for some time, we now have a published appellate decision to rely on.

More specifically, the court in *Billesbach v. Specialized Loan Servicing LLC*[2], found that (1) a mortgage servicer has no liability under California Civil Code sections 2923.55, 2923.7, and 2924.17 where it postpones the foreclosure sale after pre-sale violations and allows the borrower to pursue foreclosure alternatives; and (2) a mortgage servicer does not violate Civil Code section 2923.6 for dual tracking where a foreclosure sale takes place after the borrower fails to accept an offer by a specified deadline for a trial-period modification plan.

Under Civil Code section 2923.55, before recording a notice of default, mortgage servicers must contact (or diligently attempt to contact) the borrower to assess the borrower's financial position and explore foreclosure prevention alternatives (FPA).[3] Section 2924.17 requires that a declaration attached to the notice of default attesting to compliance with section 2923.55 "be accurate and complete."[4] If a borrower requests an FPA, then under section 2923.7, the servicer must promptly provide a means of communication with a single point of contact (SPOC). Further, under section 2923.6, a mortgage servicer cannot proceed with the next phase of foreclosure proceedings while a complete application for a loan modification is pending, known as "dual tracking."

In *Billesbach*, following a payment default by the deceased borrower's husband, Mr. Billesbach, the loan servicer, Specialized Loan Servicing LLC (SLS), recorded a Notice of Default which included a declaration that SLS had tried diligently to communicate about FPAs pursuant to Civil Code section 2923.55. SLS scheduled a foreclosure sale, and Billesbach filed this action to enjoin the sale, claiming violations of Civil Code section 2923.7 for failing to assign him a SPOC, violation of section 2923.55 for failing to communicate about FPAs, and violation of section 2924.17 for recording a false declaration of compliance. The sale was postponed to review Billesbach's loan modification application. After review, SLS offered Billesbach a trial period modification plan. Billesbach rejected the offer, seeking more favorable terms. With the offer rejected, SLS went to sale and the property was sold to a third party. Billesbach amended the complaint to add a cause of action for violation of section 2923.6, alleging a dual tracking violation for going to sale while his application was pending a response.[5]

Although Billesbach argued, among other things, that SLS should have recorded a new Notice of Default, and that there was a dual-tracking violation because the parties were still "in negotiations" for a modification, the Court of Appeal disagreed. The Court instead found that Billesbach's HOBR claims failed, and specifically that:

"where a mortgage servicer's violations stem from its failure to communicate with

1. California Civil Code section 2923.4 et seq.
2. Billesbach v. Specialized Loan Servicing LLC (April 29, 2021) 63 Cal.App.5th 830.
3. Civil Code §2923.55 (a), (b)(2), (f).
4. Civil Code §2924.17(a).
5. Billesbach v. Specialized Loan Servicing LLC, supra, 63 Cal. App. 5th at 839-842.
6. Id. at 837.

the borrower before recording a notice of default, the servicer may cure these violations by … postponing the foreclosure sale, communicating with the borrower about potential foreclosure alternatives, and fully considering any application by the borrower for a loan modification. Following these corrective measures, any remaining violation related to recording of the notice of default is immaterial, and a new notice of default is therefore not required to avoid liability."[6]

HOBR creates liability only for **material** violations that are not remedied before the Trustee's Deed Upon Sale is recorded.[7] Courts have held that, "[a] material violation is one that affected the borrower's loan obligations, disrupted the borrower's loan-modification process, or otherwise harmed the borrower."[8] Here, SLS remedied any material violation under HOBR before the sale, rendering any pre-sale technical violations immaterial and not actionable.

With respect to *Billesbach's* claim that SLS violated section 2923.6 by going to sale when his loan modification offer was pending, the court found no violation, stating that the statute does not suggest that "continued interactions between the servicer and borrower following the expiration of a loan modification offer—much less the borrower's extension of a new offer thereafter—can revive the original offer or extend the pendency of the borrower's application."[9] The court refused to create a "nebulous concept of negotiations" as a standard to determine a servicer's ability to proceed with the foreclosure process.[10] Section 2923.6 provides clear rules on when an application is pending and when the servicer may conduct a sale—when the borrower does not accept an offer within 14 days of the offer (§2923.6(c)(2)) or 14 days after a loan modification is offered after appeal but declined by the borrower (§2923.6(e)(2)).

Obviously, all loan servicers strive for complete HOBR compliance. However, the important take-away from the *Billesbach* ruling is that, in the rare event of an actual HOBR violation, the servicer can quickly remedy the violation by reviewing the borrower for a loan modification prior to the foreclosure sale. While some court rulings do not make logical sense, this one does! The borrower receives the full protections of the HOBR, while the lender does not have to restart the entire foreclosure due to a technical and **immaterial** HOBR violation. Congratulations to the Court of Appeals for getting this one right.

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7. Id. at 837.
8. Id. at 837, citing, e.g., Cardenas v. Caliber Home Loans, Inc. (N.D. Cal. 2017) 261 F. Supp. 3d 862, 870; Galvez v. Wells Fargo Bank, N.A. (N.D. Cal. Oct. 4, 2018, No. 17-cv-06003-JSC) 2018 U.S. Dist. Lexis 172087, at *12
9. Id. at 850.
10. Id. at 850, citing Jolley v. Chase Home Finance, LLC (2013) 213 Cal. App. 4th 872, 904.