States: Washington

Jordan v. Nationstar Mortgage, LLC: The Washington Supreme Court's Sweeping New Decision on Pre-foreclosure Efforts to Enter and Secure Real Property in the State

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The Washington Supreme Court released a sweeping opinion on July 7, 2016 in the case of Jordan v. Nationstar Mortgage, LLC (No. 92081-8), voiding common provisions of deeds of trust and barring pre-foreclosure efforts to enter and secure real property in Washington. Before the court were the following facts. Just a few months after the borrower's default, Nationstar's property preservation agents determined the house to be vacant, changed the lock to the front door and placed a lockbox on the door with a notice that advised the borrower to call for access. The borrower did call Nationstar, who provided the lockbox code. She gained access to the property, and the following day promptly vacated. Thereafter, the borrower sued, and a class was certified in the U.S. District Court for the Eastern District of Washington.

The District Court certified the question of whether under Washington's lien theory of mortgages and RCW 7.28.230(1), a borrower and lender can enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure. Thus, the Supreme Court was tasked with determining if RCW 7.28.230(1) (Washington's lien statute that bars pre-foreclosure possession of property) conflicts with common contractual right of entry provisions such that they must be declared void as against public policy. The court was asked a broad question regarding the enforceability of pre-foreclosure repair, security and entry provisions. However, the court constrained its analysis to the acts of changing the lock, installing a lockbox, and forcing the borrower to contact Nationstar to regain access to the property. In the court's opinion, the certified question turned on whether or not the lender was authorized by the deed of trust to take actual possession of the property before foreclosure. Actual possession, the court reasoned, required a certain degree of physical control. The court stated: "[t]his action of changing the locks and allowing her a key only after contacting Nationstar for the lockbox code is a clear expression of control." In answering the certified question, the court indicated that the entry provisions are unenforceable. The court described the "entry provisions" as the portions of the deed of trust, which allow the lender to enter, maintain, and secure the property after the borrower's default or abandonment.

Unfortunately, there appears to be a disconnect between the broad nature of the certified question and the narrow analysis performed by the Court. Based on the particular facts demonstrating possession and control of the property in this case, the Court appears to invalidate all provisions of a deed of trust authorizing any type of physical pre-foreclosure activity regarding the property. The Court's response to the first certified question in the negative leaves servicers with the impression that even non-possessory activity like grass cutting and fence repair cannot be completed without borrower approval, a court order or a receivership in place in advance.

The District Court also certified the question of whether receivership under Chapter 7.60 of the Revised Code of Washington is the exclusive remedy, absent consent by the borrower after default, for a lender seeking pre-foreclosure access to an encumbered property. The court held that receivership is not the exclusive remedy. While acknowledging that other remedies are available, the court did not set forth any particular procedure by which a lender may enter and secure real property after default aside from receivership. This lack of guidance is particularly concerning with respect to vacant and blighted property that is the subject of city code violation or abatement proceedings. However, it now appears that a lender or servicer will be required to either obtain the consent of the borrower, appointment of a receiver, or other court order prior to taking physical pre-foreclosure action regarding encumbered property in Washington.

Lenders should take caution after Jordan when dealing with property preservation efforts, and should guard against reading the case too narrowly, until further clarification is obtained. Given that the court's analysis turned on possession and the certain degree of physical control that is required to establish possession, it is tempting to believe that the court's opinion should not be read to prevent other aspects of the lender's rights under a deed of trust's entry provisions. For example, the court says nothing about exterior maintenance, yard upkeep, or the remediation of code violations for exterior debris or disrepair. Arguably, none of those actions would express a "degree of physical control" over the property as they would not exclude the borrower from access to the property. On the other hand, based on the court's analysis, actions such as turning off utilities, boarding up windows and doors probably do constitute physical control and would be barred under RCW 7.280.230(1). Nevertheless, in rendering the "entry provisions" invalid, the court's opinion made no distinction between "lock-out" activity constituting possession and the various other types of conduct authorized under Paragraph 9 of Nationstar's deed of trust (inspection, protection, repair) that would arguably not appear to constitute possession to the exclusion of the borrower.

Without the benefit of other cases interpreting this decision, there is no guarantee that the lender/servicer will not be sued by a homeowner for taking any pre-foreclosure action on a property. Thus, it is important to consult with counsel regarding the language of the particular entry provisions at issue and the risk tolerance of your organization with respect to future property entry and preservation policies and available remedies in the state of Washington. According to the Washington State Supreme Court Clerk's Office, a motion for reconsideration was filed on July 27, 2016, and a ruling on that motion is pending as of the date this article was drafted.

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