PUBLICATION

Show-Me-The-Note v. Split-the-Note: An Overview of Rulings from the Fifth Circuit Court of Texas

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In the case of *Ashley Martins v. BAC Home Loans Servicing, L.P. and Federal National Mortgage Association* (No. 12-20559, 2013 WL 3213633), the Fifth Circuit Court of Texas was first asked to decide whether the "show-me-the-note" theory or the "split-the-note" theory requires a mortgage lender or servicer to produce the original promissory note in order to conduct a non-judicial foreclosure sale pursuant to a deed of trust lien. The "show-me-the-note" theory posits that a party must produce the original note bearing a "wet ink" signature in order to foreclose, and the "split-the-note" theory contends that a foreclosing party must hold both the note and deed of trust in order to exercise the power of sale. Both theories are frequently advanced by borrowers seeking to avoid foreclosure.

The court held that, where the foreclosing party is a mortgage servicer and the mortgage has been properly assigned, the foreclosing party need not possess the note in order to foreclose. This holding resolves a pre-existing conflict among various federal district courts in Texas. In order to reach their holding, the court took note of the fact that Texas foreclosure statutes do not require possession or production of the original note and that Texas precedent permits proof of a note by photocopy and attached affidavit, in lieu of an original instrument. The court further noted that a deed of trust gives both the lender and the beneficiary the right to invoke the power of sale, even though they may be separate entities and therefore cannot both hold the note. As such, the law contemplates that the foreclosing party may not possess the note, and production of the original note is therefore not a prerequisite to foreclosure.

The court was also asked to decide whether Section 51.002 of the Texas Property Code requires that a borrower receive notice of a pending foreclosure sale. The court held that it does not, resting its decision upon Section 51.002(e). This section provides that service is complete when notice is sent via certified mail and that an affidavit of a knowledgeable person that such occurred is *prima facie* evidence of service.

Finally, the court was asked to decide whether an oral promise that the borrower's home would not be foreclosed on if he submitted a HAMP application was sufficient to give rise to a claim of promissory estoppel to bar foreclosure. The court held that the oral promise was not sufficient, as promissory estoppel would require a written agreement in order to satisfy the statute of frauds. Under the Texas statute of frauds, an agreement regarding the transfer of real property or the modification of a loan in excess of $50,000 must be in writing to be enforceable. The mere oral promise to refrain from foreclosing therefore is insufficient to create an enforceable legal or equitable right or obligation.