COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT DOCKET
NO. FAR-27062

ANTHONY GIANNASCA
Petitioner/Appellant

vs.

DEUTSCHE BANK NATIONAL TRUST CO & others
Defendants/Appellees

On Appeal from a Judgment of the Middlesex County
Superior Court

APPLICATION FOR FURTHER APPELLATE REVIEW
PURSUANT TO Rule 27.1 M.R.A.P.

Memorandum and Order by the Massachusetts Appeals Court in
Case# 18-P-0349 dated August 21, 2019

For the Petitioner/Plaintiffs
Glenn F. Russell, Jr., Esq.
BBO # 656914

Glenn F. Russell, Jr., &
Associates, P.C.
38 Rock Street, #12
Fall River, MA 02720
508-324-4545
russ45esq@gmail.com

October 10, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

MASSACHUSETTS STATE STATUTES

1) Request for Leave to Obtain Further Appellate Review

The Petitioner/Plaintiff Anthony Giannasca ("Petitioner") herein though undersigned, respectfully seeks further appellate review of the published Opinion issued by the Appeals Court on August 21, 2019, in which the majority affirmed the trial court's ruling. However, a very strong dissent was submitted by Rubin, J., in which he identifies and opines on many unresolved issues of Massachusetts real property law regarding the use of the statutory remedy under G.L. c. 244, §14. Indeed, Judge Rubin very clearly states that his impression is that the ruling by the majority may well call into question the title to many pieces of property, i.e. those in whose chain of title an assignment or other conveyance was made in the wrong capacity -- say individually instead of as trustee -- whose subsequent purchasers have relied on the status of such assignments and conveyances as a nullity.

Indeed, since *Ibanez*, this Court has declined and/or not entertained any follow up to issues related to a "pooling and servicing agreement" under its landmark rulings regarding G.L. c. 244, §14, in *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637 (2011), or issues

involving "MERS" since *Eaton v. Fed Nat'l Mortgage Ass'n*, 462 Mass. 569 (2012).[1] Such follow-up review is critical, given the fact that Eaton changed the previous interpretation of the statutory definition of the term "mortgagee".[2] The result of the preceding is that the law continues to remain unsettled regarding the operation of G.L. c. 244, §14. This situation creates conflicts of opinion, as evidenced within this very Opinion under review.

Further, issues related to Mortgage Electronic Registration System, Inc. ("MERS") have yet to be fully examined by this Court under the "post-Eaton"

---

[1] Such examination under further appellate review is warranted given this Court's finding in Eaton at n. 24, n. 10, n. 29, and n. 27. Additionally, under the Eaton fact pattern this Court was only presented a matter procedurally postured as a preliminary injunction.

[2] Indeed, many of the footnotes from this Court in Eaton clearly identified issues that are, and still remain, open issues of undecided Massachusetts state law. The reason for further appellate review in this matter is even more critical given that fact that the unresolved issues of state law identified by this Court in Eaton were never fully addressed on remand, as FNMA settled the case just prior to trial, [lest a true examination ensue], see, Eaton v. Fed. Nat'l Mort. Ass'n, et. al., Ca. No. 1184CV01382, Memorandum of Decision allowing Summary Judgment, (Sept. 29, 2016); see the appeal of this decision at Eaton v. Fed. Nat'l Mort. Ass'n, et. al. Ca. No 17-P-0359 (Mass. App. Ct. Jan. 12, 2018), and on remand at Eaton v. Fed. Nat'l Mort. Ass'n, et. al., Ca. No. 1184CV01382, (Suff. C., Sup Ct. 2019) [settled on Feb. 12. 2019].

construction of G.L. c. 244, §14.[3] The majority cites to two matters; *Sullivan v. Kondaur Capital, Corp.*, 85 Mass. App. Ct. 202 (2014) and *Bank of N.Y. Mellon Corp. v. Wain*, 85 Mass. App. Ct. 498, 503 (2014), in which both fact patterns (despite being decided in 2014) were "pre-Eaton" fact patterns in which there was no requirement to make any examination as to the note.[4] This Court was clear in Ibanez, at 649;

"Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such."

In that same vein, issues related to MERS claimed (apparently magical) ability to circumvent the historical ratio decidendi of this Commonwealth's real property law and judicial rulings have also not been examined since Eaton. MERS' claims to act as a "nominee" for an open and unidentified class of any or all unnamed "successor or assign" note owners. Such claim is clearly antithetical to this court's pronouncement from Ibanez

[3] Eaton v. Fed. Nat'l Mortgage Ass'n, 462 Mass. 569 (2012)

[4] The publication of auction sale in each of these matters predated the prospective only application of the Eaton ruling (June 22, 2012).

above related to assignments of mortgage *["…..must be treated as such"].* The terms of Petitioner's Mortgage clearly contain a limitation clause at paragraph 16 that subordinates the terms to "Applicable Law". Additionally, this Court also clearly stated in Ibanez (Applicable Law) that "the mortgage *does not* follow the Note in Massachusetts, see Id. 652-653. Further yet, there continues to exist no guidance from this Court regarding the open issue of state law related to the "nominee question". The preceding exists despite this Court twice opining its uncertainty as to the use of the term "nominee" under MERS claimed capacity to act in the "*mortgage context*", [see *Eaton*, at n. 29, and *Galiastro v. MERS* 467 Mass 160, n. 19 (2014)][5]. Thus, it is unclear whether MERS would be deemed an "agent" of the Note owner.[6] These issues continue to lack any definitive pronouncement from this Court to guide the inferior courts as well as the public.

Further, the instant ruling would also appear to be

[5] Undersigned successfully argued this matter on behalf of the Galiastro family.

[6] If deemed to be an agent, MERS would also need to identify the specific Note owner it is acting as an agent for in the purported transfer of the interest in Petitioner's title to the Respondent,…see Ibanez at 649, "…..must be treated as such…"

in conflict with Starkey v. Chase Home Finance, LLC & others, 94 Mass. App. Ct. 1, 5-6; (Sept. 11, 2018), which also involved issues related to a purported claimed previous transfer of a mortgage loan under a pooling and servicing agreement ("PSA") involving a failed bank (Washington Mutual, N.A.) and subsequent takeover by the Federal Depository Insurance Corporation ("FDIC").[7] The Starkey Court examined requirements under the PSA, and requirements to have received the transfer of assets by the "closing date".[8] Although the instant matter involves IndyMac Bank FSB, the issues examined would seem to be somewhat in parallel related to the "timing question" as related to the claim of being the [legal] "mortgage holder" sufficient to meet

[7] Tellingly, in Starkey, unlike Strawbridge and Ressler, undersigned was not threatened for merely making cogent argument regarding the PSA.

[8] Such examination would also appear to be at odds with Strawbridge, and Ressler, and in accord with Ibanez, see n. 12 below Supra. Thus, there is an unexplained dichotomy re the PSA, where the Strawbridge and Ressler Courts take the position that there can be no standing to challenge, yet this Court based its ruling in Ibanez supported by the PSA on behalf of the borrowers in that case. Despite claims otherwise, the fact that the bank trustees in Ibanez is irrelevant where this Court found that "For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests, Id at 648.

requirements under G.L. c. 183, §54B, where confronted with a securitized mortgage loan under a PSA.[9]

Undersigned was brought on by the Petitioner to solely present oral argument upon the pro-se brief at the hearing before the Appeals Court. During such oral argument, undersigned presented a detailed rebuttal to the trial court's position that "surrender" elected during an active Chapter 7 bankruptcy could not preclude a borrower such as Petitioner from raising defenses to the state in rem foreclosure proceeding under G.L. c. 244, §14. Indeed, this Court has opined that the note and mortgage require independent examination.[10] Further, undersigned provided post argument supplemental authority to the Appeals Court that stands for the

---

[9] Undersigned successfully argued this matter on behalf of the Starkeys before the Massachusetts Appeals Court, and this matter is presently on remand at the Barnstable County Superior Court under Ca. No. 0972-CV-00829. Indeed, Judge Rubin also sat on the panel of Starkey and authored its opinion, hence his apparent greater familiarity with the subject matter than the members of the majority.

[10] Although undersigned's outline for the oral argument involved extensive discussion regarding the issues related to MERS, the FDIC, and the PSA, due to the fact that no party briefed the "surrender" issue, the Panel in this matter used undersigned's entire 15 minutes discussing the bankruptcy issue, leaving no time to discuss any of the remaining issues raised. The oral argument can be reviewed at http://www.ma-appellatecourts.org/display_docket.php?src=party&dno=2018-P-0349

proposition that "surrender" is limited to a remedy solely for the Trustee to be exercised during the bankruptcy. For these reasons, and those that will be more fully set out below, the Petitioner respectful requests that this Court grant the extraordinary relief requested to take this matter up on Further Appellate Review. Petitioner respectfully reiterates this matter presets significant issues of open and undecided areas of Massachusetts state law that the Commonwealth desperately needs official guidance on, and which are also clearly capable of repetition.

2) Summary Statement

This petition for further appellate review arises out of the dispute brought by Petitioner (pro-se); in which under his First Amended Complaint, he alleged seven (7) counts; 1) Breach of Contract, 2) Lack of Standing, 3) Fraud In The Inducement, 4) Intentional Infliction, 5) Slander of Title, 6) Quiet Title, and 7) Declaratory Relief [Note and Mortgage]. In the ten (10) page pro-se appellate brief, Petitioner raised Two primary areas for review; 1) Was the 2011 alleged mortgage assignment from Indymac Bank, FSB to Respondent valid, and 2) Did substantial facts in controversy still exist when summary judgment was entered in Respondent's

favor.

While the Respondent took the position before the Appeals Court that Petitioner only appealed issues related to the assignment, while admittedly inartfully articulated by a non-legal professional, the second issue would appear to cover some if not all of the remaining counts in the complaint, should he receive a finding that the mortgage assignment was not legally effective to transfer the interest in title to the Respondent.

The succinct issues raised by Petitioner under Count II, Count VI, and Count VII of his complaint specifically involve an examination as to whether the named Respondent, Deutsche Bank National Trust Co., as Trustee of The Indymac INDX Mortgage Loan Trust 2005-AR33 [Trust] stood currently legally seized of any *current* authority under statute, by way of a legally valid assignment, to utilize the remedy of the power of sale [G.L. c. 183, §21], under the revised statutory construct of G.L. c. 244, §14.

Thus, where the Respondent claims sole authority through a purported receipt of a valid assignment of mortgage, the issue squarely presented to the majority was to examine, [under new statutory construct], whether

the Respondent was currently seized of proper statutory authority to utilize G.L. c. 244, §14 at the time of the first publication. Respondent additionally relies upon earlier purported "transfers" under the PSA.[11]

The majority made conclusory findings related to the claim that the FDIC "sold" the Petitioner's mortgage loan as part of "the assets" of Indymac to One West Bank, F.S.B.. However, there was no document presented within the record to support this claim related to the specific transfer of the interest of Petitioner's title, and thus genuine issues of dispute remained regarding this issue.[12] [13]

The majority also clearly ignored the admonition twice opined by this Court that it is unsure as to what the meaning on "nominee" would be in the mortgage context

---

[11] The preceding examination involved the precise assignment of mortgage contained within the record upon summary judgment [and reference to the specific PSA], which clearly could not have been examined in any other cited matter.

[12] This Court also spoke to what requirements are necessary when relying upon a "PSA" to transfer a mortgage, see Ibanez, at p. 651; "However, there must be proof that the assignment was made by a party that itself held the mortgage" (IndyMac MBS, Inc.).

[13] This is also somewhat similar to the issue in Starkey where there was also no loan schedule provided that supported the claim that the Starkey mortgage (in particular) was part of the certain assets of WaMu acquired by the FDIC.

and could only "assume" that it related to the "agency question". The majority made no inquiry into this open question of law, or even considered the same under its de novo review. The Panel freely refers to the PSA for support that the "PSA provided that IndyMac transferred its interest in each mortgage loan without recourse to Indymac MBS, Inc., which in turn transferred those interest to "Deutsche Bank"". Again, there was no document submitted by Respondent in the record that specifically identified Petitioner's mortgage as being one transferred to "Indymac MBS, Inc.", or one what was transferred from Indymac MBS, Inc. to Respondent. Again, a transfer of a mortgage is a transfer of an interest in land; ["must be treated as such", see Ibanez at p. 649]. To this end, the ancillary claim by Respondent (and accepted by the majority) is that Mortgage Electronic Registration Systems Inc. ("MERS") somehow has the magical ability to evade centuries old real property law of this Commonwealth, merely because its "system" has created rules to be followed.[14] The majority also focused on the wording contained within the Petitioner's

[14] Petitioner respectfully queries, what authority stands for the proposition that a company set of rules is somehow controlling over the requirements of state law.

Mortgage contract identifying MERS as the "mortgagee"; and that these terms also 'authorized' MERS to act as a representative of Indymac [Bank, N.A.] AND its successors and assigns, AND the successor/assigns of MERS, and therefore MERS had the 'authority' to 'represent' Deutsche Bank. The Panel failed to review paragraph 16 of the Mortgage contract which subordinates the contractual terms of the Mortgage to the "Applicable Law" [defined term under the contract], rendering such contractual terms a nullity. Where MERS admits it does not own or hold notes, and purports to "act" as an undefined "nominee" for no specifically identified note owner, the contractual language of the Mortgage describing MERS as "the mortgagee", is now clearly subject to this Court's ruling in Eaton that changed the statutory interpretation of this term.[15] Purported

[15] Thus, cases like *Strawbridge v. Bank of N.Y. Mellon*, 91 Mass. App. Ct. 827 (2017) and *Ressler v. Deutsche Bank Trust Co. Americas*, 92 Mass. App. Ct. 502 (2017)", which held that the prospective effect of Eaton had no bearing on previously decided case law under the pre-Eaton paradigm (no examination of note) and equally controlling post Eaton, misstep of the law. Indeed, at oral argument in Starkey when the financial industry counsel attempted to attack undersigned with these holdings, Judge Rubin responded that he was "not a fan" of those decisions. Case law decisions merely parroting other holdings finding that claims that a borrower "lacks standing to challenge an assignment on those grounds". Reliance upon the theory expressed under these

"transfers" under a PSA are not immune from Massachusetts real property law, [see Ibanez at p. 649]. Additionally, the trial court findings related to its position that electing "surrender" in bankruptcy would somehow estop the Petitioner from defending the Massachusetts in rem foreclosure process is also not

---

rulings completely missteps both procedurally and on the statement of the law. **Petitioner does not seek to enforce any "rights" under the terms of the PSA, but rather he seeks to defend his title on the basis of the invalidity of the assignment that Respondent solely relies upon;** [compare *Sullivan v. Kondaur Capital, LLC*, 85 Mass. App. Ct. 85 Mass. App. Ct. 202, 205-207 (2014)] ("*However, that is not the position the Sullivans occupy, since they are not seeking to enforce any rights under either assignment. Instead, by their complaint they seek to challenge Kondaur's claim of title to the property the Sullivans formerly owned, which derives from foreclosure of the mortgage Kondaur claims to have acquired by virtue of the first and second assignments. Kondaur held legal authority to conduct the foreclosure, under the statutory power of sale contained in the mortgage, only if it held a valid title to the mortgage at the time it gave the notice of foreclosure required under G. L. c. 244, § 14, and at the time it exercised the power of sale. See U.S. Bank Natl. Assn. v. Ibanez, 458 Mass. 637 , 647-648 (2011). If it did not hold a valid title to the mortgage at the relevant times, the foreclosure would be void, as would Kondaur's claim to have extinguished the Sullivans' equity of redemption. Id. Put another way, the legally cognizable interest the Sullivans seek to protect by their complaint is their ownership interest in the property, based on their claim that Kondaur's purported foreclosure was void by reason of its lack of legal authority to conduct it. [Note 7] We accordingly conclude that the Sullivans have standing to challenge the validity of the assignments by which Kondaur claims to have acquired the mortgage. [Note 8]*
.

consistent with decided case law and/or common sense.

The instant request for extraordinary relief by Application to this Court is also based on the open issues that have never been independently addressed by this court after its decisions in *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637 (2011), and *Eaton v. Fed. Nat'l Mortgage Ass'n* 462 Mass. 569 (2012).

Respectfully submitted, the trial court opinion and Affirmance by the majority misstep both factually and procedurally. Unlike prior decisions from the Appeals Court that have sought further Appellate Review, here there is a very strong dissent presented by Rubin, J.. Indeed, Judge Rubin respectfully discusses these issues, and challenges the majority as to its findings. Judge Rubin goes further than merely opining as to his subjective viewpoint, as he supplies "black letter law" from this Commonwealth that clearly supports both his dissent, and his concern that the instant ruling may create mischief to potentially invalidate titles to real property within this Commonwealth.

3 *Statement of the Undisputed Facts Relevant to this Petition*

On November 18, 2005, the Petitioner entered into a mortgage loan transaction, whereby he executed a

promissory Note specifically in favor of Indymac Bank, FSB, as the "Lender" and payee in the amount of $322,500.00, [RA0503 to RA0519]. On the same date, the Petitioner also entered into a bargained for bilateral Security Instrument contractual agreement specifically naming Indymac Bank, FSB, as "the Lender" [RA0521 to RA0538]. The said agreement consisted of a Security Instrument Contract [Mortgage], whereby the Petitioner deeded a defeasible fee title interest in their real property and granted the contractual right to the power of sale, to "the Lender". However, at paragraph (C), P. 1, the bargained for terms of the mortgage contract between the parties states that *"MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's assigns. MERS is the mortgagee under this Security Instrument"* [RA0521]. The Mortgage contract terms include the paragraph 16 Governing Law paragraph [RA530] that specifically include a "limitations clause", whereby such terms of the Mortgage contract are *subordinated* to "Applicable Law", [RA0522, at (I) "Applicable Law"] a contractually defined term within the mortgage contract .[16] The Respondent repeatedly

[16] See also [Power of Sale] G.L. c. 183, §21, "*....first complying with the terms of the mortgage and the statutes*

claims that "after origination the Petitioner's specific Note was "pooled with other notes in a securitized trust", but fails to definitively establish that Petitioner's Note was among those purportedly "pooled". The Respondent appears to rely upon the fact that the assignment is recorded to establish its validity.[17] There are no writings associated with purported numerous transfers of the interest in Petitioner's real property, save the purported solitary assignment that Respondent relies upon. The preceding is alleged, despite Respondent admitting that there were numerous sales/transfers of Petitioner's mortgage loan.

On December 06, 2011, a purported "assignment" is executed, claiming on its face that MERS as "nominee" [specifically] for Indymac Bank F.S.B. does hereby grant, sell, assign, transfer, and convey unto Respondent "it's right title and interest" in Plaintiff's Mortgage [together with the Notes and obligations therein described...] [RA0540]. The Respondent thereafter published the notice of auction sale, which relied solely on obtaining the above

---

relating to the foreclosure of mortgages....."

[17] But see Bevilacqua v. Rodriguez, 460 Mass. 762, 771 (SJC 2011)

described assignment from a non-existent legal entity [Indymac Bank FSB was no longer in existence at the time of the execution].

Subsequently, October 05, 2011, Respondent filed for relief under Chapter 13, under Ca. No. 11-19499 [RA0542]. Respondent thereafter filed a Motion to convert the Chapter 13 bankruptcy to one under Chapter 11, which was granted on November 29, 2011, [RA0579]. The Debtor elected to provide the Trustee in the bankruptcy with the remedy of Surrender [not Respondent], and so elected, [RA0581]. Thereafter, Respondent filed a Motion to convert the Chapter 11 proceeding to one under Chapter 7, which was granted by the Court on February 26, 2013 [RA0583]. Thereafter, the Chapter 7 Trustee filed his Notice to Abandon the Property as it was of no benefit or value to the bankruptcy estate [RA0585]. On December 03, 2013, the Respondent received a discharge under the Chapter 7 case [RA0588]. Thereafter, the Respondent received a 150-day Right to Cure Mortgage Default letter dated January 30, 2015 [RA0592]. The letter deceptively only provided notice under a small paragraph in a "Disclosures" section, first para. [which was not emboldened] that *"..if you have received an order of discharge, please be*

advised that this is not an attempt to collect a pre-petition or discharged debt." [RA0595].[18] Thereafter, Petitioner received correspondence that provided a copy of the Notice of auction sale, which also specifically identified that MERS acted "solely" as "nominee" for Indymac Bank, FSB under the purported assignment (secondary evidence of the claimed capacity in which MERS purported to "act") [RA0615].

4) Statement of the Prior Proceedings

In response to the Respondent's initiation of the statutory foreclosure process by publication, on April 13, 2016, the Petitioner filed an emergency Motion for Preliminary Injunction, along with an underlying verified complaint. On April 22, 2016, the Petitioner filed the operative first amended complaint. After several issues related to hearings and scheduling, on August 17, 2016, Respondent filed an Answer to Petitioner's first amended complaint. On January 17, 2017, Respondent filed his pro se Motion for Summary Judgment. On February 10, 2017, Respondent filed its cross Motion for Summary Judgment, Manning Affidavit,

[18] Of course, should a least sophisticated borrower miss or fail to understand this admonition and then make a "payment to cure", the discharged debt would again become fully animated much like Frankenstein's monster.

Statement of Material Facts, and Joint Appendix, as well as Motion to Strike Petitioner's Affidavit of William Paatalo. Also filed on February 10, 2017, was Petitioner's Opposition to Respondent's Motion for Summary Judgment, with Affidavit of William Paatalo. On February 17, 2017, Respondent filed its Reply Brief. On February 21, 2017 Respondent filed its Motion to Strike Petitioner's Affidavit. On February 23, 2017 hearing was held on the parties cross motions for Summary Judgment. On June 26, 2017, the trial court issued its Order Denying Petitioner's R. 56 Motion and Allowing the R. 56 Motion of Respondent. On June 26, 2017, the Court issued its Order relative to Respondent's Motion to Strike the Petitioner's Paatalo Affidavit, which was allowed in part and denied in part relative only to "legal opinions" expressed therein. On July 06, 2017 the Court entered its ruling on Summary Judgment. On August 04, 2017, Petitioner filed his Notice of Appeal. After numerous post judgment Motions, on March 06, 2018, the trial court finished its assembly of the record on appeal. On March 15, 2018, Petitioner officially entered the appeal on the Appeals Court docket. On August 21, 2019, the Appeals Court Issued its Full Opinion, which also included the Dissent of Rubin, J.

5. *Points Upon Which Further Appellate Review Is Sought*

A. *Whether The Majority Erred In Failing To Apply Well Settled And Centuries Old Massachusetts Real Property Law Regarding Petitioner's Challenge To The Assignment As Void In The Defense of The Title To His Real Property*

Respectfully submitted, the majority merely resorted to making conclusory findings of law unsupported by the evidence within the summary judgment record. For instance, the majority freely and repeatedly states that the terms of the mortgage allowed MERS to act as "mortgagee", and therefore because the terms authorized MERS to act for the Lender and the Lender's successors/assigns, the assignment was not void:

"Because the mortgage instrument gave MERS the authority to act as representative of IndyMac or its "successors or assigns, "MERS had the authority to represent Deutsche Bank in the 2011 assignment. The assignment was therefore valid, and not void."

The majority failed to even consider the impact of this Court's ruling in Eaton under paragraph 16 of the Petitioner's Mortgage contract [RA0051], which clause indisputably subordinates the operative effect of the contractual language to "Applicable Law", a contractually defined term, which includes deference to all final, non-appealable, judicial rulings [RA0043, at ¶(I)]. Clearly the Eaton ruling fits the preceding

criteria of "Applicable Law".

It is undisputed that MERS admits that it does not own or hold Notes, see Eaton at n. 27, and Culhane v. Aurora Loan Servcs. of Neb., 708 F. 3d. 282, 287 (1st Cir. 2013);

"The upshot of this arrangement is that MERS holds the legal title to the mortgage as mortgagee of record, but it does not have any beneficial interest in the loan."

In addition, this Court has twice opined its uncertainty as to the purported "nominee" status of MERS:

"MERS accepted, for purposes of the motion to dismiss, the Galiastros' allegation that it was not an authorized agent of the note holder. See note 8, supra. On appeal, MERS argues for the first time that it was an agent of the note holder and thus should prevail even if the conclusion reached in Eaton applies. As support, MERS points to a clause in the Galiastros' mortgage providing that MERS is a "nominee for Lender and Lender's successors and assigns." As was the case in Eaton, supra at 590 n.4, "[i]t is not clear what 'nominee' means in this context, but the use of the word may have some bearing on the agency question.", Galiastro v. MERS, 467 Mass. 160, at n. 29 (SJC 2014)

Thus, where MERS admits; 1) that it is not a note owner, and 2) this Court has never definitively stated that MERS is an "agent" of a note holder, [Eaton at n. 29] MERS cannot currently meet the definition of a "mortgagee". Thus, despite contractual language stating MERS is the "mortgagee", said language is clearly subject to the preceding and paragraph 16 of the Mortgage. Therefore, the majority's sole reliance upon

the terms of the Mortgage is misplaced.

In this same vein the Mortgage terms stating that MERS can simultaneously act as a "nominee" for the Lender [note owner] and the successors/assigns of the Lender [note owners] and the successor assigns of MERS also would be subordinated to the law of this Commonwealth. This Court examined claimed mortgage assignments, and the capacity that a purported mortgage holder (solely) would be a mere reversionary trustee without any independent authority to take "affirmative acts"; see Eaton, n. 10:

"Citing In re Marron, 455 B.R. 1, 6-7 (Bankr. D. Mass. 2011), the defendants suggest that because a mortgage and note can be separated, with the mortgage held in trust for the note holder, a mortgagee with "bare legal title" should be able independently to foreclose on the mortgage property as the trustee of the note holder, and thereafter account to the note holder for the sale proceeds. The argument, however, fails to take into account the nature of the trust at issue. This trust is an equitable device that may qualify as a resulting trust, see Young v. Miller, 6 Gray 152, 154 (1856); **it is not an express trust that vests specific, independent authority in the trustee to foreclose on the trust property or to take other affirmative acts**."

It is also undisputed that this Court definitively stated in Ibanez that the mortgage *does not* follow the Note in this Commonwealth, see Ibanez at p. 651:

"In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v.

Boardman, 149 Mass. 106, 114 (1889).”

In addition, in Ibanez, this Court clearly identified that as Massachusetts is a title theory jurisdiction, which requires a writing from the grantor:

“Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.” Ibanez, at 649.[19]

Indeed, the Dissent authored by Judge Rubin picks up on this theme at p. 1

"It is black letter law in this Commonwealth that one who holds an interest in property in one capacity may convey it only when acting in that capacity. See, e.g., Bongaards v. Millen, 440 Mass. 10, 14 (2003) ("D'Amore held the property as trustee for the beneficiaries of the trust, and she lacked power to convey the property in her individual capacity").

Plaintiff challenged the assignment as being void due to the fact it states on its face that the grantor was MERS as nominee for *Indymac Bank, FSB*, at a time when Indymac Bank, FSB no longer existed. As Judge Rubin finds through decided case law of this Commonwealth, MERS could only convey an interest in property in the capacity as a resulting trustee specifically for Indymac Bank, FSB, [despite contractual language purporting to authorize

[19] In fact. this Court in Eaton went so far as to say that a holder of a mortgage unconnected to a note is in possession of nothing of value, see Eaton at p. 577

its (unknown) nominee capacity to act for successors/assigns]. The majority based its ruling solely upon the terms of the mortgage contract. Again, as the Dissent points out, the majority's finding finds no authority under Massachusetts state law or any case law decision from this Court examining the same:

"I note, however, that I am aware of no authority, and the majority cites none, answering the question whether an assignment like that purporting to be by a nominee acting on behalf of some nonspecific open and indefinite class, rather than on behalf of the actual note holder, would suffice to identify the capacity in which the assignor was acting." Dissent at 2.

The majority failed to properly apply very long held tenants of Massachusetts real property law by failing to properly examine the terms of the Mortgage contract, specifically paragraph 16 [as required under G.L. c. 183, §21], which was compounded by a further failure to carefully review and apply the direction from this Court under the Ibanez, Eaton, and Galiastro, decisions. Again, the Commonwealth desperately needs direction from this Court regarding these open areas of Massachusetts state law.

1. *The Majority Improperly Applied G.L. c. 183, §54B*

As correctly identified by the Dissent, the majority correctly identifies that G.L. c. 183, §54B determines whether an assignment is void;

"As the majority notes, "Whether a mortgage assignment in Massachusetts is valid or void is determined by statute. See G. L. c. 183, § 54B. See also Bank of N.Y. Mellon Corp. v. Wain, 85 Mass. App. Ct. 498, 503 (2014)." Dissent at 3

However, the Dissent states at p. 2:

"[N]owhere on the face of the instrument is there any indication or evidence that [the signatory] was, or in any manner purported to be, an officer or other authorized agent of "the owner of the interest in the mortgage, MERS as nominee for Deutsche Bank. Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202, 213 (2014).

The majority clearly erred by failing to apply and/or consider well settled Massachusetts state law that leaves the purported assignment void:

"Indeed, the majority recognizes that an assignment "is effective to pass legal title and 'cannot be shown to be void'" when "the assignment is (1) ***made by the mortgage holder or its representative****, (2) executed before a notary public, and (3) rather than signed by an authorized employee of the mortgage holder." Ante at , quoting Wain, 85 Mass. App. Ct. at 503.* ***Here the assignment was not made by the mortgage holder****." Dissent at 3-4*

B. *The Majority Failed To Consider This Court's Direction In Ibanez Where Relying Upon A PSA To Assign A Mortgage*

The majority freely refers to the PSA for support of proof of the transfer of Petitioner's "mortgage loan" happened in 2005 [prior to Indymac Bank FSB failure]:

"Pursuant to the pooling and servicing agreement, IndyMac transferred its interest in Giannasca's mortgage loan to Deutsche Bank in 2005, long before IndyMac's failure. Thus, in 2005 Deutsche Bank became the successor to IndyMac's interest in Giannasca's mortgage

loan."

However, it is undisputed that the face of the purported assignment that Respondent relies upon identifies that it was executed on December 06, 2011, not 2005 [RA0067].[20] The majority also fails to specifically identify "Indymac" as Indymac Bank FSB". Indeed, the majority also finds the following:

"In 2008, IndyMac failed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of its assets and obligations. In 2009, the FDIC sold the assets of Indymac to One West Bank, F.S.B. In December 2011, MERS, acting "solely as nominee for IndyMac Bank, F.S.B.," assigned the "[m]ortgage . . . executed by . . . Giannasca" to Deutsche Bank." *Majority at p. 6*.

Yet at p. 3 of the majority opinion the Court it incongruently states:

"In 2005, the promissory note was pooled with other such instruments in a securitized trust, IndyMac INDX Mortgage Loan Trust 2005-AR33 Mortgage Pass-Through Certificates, Series 2005-AR33. Deutsche Bank was trustee for the trust. ***The pooling and servicing agreement provided that IndyMac transferred its interest in each mortgage loan without recourse to IndyMac MBS, Inc., which, in turn, transferred those interests to Deutsche Bank".***

Thus, here at p. 3, the majority clearly makes a finding that "Indymac [Bank FSB]" transferred its interest in "each mortgage loan" to Indymac MBS, Inc, and then

[20] If Respondent claims that this is a "confirmatory assignment", this Court spoke to those requirements in Ibanez at p. 654.

Indymac MBS, Inc transferred those interests to Respondent. Thus, according to the Court's finding, it was Indymac MBS, Inc., not Indymac Bank FSB that purportedly assigned its interest in Petitioner's Mortgage to the Respondent in 2005. If this was so, why is the purported assignment grantor identified as MERS as nominee for Indymac Bank FSB that assigned the Mortgage loan to Respondent in 2011. There is no writing that supports that MERS acted as "nominee" for Indymac MBS, Inc. under any purported "assignment" to Respondent, as stated as relied upon under the PSA by the majority.[21] Further there are no writings supporting the Respondent's claim that Petitioners mortgage was 1) part of the "mortgage assets" sold to respondent by Indymac MBS Inc. in 2005. Again, this Court examined the requirements necessary when relying upon the PSA to assign a mortgage; see Ibanez at p. 651, "*However, there must be proof that the assignment was made by a party that itself held the mortgage"* (Indymac MBS, Inc.).[22]

---

[21] If Respondent attempts to rely upon the PSA itself, this Court has stated that there must be proof that the entity owned the mortgage it was assigning thereunder, see Ibanez at p 651.

[22] Additionally, the wording in Ibanez at p. 651 stating that "A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder

Under the Court's own findings there were numerous purported sales/transfers of the Petitioner's "mortgage loan". If "mortgage loan" is read to be the Note, we clearly have numerous transfers of Petitioners Note.[23] Additionally, as the Dissent notes, MERS capacity on the assignment is solely one of a resulting trustee to act as a "nominee" solely for Indymac Bank FSB, a non-existent legal entity. The preceding leaves the assignment void as representing nothing of value, see Eaton at p. 577 (mortgage unconnected to a note is a nullity), see also Dissent at p. 1, quoting *Bongaards v. Millen, 440 Mass. 10, 14 (2003)*. See also Eaton at n. 10, (holder of a mortgage singly lacks capacity to undertake any [autonomous] "affirmative act").

1. ***Petitioner Has Standing To Challenge Assignment As Void***

---

of the mortgage [citing In re Parris, 326 B.R. 798, 20 (Bankr. N.D. Ohio 2005); ["If the claimant acquired the note and mortgage from the original lender, **or from another party or acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant**")."

[23] Therefore, Petitioner queries how exactly the terms of Petitioner's mortgage stating that a purported mortgage holder (MERS) could automatically remain the recorded title holder for all future successors and assigns of the lender [note owners] with no writings assigning the underlying security interest to these purported successive purchasers of the Note. Clearly the preceding would not comport with the findings by this Court in Ibanez or with Massachusetts state law.

The Dissent correctly identifies that the assignment is void under G.L. c. 183, §54B, where MERS claims to act as a "nominee" for a legally defunct entity, and the terms claiming that MERS could act for any all of a future open class of "successor/assigns has no foundational basis under the law of this Commonwealth.

The appeals court has previously opined on a borrower's standing to challenge an assignment (albeit not under the PSA), see Sullivan v. Kondaur Capital Corp. 85 Mass App Ct. 202, 205-206 (2014):

"Observing that the Sullivans are neither parties to nor intended beneficiaries of the first assignment or the second assignment, Kondaur contends that they are without standing to challenge the validity of either instrument. It is of course true that a nonparty who does not benefit from a contract generally is without standing to enforce rights under it. See, e.g., Cumis Ins. Soc., Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458 , 464 (2009). **However, that is not the position the Sullivans occupy, since they are not seeking to enforce any rights under either assignment. Instead, by their complaint they seek to challenge Kondaur's claim of title to the property the Sullivans formerly owned, which derives from foreclosure of the mortgage Kondaur claims to have acquired by virtue of the first and second assignments.** Kondaur held legal authority to conduct the foreclosure, under the statutory power of sale contained in the mortgage, only if it held a valid title to the mortgage at the time it gave the notice of foreclosure required under G. L. c. 244, § 14, and at the time it exercised the power of sale. See U.S. Bank Natl. Assn. v. Ibanez, 458 Mass. 637 , 647-648 (2011). If it did not hold a valid title to the mortgage at the relevant times, the foreclosure would be void, as would Kondaur's claim

to have extinguished the Sullivans' equity of redemption.

This Court clearly found in Ibanez that the preceding would also hold true under a PSA:

"Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, *but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such*."

C. *Petitioner's Election of Surrender Has No Bearing On His Ability To Defend His Title Under The State Statutory Remedy*

Neither party briefed this issue on Appeal. However, undersigned extensively presented oral argument at the hearing on appeal.[24] Undersigned also submitted supplemental authority that included citation to *Everbank v. Chacon*, 92 Mass. App. Ct. 1101 (2017), and *In re Claflin*, 249 B.R. 840, at n. 6 (1st Cir. BAP Mass 2000), citing; and *In re Lair*, 235 B.R. 1, 60-61 (Bankr.M.D.La. 1999).

6. *Conclusion*

For all the foregoing reasons, it is respectfully requested that this Petition for Further Appellate Review be Allowed.

[24] Which can be reviewed at http://www.ma-appellatecourts.org/display_docket.php?src=party&dno=2018-P-0349

Respectfully Submitted,
Petitioner,
by their Attorney

Glenn F. Russell, Jr.
Glenn F. Russell, Jr.
BBO# 656914

Glenn F. Russell, Jr., &
Associates, P.C.
38 Rock Street, #12
Fall River, MA 02720
Phone: (508) 324-4545
Fax: (508) 938-0244
russ45esq@gmail.com

CERTIFICATE OF SERVICE

I, Glenn F. Russell, Jr., hereby certify that on this 10th day of October 2019, I emailed a copy of the preceding Application for Further Appellate Review to the Defendants counsel of record listed below, and have placed the same with USPS to be served a copy of the Appellants' Application for Further Appellate Review, postage prepaid, on the following counsel of record:

James A. Ponsetto Esq.
Cliff Anderson Esq.
GREENBERG TRAUIG, LLP
One International Place, 20th Floor
Boston, MA 02110

Glenn F. Russell, Jr.
Glenn F. Russell, Jr.

Document: Giannasca v. Deutsche Bank National Trust Company

Giannasca v. Deutsche Bank National Trust Company

Appeals Court of Massachusetts

March 6, 2019, Argued; August 21, 2019, Decided

No. 18-P-349.

Reporter

95 Mass. App. Ct. 775 | 2019 Mass. App. LEXIS 105

ANTHONY GIANNASCA *vs.* **DEUTSCHE BANK NATIONAL TRUST COMPANY**, trustee,[1] & others.[2]

Prior History: Middlesex. CIVIL ACTION commenced in the Superior Court Department on April 13, 2016.

The case was heard by *Peter B. Krupp*, J., on motions for summary judgment.

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Assignment > *Mortgage* > Assignment > Foreclosure > *Real Property* > Mortgage > *Practice, Civil* > Standing

In a civil action challenging a mortgage foreclosure, a Superior Court judge properly allowed summary judgment in favor of the defendant bank, where the assignment of the mortgage from the original mortgagee (acting as a nominee for the lender and the lender's successors and assigns) to the defendant was valid, in that the assignment was executed by an authorized employee of the original mortgagee and was verified by a notary public, and in that the plaintiff did not show that the original mortgagee was not a representative of the legal mortgage holder at the time of its assignment to the defendant — i.e., given that the lender transferred its interest in the mortgage loan to the defendant long before the lender's failure, and thus the defendant became the successor to the lender's interest in the loan, the original mortgagee had the authority to represent the defendant in the assignment. [777-778] RUBIN, J., dissenting.

Counsel: *Glenn F. Russell, Jr.*, for the plaintiff.

James P. Ponsetto for the defendants.

Judges: Present: RUBIN, KINDER, & SINGH, JJ.

Opinion by: KINDER

Opinion

KINDER, J. This action arises from a home mortgage foreclosure. The plaintiff, mortgagor Anthony **Giannasca**, brought the underlying complaint seeking, among other things, a declaratory judgment that defendant Deutsche Bank National Trust Company (Deutsche Bank) had no enforceable mortgage interest in **Giannasca**'s property at 9 Joseph Street in Medford (property). Specifically, Gi- annasca claimed that the assignment of his mortgage from the original mortgagee, Mortgage Electronic Registration Systems, Inc. (MERS), to Deutsche Bank was invalid and that, as a consequence, Deutsche Bank had no mortgage interest to foreclose upon. A Superior Court judge disagreed and allowed summary judgment in favor of Deutsche Bank. **Giannasca** challenges that conclusion on appeal. We affirm.

Background. We summarize the facts contained in the summary judgment record in the light most favorable to **Giannasca**. See *Barrasso* v. *New Century Mtge. Corp.*, 91 Mass. App. Ct. 42, 43, 69 N.E.3d 1010 (2017). In November 2005, in connection with his purchase of the property, **Giannasca** executed a promissory note in the amount of $332,500 in favor of IndyMac Bank, F.S.B. (IndyMac), and a mortgage to secure repayment of the loan. MERS was named as the mortgagee, "solely as a nominee for Lender [IndyMac] and Lender's successors and assigns." The mortgage instrument further stated, "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale" the property. In 2005, the promissory note was pooled with other such instruments in a securitized trust, IndyMac INDX Mortgage Loan Trust 2005-AR33 Mortgage Pass-Through Certificates, Series 2005-AR33. Deutsche Bank was trustee for the trust. The pooling and servicing agreement provided that IndyMac transferred its interest in each mortgage loan without recourse to IndyMac MBS, Inc., which, in turn, transferred those interests to Deutsche Bank.

In 2008, IndyMac failed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of its assets and obligations. In 2009, FDIC sold the assets of IndyMac to OneWest Bank, F.S.B. In December 2011, MERS, acting "solely as nominee for IndyMac Bank, F.S.B.," assigned the "[m]ortgage ... executed by ... **Giannasca**" to Deutsche Bank.

On October 5, 2011, **Giannasca** filed a petition for personal bankruptcy. On January 7, 2013, he filed a notice of intent to surrender the property "to the mortgagee, [OneWest Bank, F.S.B.]"[3] On November 18, 2013, the bankruptcy trustee filed a notice of intent to abandon the property because it had no equity. The property had a fair market value of $244,700, but the outstanding mortgage debt was $415,686.48. On December 3, 2013, **Giannasca**'s personal liability on the debt was discharged in the bankruptcy proceeding.

In a letter dated January 30, 2015, after **Giannasca** failed to make five consecutive mortgage payments, Deutsche Bank's loan servicer notified him of his right to cure the past due amount within 150 days. **Giannasca** failed to do so, and Deutsche Bank commenced foreclosure proceedings in September 2015.

In April 2016, **Giannasca** filed a complaint in the Superior Court seeking, among other things, declaratory relief that Deutsche Bank had no enforceable mortgage interest in the property. Ultimately, on cross motions for summary judgment, a Superior Court judge allowed summary judgment in favor of Deutsche Bank, reasoning that **Giannasca**'s filing of a notice of intent to surrender the property in the bankruptcy action estopped him from contesting the foreclosure. The judge also concluded that the assignment of the mortgage interest to Deutsche Bank was valid. On appeal, **Giannasca** challenges only the validity of the assignment.

Discussion. **Giannasca** claims that the assignment to Deutsche Bank was invalid because IndyMac, on whose behalf MERS purported to act when it assigned the mortgage, did not, because of its 2009 dissolution, have any interest in the mortgage at the time of the assignment.[4] We review a grant of summary judgment de novo and determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991).

"[A] foreclosing mortgagee must demonstrate an unbroken chain of assignments in order to foreclose a mortgage, see [*U.S. Bank Nat'l Ass'n* v. *Ibanez*, 458 Mass. 637, 651, 941 N.E.2d 40 (2011)], and ... that it holds the note (or acts as authorized agent for the note holder) at the time it commences foreclosure, see [*Eaton* v. *Federal Nat'l Mtge. Ass'n*, 462 Mass. 569, 586, 969 N.E.2d 1118 (2012)], [but] nothing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior holders of the record legal interest in the mort- gage also held the note at the

time each assigned its interest in the mortgage to the next holder in the chain." *Sullivan* v. *Kondaur Capital Corp.*, 85 Mass. App. Ct. 202, 210, 7 N.E.3d 1113 (2014).

For a mortgagor to have standing to challenge an assignment purporting to give a foreclosing mortgagee legal title and the authority to conduct a foreclosure sale, a mortgagor must claim the assignment was void and not merely voidable. See *Sullivan*, 85 Mass. App. Ct. at 206 n.7. Whether a mortgage assignment in Massachusetts is valid or void is determined by statute. See G. L. c. 183, § 54B. See also *Bank of N.Y. Mellon Corp.* v. *Wain*, 85 Mass. App. Ct. 498, 503, 11 N.E.3d 633 (2014). If the assignment is (1) made by the mortgage holder or its representative, (2) executed before a notary public, and (3) signed by an authorized employee of the mortgage holder, it is effective to pass legal title and "cannot be shown to be void." *Id.*

Here, it is undisputed that the assignment was executed by an authorized employee of MERS, and that the execution was verified by a notary public. **Giannasca** has not shown, and nothing in the record suggests, that MERS was not a representative of the legal mortgage holder at the time of its assignment to Deutsche Bank. Pursuant to the pooling and servicing agreement, IndyMac transferred its interest in **Giannasca**'s mortgage loan to Deutsche Bank in 2005, long before IndyMac's failure. Thus, in 2005 Deutsche Bank became the successor to IndyMac's interest in **Giannasca**'s mortgage loan. Because the mortgage instrument gave MERS the authority to act as representative of IndyMac or its "successors or assigns," MERS had the authority to represent Deutsche Bank in the 2011 assignment. The assignment was therefore valid and not void. Accordingly, "[b]ecause the record title holder of the mortgage satisfied the dictates of the statute governing the assignment of mortgages, [**Giannasca** has] no basis for arguing that the assignment is void. Regardless of whether any hidden problems [he seeks] to raise might provide a basis for a third party to claim that the assignment was potentially voidable, [**Giannasca** himself has] no right to raise such issues."[5] *Bank of N.Y. Mellon Corp.*, 85 Mass. App. Ct. at 504.

Judgment affirmed.

Dissent by: RUBIN

Dissent

Rubin, J. (dissenting). The assignment in this case purports to be from Mortgage Electronic Registration Systems, Inc. (MERS), acting "solely as nominee for IndyMac Bank, F.S.B." But at the time of the alleged assignment, IndyMac Bank, F.S.B., had no interest in the mortgage. Indeed, it had failed and did not exist. The mortgage holder was apparently MERS, as nominee for Deutsche Bank National Trust Company (Deutsche Bank), as trustee for the IndyMac INDX Mortgage Loan Trust 2005-AR33, Mortgage Pass-Through Certificates, Series 2005-AR33, under the pooling and servicing agreement dated December 1, 2005.[1]

It is black letter law in this Commonwealth that one who holds an interest in property in one capacity may convey it only when acting in that capacity. See, e.g., *Bongaards* v. *Millen*, 440 Mass. 10, 14, 793 N.E.2d 335 (2003) ("D'Amore held the property as trustee for the beneficiaries of the trust, and she lacked power to convey the property in her individual capacity"). "Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor." *U.S. Bank Nat'l Ass'n* v. *Ibanez*, 458 Mass. 637, 649, 941 N.E.2d 40 (2011). The grantor, MERS, solely as nominee for IndyMac Bank, F.S.B., did not hold the mortgage, that is, legal title to the property. See *id.* ("Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such"). "Where, as here, the grantor has nothing to convey, ... [t]he purported conveyance is a nullity, notwithstanding the parties' intent." *Bongaards*, *supra* at 15.

"[N]owhere on the face of the instrument is there any indication or evidence that [the signatory] was, or in any manner purported to be, an officer or other authorized agent of" the owner of the interest in the mortgage, MERS as nominee for Deutsche Bank. *Sullivan* v. *Kondaur Capital Corp.*, 85 Mass. App. Ct. 202, 213, 7 N.E.3d 1113 (2014).[2] It therefore was void, and **Giannasca** has standing to challenge it. As the majority notes, "Whether a mortgage assignment in Massachusetts is valid or void is determined by statute. See G. L. c. 183, § 54B. See also *Bank of N.Y. Mellon Corp.* v. *Wain*, 85 Mass. App. Ct. 498, 503, 11 N.E.3d 633 (2014)." *Ante* at 778. That statute provides, in relevant part, that an assignment "by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, *of the entity holding such mortgage*, or otherwise purporting to be an authorized signatory for such entity, or acting under such power of attorney on behalf of such entity, acting in its own capacity or as a general partner or co-venturer of the entity holding such mortgage, shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording" (emphasis added). G. L. c. 183, § 54B.

Indeed, the majority recognizes that an assignment "is effective to pass legal title and 'cannot be shown to be void'" when "the assignment is (1) made by the mortgage holder or its representative, (2) executed before a notary public, and (3) signed by an authorized employee of the mortgage holder." *Ante* at 778, quoting *Bank of N.Y. Mellon Corp.*, 85 Mass. App. Ct. at 503. Here, the assignment was not made by the mortgage holder.

I therefore must dissent from the majority holding that this assignment was not void. Perhaps the signature on behalf of MERS in the incorrect capacity is the result of nothing more than the sloppy work of the party purporting to hold the mortgage. See *Sullivan*, 85 Mass. App. Ct. at 213, quoting *Ibanez*, 458 Mass. at 655 (Cordy, J., concurring) ("what is surprising about these cases is ... the utter carelessness with which the [foreclosing lenders] documented the titles to their assets"). But the majority's decision upsets settled law: "Massachusetts is a title theory state," *Faneuil Investors Group, Ltd. Partnership* v. *Selectmen of Dennis*, 458 Mass. 1, 6, 933 N.E.2d 918 (2010), and today's decision may call into question the title to many pieces of property, those in whose chain of title an assignment or other conveyance was made in the wrong capacity — say, individually instead of as trustee — whose subsequent purchasers have relied on the status of such assignments and conveyances as a nullity. So although today's decision may give the impression of cleaning up a technical flaw, i.e., a minor misstep in the scheme of the multitude of mortgage foreclosures precipitated by the financial crisis of 2007 and 2008, I fear that, compared with requiring a new, proper assignment, today's decision may create an enormous amount of mischief. With respect, I therefore dissent.

Footnotes

1 Of the IndyMac INDX Mortgage Loan Trust 2005-AR33, Mortgage Pass Through Certificates, Series 2005-AR33.

2 OneWest Bank, F.S.B., formerly known as IndyMac Bank, F.S.B.; Mortgage Electronic Registration Systems, Inc.; and Ocwen Loan Servicing, LLC.

3 The day after **Giannasca**'s bankruptcy proceeding was converted to a proceeding under Chapter 7 of the United States Bankruptcy Code, he filed a notice of intention to retain the property and to reaffirm the debt. He did not, however, enter into a reaffirmation agreement with the creditor or file any such agreement with the Bankruptcy Court, the statutory requirements for reaffirmation of the debt. See 11 U.S.C. § 524(c) (2012).

4 Although **Giannasca**'s brief is not clear on this point, we interpret his argument to be that the assignment was flawed because MERS made the assignment "solely as nominee for IndyMac Bank, F.S.B.," rather than "solely as nominee for IndyMac Bank, F.S.B., and its successors and assigns."

5 In light of our conclusion that the assignment from MERS to Deutsche Bank was valid and binding, we need not reach the question whether **Giannasca** was estopped from challenging the foreclosure by virtue of his notice of intent to surrender the property in the bankruptcy proceeding.

1 I am assuming here that the majority is correct that the note was transferred as the majority describes to Deutsche Bank. There may be a dispute as to this fact; **Giannasca** appears to assert that ownership of the note actually passed to OneWest Bank, F.S.B., the successor to IndyMac Bank, F.S.B., because the note was one of the assets of IndyMac Bank, F.S.B., when it failed, was taken into receivership by the Federal Deposit Insurance Corporation, and had its assets sold to OneWest Bank, F.S.B. The issue, however, is immaterial for present purposes because, whoever held the note, it was not the defunct entity, IndyMac Bank, F.S.B.

2 The majority suggests that this flaw could have been addressed by stating that MERS acted "solely as nominee for IndyMac Bank, F.S.B., and its successors and assigns," rather than as nominee for Deutsch Bank. *Ante* at note 4. Because the assignment did not say that, I need not determine whether the majority is correct. I note, however, that I am aware of no authority, and the majority cites none, answering the question whether an assignment like that purporting to be by a nominee acting on behalf of some nonspecific open and indefinite class, rather than on behalf of the actual note holder, would suffice to identify the capacity in which the assignor was acting.

Content Type: Cases

Terms: GIANNASCA

Narrow By: Sources: Sources

Date and Time: Oct 10, 2019 10:44:58 a.m. EDT