

# MORTGAGE e-ALERT

(special 2-24-16)

## FORECLOSE AND GET SUED FOR WRONGFUL FORECLOSURE BY THE HOMEOWNER

### FACTS

On February 18, 2016, the California Supreme Court issued its opinion in the case of *Tsvetana Yvanova v. New Century Mortgage Corporation*. This decision allows borrowers to file lawsuits for wrongful foreclosure and the borrower/homeowner could seek to halt or delay foreclosures on their homes where the mortgages are loans pooled into securitized trusts. **The borrower on a home loan secured by a deed of trust may sue for wrongful foreclosure alleging that a purported assignment of the note and deed of trust to the foreclosing party had defects making the assignment void.**

The California Supreme Court, in a unanimous opinion, held that **"a borrower who has suffered nonjudicial foreclosure does not lack standing merely because he or she was in default on the loan and was not a party to the challenged assignment."**

### DETAILS

**In September, 2012 Yvanova's home** was sold at foreclosure. She was eventually evicted. She then sued for quiet title alleging that, in 2011 her original lender, New Century Mortgage Corporation ("New Century"), had purportedly assigned Yvanova's \$483,000 note and deed of trust on the property to Deutsche Bank National Trust Company ("Deutsche Bank") as trustee of a Morgan Stanley investment loan trust ("Trust") identified as "Msac-2007 Trust-He-1 Pass Thru Certificates." According to Yvanova, the **assignment was allegedly "void" for two reasons:** (1) New Century did not have the power to make the assignment because its assets had earlier been transferred in 2008 to a bankruptcy trustee; and (2) The investment Trust had closed to new loans in 2007.

The Superior Court sustained a demurrer to Yvanova's second amended complaint without leave to amend, concluding that plaintiff could not state a cause of action for quiet title. The Court of Appeal affirmed the judgment for defendants because plaintiff did not allege that she had tendered payment of her debt. The Court of Appeal **also ruled that authorization for amendment of plaintiff's pleading to state a cause of action for wrongful foreclosure was not warranted**

The Supreme Court justices claim that their ruling is not holding that a borrower could attempt to preempt a threatened nonjudicial foreclosure suit by questioning the foreclosing party's right to proceed or that the plaintiff in the case had actually alleged facts showing that the assignment was void.

A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interest. The borrower has lost ownership to the home in an

allegedly illegal trustee's sale. The bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. The harm which is the foreclosure is traced directly to the foreclosing entity's exercise of the authority purportedly delegated by the assignment which the borrower state is void and therefore illegal.

A person in default of their mortgage debt obligations has a legally protected interest in their home, and such an interest confers the ability to sue when the entity foreclosing does not really have an interest in the mortgage.

The borrower is not entitled to object to an assignment of the promissory note as to a person or entity that has actually been assigned the debt. The borrower owes money only to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the mortgage.

### **MORAL**

1. If you are going to foreclose be sure to trace the assignments of the mortgage and verify all are legal transfers. For example, trying to add a mortgage to a securitization of mortgages after the close is not a legal transfer in the majority of cases.
2. Does the person transferring the note still own it. For example New Century filed bankruptcy and then the transfer was made. But when filing bankruptcy the trustee from the bankruptcy court holds title to the assets generally.
3. In short form: Plaintiff was a borrower on a home loan secured by a deed of trust. The deed of trust was assigned multiple times. After Plaintiff's home was sold at public auction, Plaintiff filed the wrongful foreclosure action alleging that the assignment of the deed of trust to the foreclosing party bore defects rendering the assignment void. The court of appeals concluded that Plaintiff could not state a cause of action for wrongful foreclosure based on the allegedly void assignment because she lacked standing to assert improprieties in the assignment where, as an unrelated third party to that assignment, Plaintiff was unaffected by such deficiencies. The Supreme Court reversed, holding that a home loan borrower who has suffered a nonjudicial foreclosure has standing to sue for wrongful foreclosure based on an allegedly void assignment even though she was in default on the loan and was not a party to the challenged assignment because an allegation that the assignment was void will support an action for wrongful foreclosure.

**Interesting, is it not?**

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