

Mortgage Meltdown

Distressed homeowners take on lenders in court

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By: Paola Iuspa-Abbott

Diana and John Cirigliano can't wait to face off with Wells Fargo at a foreclosure trial.

A Miami-Dade circuit court judge last month sided with them, when he ruled that the lender had failed to prove it had the right to foreclose on their Miami Beach condo.

"I was ready to kiss the judge," Diana Cirigliano said. "I thanked the judge for listening to us. He took the facts and ruled on the facts."

The couple represents a small but growing group of home owners who are scoring victories in their fight against foreclosures. The Ciriglianos recently persuaded the court to deny their lender's motion to sell their condo at a foreclosure auction because the lender couldn't prove it was the true owner of the loan.

In the on-going battle between lenders and homeowners facing foreclosure, some persistent owners are pushing to have a judge — not the lender — decide the future of their home.

Their defense: Lenders are increasingly unable to show proper documents proving they have the right to seize their homes.

Nearly three years after the foreclosure crisis began clogging courthouses across South Florida, some cases are now beginning to reach the trial stage, which is uncommon.

Few foreclosure cases are ever defended by homeowners. Typically, after a lender files a lawsuit, borrowers can ask a judge to dismiss the case on various grounds. If the judge rejects the dismissal motion, the lender will seek a summary judgment, which gives it the go-ahead to auction the property.

Web Extra:

[Judge's ruling and motion opposing a summary judgment request](#)

If the summary judgment is denied, the case can move forward to trial.

That's the case of the Ciriglianos, who have spent thousands of dollars in their legal battle.

Some experts say more homeowners are likely to embrace the Ciriglianos' strategy of fighting lenders who previously saw most foreclosure cases slide through the system.

If the couple wins at the trial, they may get their \$548,000 first mortgage rescinded, said their Miami lawyer Arturo Alfonso.

"There are not a lot of foreclosure trials right now, but I suspect that there will be in the future," said foreclosure defense lawyer Thomas Willis, with Shuster & Saben in Miami. "You are going to have more and more cases where the documents produced by the banks just flat don't add up."

In the Ciriglianos' case, Miami-Dade Circuit Judge Stuart Simons ruled that lender Wells Fargo — as the trustee for investors in pool of mortgage-backed securities — didn't prove it owned the note on their condo. On March 25, he denied Wells Fargo's motion for a summary judgment.

The Law Offices of Marshall C. Watson, which represents Wells Fargo, declined to comment. A spokeswoman with Wells Fargo declined to comment.

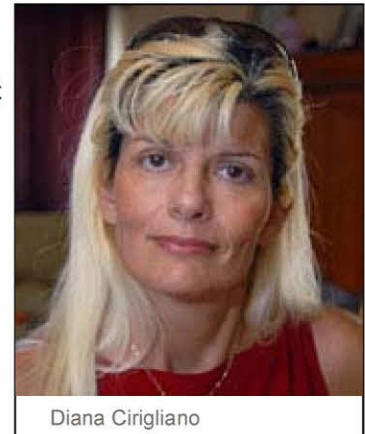
Case dismissals

Several foreclosure defense lawyers said it is unusual for a foreclosure case to get this far. The reason: Cases are often dismissed — with an option to be re-filed — if lenders can't prove they own the mortgage and promissory note before and during the summary judgment hearing.

Defense lawyer Thomas Ice in West Palm Beach said he has two foreclosure suits set for trial later this month. In both cases, the home owners successfully questioned the lenders' right to take their properties.

"You should see more of them [go to trial] if they are well defended and you have a fair judge," said Ice, with Ice Legal in West Palm Beach. "[Lenders] made enough mistakes and don't have all the paperwork they need to properly get a summary judgment so they should be denied and go to trial."

Palm Beach Circuit Court Judge Meenu Sasser, who handles foreclosures, said an increasing number of foreclosure cases are going to trial.



Diana Cirigliano

"Each month, we have dozens and dozens of [foreclosures] cases that are set and noticed for trial," she said.

However, Miami-Dade Circuit Court Judge Jennifer Bailey said she rarely sees foreclosure cases in her courtroom go to trial. She said lenders are usually able to establish their right to foreclose. And when a lender doesn't, she denies the summary judgment motion and usually issues an order to show cause why the case shouldn't be dismissed, rather than letting the case go forward.

"I don't want the case just hanging around," she said. "If you are not the right plaintiff, tell me why I shouldn't dismiss the case. Trial can be very expensive for everyone involved."

U.S. Bankruptcy Judge John K. Olson said he confirms the lender's right to a property before allowing them to move forward with a foreclosure action. Many foreclosures are put on hold when homeowners file for bankruptcy. The foreclosure cases can't proceed until the bankruptcy judge agrees.

Olson said many lenders struggle to come up with the proper documents to prove they own a loan.

"Lenders have created a situation where their own internal sloppiness creates the problem," he said, adding that "borrowers should not be compelled to pay money to somebody who doesn't have the right to it."

Chain of custody

In the Cirigliano case, Wells Fargo couldn't prove it owns the loan originally made in 2005 by now-defunct Greenpoint Mortgage Funding.

Proving ownership can be difficult at a time when loans are bundled, securitized and sold multiple times to numerous investors.

The loans are owned by a trust, which often hires a loan servicer to collect the mortgage payments from borrowers.

When the notes were sold and resold, they were to be endorsed as part of the transfer to a new buyer. But that didn't happen all the time.

In the Cirigliano case, two things worked against Wells Fargo, according to Alfonso.

- The loan had not yet been assigned to Wells Fargo when the lender filed suit against the couple in May 2008.
- It failed to provide documents — called securitization agreements — that were filed with the Securities and Exchange Commission that showed who owned the note.

"They couldn't show any evidence of how the loan went from Greenpoint to Wells Fargo," Alfonso said. "We asked for the agreements but they never gave them to us."

The Ciriglianos hired mortgage investigator Steve Dibert to find out whether Wells Fargo owned their loan.

Dibert went through SEC filings but couldn't find the trust that appears in the Ciriglianos complaint.

"We looked for the trust that Wells Fargo claims they are the trustee of, but the trust doesn't exist," said Dibert, president MFI-Miami in Boynton Beach. "Under Florida law, only the trustee can file a foreclosure action. But this trustee lacks legal standing because the trust didn't exist."

Wells Fargo is not the only trustee having trouble fighting delinquent borrowers.

"There are a lot of cases out there where the lender has serious problems in proving that they own these notes and mortgages," Willis said.

"As long as they are not able to produce the right evidence or produce evidence that lacks credibility, their cases are not going to be resolved through summary judgment."

Condo purchase

The Ciriglianos bought the two-bedroom condo at 6515 Collins Ave. in 2005. They obtained an adjustable first mortgage of \$548,000 and a second mortgage of \$68,000, both from Greenpoint, to make the purchase.

The Ciriglianos, residents of Coral Springs, were in the process of moving to the condo when they were told their payments were increasing from nearly \$1,700 a month to about \$4,000 per month, according to Diana Cirigliano.

They decided not to move. The couple realized that the mortgage was drastically different from the one that they had agreed to, she said. They reviewed copies of the closing documents and suspected that John Cirigliano's signature had been forged on documents that reflected payment terms they couldn't afford.

Eventually, a handwriting analyst confirmed John Cirigliano's signature had been forged, she said. She said she does not know how the signature was forged.

Diane Cirigliano said the couple tried to sell the unit through a short sale, which occurs when the price is less than the amount owed, but the lender never agreed to the deal.

In late 2007, the couple stopped paying the first mortgage. In May 2008, Wells Fargo sued them.

The couple counter sued. On March 25, they scored a victory with Simons' ruling.

"We are not going away now," Cirigliano said. "We've gone this far and we are going to fight them."

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