

Foreclosure Crisis

4th DCA to review controversial switch of lender plaintiff

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By: Polyana da Costa

Garret Bender and his wife Gina started a court battle more than a year ago against SunTrust Mortgage, which wanted to foreclose on their Delray Beach house to recoup a \$4 million mortgage.

The Benders asked the 4th District Court of Appeal to intervene last week after they came across what many foreclosure defense attorneys call growing and serious problems in South Florida courts — plaintiff substitutions and the increasing use of confidentiality in foreclosures against a backdrop of the muddled world of securitized mortgages.

Lender-plaintiffs have often lacked the documentation to prove they are the actual owner of the mortgage in question. Many loans in foreclosure have been sold in securitized packages numerous times and tracking ownership can be complicated. Critics say judges, overwhelmed by the volume of pending foreclosures cases, have overlooked the critical issue to move cases more quickly, taking away the homeowners' right of due process.



Judge Meenu Sasser

The Benders filed a petition to quash an order by Palm Beach Circuit Judge Meenu Sasser granting a motion by SunTrust to keep confidential the documents related to the transfer and sale of the Benders' mortgage. In the petition, the couple also criticized the order that allowed SunTrust to name a new plaintiff to replace itself in the foreclosure action. The order granting confidentiality was decided without a hearing and failed to identify the grounds for making the court records confidential. Fort Lauderdale appellate attorney Laura Watson claims in the petition she filed on behalf of the Benders. Watson did not return a call seeking comment by deadline.

Sasser ordered the documents related to the purchase and servicing of the mortgage be made available to attorneys representing the Benders but otherwise remain confidential. SunTrust claimed in its motion for confidentiality that the documents contained "proprietary commercial information."

Florida International University law professor Howard Wasserman said the ruling seems unusual since no hearing was held on the confidentiality motion and the justification for granting confidentiality isn't detailed in the order.

"Ideally, there would be an opportunity for the defense to respond, and you have to have good reason why the records should be confidential," he said.

SunTrust attorney Lori Heyer-Bednar, partner in charge of the Fort Lauderdale office of Roetzel & Andress, did not return a call seeking comment by deadline.

The issue of court secrecy was addressed by the Florida Supreme Court in 2007 after the discovery of widespread abuses by judges in sealing court cases and filings.

In an effort to protect the public's constitutional right of access to court records, the Florida Supreme Court prohibited secret dockets in civil cases, barring judges from sealing civil court cases from the public. Earlier this year, the decision banning the secrecy of court records were extended to criminal cases.

In the petition to the 4th DCA, Watson noted SunTrust was allowed to drop out and name a substitute plaintiff more than a year after filing the foreclosure suit. SunTrust said it needed to make the change because the mortgage had been assigned to SunTrust Bank, which is the new plaintiff on the case.

Boca Raton attorney Robert Sweetapple, who is representing the Benders in circuit court, filed a motion for summary judgment Tuesday to dismiss the suit claiming SunTrust Mortgage had no right to file the foreclosure suit in 2009 because it did not own the note.

The Benders, who did not return calls by deadline, have been claiming since last year that SunTrust Mortgage was not the actual owner of the mortgage, according to the appellate petition.

Attorneys say the issue is critical to homeowners who face foreclosure because if the wrong entity is allowed to foreclose, the borrowers could still be left owing money to the actual lender.

In the Benders' case, if Suntrust Mortgage had been allowed to foreclose on the Benders house, based on a mortgage it did not own, the Benders would still be liable for the payment of the loan if the actual owner of the note, Suntrust Bank, later filed a new foreclosure suit against them. By then, Suntrust Mortgage could have already sold the property. Foreclosure defense attorneys say if the courts continue to overlook the issue of note ownership, South Florida will be flooded with additional foreclosure litigation.

Attorneys for lender SunTrust Mortgage “feigned outrage” for several months at the assertion and refused to document the “true owner of the mortgage,” according to the Benders’ petition.

On the evening before a SunTrust corporate representative was scheduled for a deposition in the case, SunTrust filed a motion to substitute the plaintiff based on an assignment of the mortgage. However, court records show the mortgage was sold or assigned to SunTrust Bank months before the initial foreclosure suit was filed.

There have been widespread problems with foreclosure in Florida. The Florida attorney general has launched investigations into Florida’s three largest foreclosure firms over allegations that lenders have been filing fraudulent mortgage assignments and affidavits related to the ownership of the mortgage note in foreclosure cases.

On Tuesday, GMAC Mortgage announced it is halting foreclosure evictions in 23 states including Florida until it can correct a “defect” with affidavits in its foreclosure cases. The company said employees submitted affidavits containing information they didn’t personally know was true and sometimes signed without a notary present.

But the issue of plaintiff substitution is relatively new to foreclosure cases, particularly in instances where the change does not involve a company that later bought the underlying loan in the foreclosure case.

Wasserman said a motion to substitute a plaintiff generally is allowed as long as a judge concludes after a hearing that defendants are not prejudiced by the substitution.

But when it comes to foreclosure lawsuits, the issue can be more complex. Lawsuits often are filed by lenders or servicers that are foreclosing based on a mortgage note that may have been sold and changed hands numerous times, clouding the identity of the lienholder.

Plaintiff substitution creates great potential for fraud, some attorneys say.

“This is a huge issue,” said Aventura foreclosure defense attorney Richard Burton. “There are people being sued by two or three different parties claiming the same mortgage.”

The 3rd District Court of Appeal issued an opinion last week in just such a case where a servicer and a lender filed foreclosure actions on the same home 20 days apart.

Attorney Darin Lentner of the Foreclosure Fighters Law Center in Fort Lauderdale said he has been involved in at least 10 cases this year in which lenders switched the plaintiff’s name in the lawsuit.

“It’s becoming a common practice for plaintiffs to rename themselves to correct problems with their original cases that were contained in their original filings,” he said. “What they are doing is inconsistent with the rules of civil procedure, yet the judiciary is allowing it to happen as if it doesn’t matter.”

If a lender sells or transfers a note to another entity after foreclosure is filed, it’s not unusual for the new noteholder to ask to take over the foreclosure proceedings as long as it can prove it purchased the note. But when a note was transferred before a foreclosure filing, in essence it means the initial plaintiff-lender did not have authority to file the foreclosure action, attorneys say. In that case, they say the correct procedure would be to dismiss the first foreclosure and require the actual note owner to file a new lawsuit and pay a new filing fee.

“What [lenders] are doing is whitewashing and cleaning the mortgage so it’s too much trouble to trace down the illegalities,” Burton said.

Burton said he also has been involved in foreclosures where lenders asked for loan sale and assignment documents to remain confidential.

“They want it to remain confidential so other people can’t make use of the information, and judges are so overwhelmed they will sign anything,” Burton said.

Lentner said it’s the first time he has heard of a foreclosure case in which the lender requested confidentiality, “but nothing surprises me.”

Fort Lauderdale foreclosure defense attorney Carol Asbury, who is not involved in the Benders’ case, said loan purchase documents or communication relating to the sale or transfer of notes should not be considered confidential. She said she has not faced a similar situation but has dealt with lenders that ignore requests to provide documentation showing they own notes.

“Anytime we make a discovery request, they say the documents are irrelevant. They say the loan has been sold several times, and they basically can’t show the chain of title.”

Asbury said she also is dealing with several cases where lenders changed the plaintiff’s name to securitized trusts and entities she has never heard of.

“I have a case in which all the way through trial last year Deutsche Bank was the plaintiff,” she said. “All of a sudden in June when we were coming close to a summary judgment, they did an ex parte motion for substitution and changed it to

Deutsche Bank Trustee Foreign Asset Backed Securitized Trust. It's happening across the board."

Even though rules require substitutions can't be granted without a hearing, several South Florida judges have been granting the ex parte motions without a hearing, she said.

Another strategy seen by Fort Lauderdale foreclosure defense attorney Dawn Rapoport is a lender filing an amended complaint that substitutes a lender-plaintiff, but she said she has been able to get orders reversed when she brought the facts to a judge's attention.

"It's all a matter of fighting through the procedural errors," she said.

For the Benders, the confidentiality order and the substitution of plaintiff are just two hurdles in their case.

Garrett Bender, a principal in Delray Beach-based Ascot Development, said in court filings that the reason he stopped paying his mortgage was because the lender altered the mortgage documents after he signed them at closing.

When Bender refinanced the mortgage on his homestead house with SunTrust in 2008, he said he insisted his wife's name should not be on the mortgage, and the bank agreed. His wife was asked to initial the mortgage as a witness to her husband's signature.

But according to the petition filed with the 4th DCA, the loan documents were altered by a title agency employee three days after the closing, and Gina Bender's name was handwritten on the mortgage, which was recorded with her as a co-borrower, the petition claims. After Bender found out, he said he refused to pay until the mortgage documents were corrected, triggering the foreclosure, according to court filings.

In a deposition filed in circuit court, the title company employee acknowledged adding the wife's name in ink to the mortgage.

Sweetapple, the Benders' attorney, declined to comment.

According to the petition filed with the 4th DCA, the Benders' attorney told the trial court during consideration of SunTrust's motion for substitution that the Benders intend to file a fraud complaint against SunTrust and provide the case information to the State Attorney's office and banking regulators.

A critic of how lenders have been handling foreclosure actions in South Florida, Lentner said he hopes they will eventually be held responsible for their alleged wrongdoing.

"We joke amongst ourselves that there are currently two set of rules — the rules that apply to every other case and the foreclosure case rules, which are being bent, manipulated and violated by lenders, lawyers and the judiciary.

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