ILLINOIS STATE BAR ASSOCIATION

AUGUST 2016 VOL 61 NO. 1

Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

When defense is offense: Burdens of proof in mortgage foreclosure trials

BY MICHAEL G. CORTINA

Mortgage foreclosure cases rarely go to trial. If a trial involving a mortgage foreclosure does occur, it is usually because there is a counterclaim or affirmative defense, or both, that requires some findings of fact. Even in these situations, however, summary judgment or other dispositive motion routinely dispatch such pleadings thereby obviating the need

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Sheriff sale purchasers keep the property despite void judgment of foreclosure and sale

BY ROBERT HANDLEY AND GRZEGORZ (GREG) CZUBERNAT

U.S. Bank N.A. v. Rahman, 2016 IL App (2) 150040

Facts

On September 29, 2009, U.S. Bank filed its complaint to foreclose a mortgage against Defendant, Syeda Nazia Rahman (Rahman) and others with an interest in the property, on a residential property

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(Notice to librarians: *The following issues were published in Volume 60 of this newsletter during the fiscal year ending June 30, 2016: October, No. 1; December, No. 2; February, No. 3; March, NO. 4; May, No. 5).*

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a mortgage foreclosure case needs only to admit into evidence the note and the mortgage. Because of the sparse amount of foreclosure trials, there are even fewer appellate decisions regarding the subject, making three appellate court decisions on the topic fairly conclusive; despite this, arguments are sometimes raised in opposition.

The IMFL

Some may argue that the IMFL requires more than just the note and mortgage in order to prove a prima facie case. The argument cites to 735 ILCS 5/15-1506(a) of the IMFL which states, "Evidence. In the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court," and then lists two exceptions to this requirement. The argument is that this section of the IMFL requires proof of the allegations in the complaint, so if it is alleged in the complaint and then denied by the mortgagor, the mortgagee must prove that allegation as part of the mortgagee's prima facie case. While this argument may seem to make sense at first blush, it is fatally flawed because it fails to take into account the fact that the IMFL is a statute in derogation of the common law.

In construing statutes in derogation of the common law, courts may not presume that an innovation thereon was intended further than the innovation which the statute specifies or clearly implies. *Gallagher v. Union Square Condominium Homeowner's Assoc.*, 397 Ill. App. 3d 1037, 1043 (2d Dist. 2010). Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least—rather than the most—change in the common law. *Adams v. Northern Illinois Gas Co.,* 211 Ill.2d 32, 69 (2004). Therefore, any legislative intent to abrogate the common law must be clearly and plainly expressed, and courts will not presume such an intent from ambiguous language. *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (1st Dist. 2000). Finally, a statute that appears to be in derogation of the common law will be strictly construed in favor of the person sought to be subjected to the statute's operation. Id.

The express language of 15-1506(a) of the IMFL merely states that the evidence to support the allegations of the complaint must be taken in open court. It does not state what that particular evidence is, nor what is required to make a prima facie case, nor does it state that a prima facie case is anything other than what the common law dictates. Further, the IMFL does not state that proof of the allegations of the complaint must be taken in open court, only that evidence to support the allegations of the complaint must be so demonstrated. Further, the IMFL statement in 15-1506(a) subjects only the mortgagee to its dictates, and must therefore be strictly construed in favor of the mortgagee. See *Tomczak*, at 1038. At best, the language in 15-1506(a) is ambiguous, and because it must be construed in favor of the mortgagee, the only logical reading of it is that the proof that is required to make a prima facie case must be taken in open court. If a trial occurs, that proof has not changed from the common law, and is still the admission of the note and mortgage into evidence—nothing more. 15-1506(a) simply requires that the mortgage and note be offered into evidence in open court.

If the IMFL were intended to change the elements of proof of a mortgage foreclosure, it would have so stated. It would have been simple enough for the legislature to insert into the IMFL exactly what was required for the plaintiff to prove its case if the legislature had intended to change the common law. The legislature could have specifically stated that all of the elements in the form foreclosure complaint shown in 735 ILCS 5/15-1504 must be proven in order for a plaintiff to make its prima facie case, but they did no such thing. Because the legislature did not change the elements of a prima facie case in the IMFL, the common law requirement of producing the note and mortgage for a mortgagee to make its case remains the law.

Conclusion

Despite the scant amount of published decisions on the topic, the only Illinois decisions pertaining to the proof required in mortgage foreclosure cases state that the mortgagee merely needs to offer the note and mortgage into evidence in order to prove its prima facie case. The Illinois Mortgage Foreclosure Law did not change this common law principle, and simply requires that evidence needed to support a foreclosure complaint be presented in open court. Mortgage foreclosure trials, therefore, will be primarily conducted by the mortgagor who needs to prove payments, affirmative defenses, or possibly her counterclaims. ■