Flynn-Law Newsletter

April 2016
Volume 3 Issue 2

Law Offices of Stephen M. Flynn, 71 Stevenson St., Ste. 400, San Francisco, CA 94105
www.smflynn-law.com smflynn@smflynn-law.com 415.655-4430

Inside This Issue

Supreme Court holds borrower has standing to sue for damages based on a void assignment of a note and deed of trust

The California Supreme Court recently held a borrower who has suffered a non-judicial foreclosure of his or her property, has standing to sue for wrongful foreclosure based on a *void* assignment of the note and deed of trust.

In *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, the borrower alleged that an assignment of her note and deed of trust was void because (i) the assignor (the original beneficiary) had filed for bankruptcy and had no authority to enter into the assignment, and (ii) the assignment was made after the expiration of the assignee's closing date (i.e. the date by which all secured loans had to be transferred to the investment pool).

"The case was narrowly decided and is important for what it held and what it did not hold. Narrowly, the Supreme Court held a borrower has standing *to assert a wrongful foreclosure cause of action for monetary damages based on the allegation an assignment of the note and deed of trust was void (not merely voidable)."*

The case was narrowly decided and is as important for what it held as for what it did not hold. Narrowly, the Supreme Court held a borrower has *standing* to assert a wrongful foreclosure cause of action for monetary damages based on the allegation an assignment of the note and deed of trust was void (not merely voidable).

The decision was limited in a number of respects.

First, and most importantly, the decision does not hold a borrower may *preemptively* sue to *enjoin* a non-judicial foreclosure sale on the basis the assignment of the note and deed of trust was void. The decision (temporarily) leaves intact a long line of cases holding a borrower *in default* may not enjoin a non-judicial foreclosure based on the allegation the beneficiary has no authority to foreclosure (as in the case of a void or voidable assignment of the note and deed of trust). (*See, e.g., Jenkins v. JP Morgan Chase Bank* (2013) 216 CA4th 497; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 CA4th 1149; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 CA4th 75.)

Yvanova, continued.

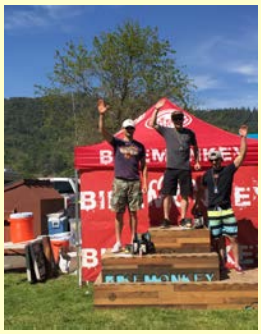
I use the word "temporarily" because the Supreme Court did not go out of its way to render much support for these decisions. Indeed, far from lending support to these decisions, the Court seemingly left the door open for future litigation on the issue.

"The Yvanova decision may be little more than a beacon of false hope – yes, you have standing, but no, you cannot show any harm if you don't pay your mortgage and someone other than the proper beneficiary forecloses."

And logically, why shouldn't it? If a borrower can sue for money damages *after* a foreclosure, why shouldn't they be allowed to stop the foreclosure *before* it occurs based on the *same* allegation of a void assignment of the note and deed of trust? As explained by the Court, "It is no mere 'procedural nicety,' from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so" (62 Cal.4th at 938).

Further, new Civil Code §2924(a)(6), which prohibits an entity from initiating a foreclosure "unless it is the holder of the beneficial interest" arguably lends weight to the argument that California's comprehensive statutory non-judicial foreclosure scheme allows (or perhaps contemplates) such a preemptive suit.

Second, the decision does not address any of the substantive aspects of a wrongful foreclosure cause of action. The Court held for purposes of *standing* only, that a borrower suffers an "injurious invasion of his or her legal rights" if an entity without the authority to foreclose, does foreclose.



However, for purposes of actually establishing a claim for wrongful foreclosure, the plaintiff ordinarily must show (i) prejudice (or harm), and (ii) that he or she has tendered the amount of the secured indebtedness, or was excused from doing so (*Lona v. Citibank, N.A.* (2011) 202 CA4th 89, 104). As the Court explained, the injury for standing purposes is a different inquiry than the harm that needs to be established to prevail on the wrongful foreclosure claim itself.

For those new to the Flynn Law Newsletter, I like to share pictures of my recent bike adventures. This is a picture of me on the podium (far left) at the SoNoMas mountain bike race in Sonoma. To my amazement, I finished 2nd in the "pro" category after Levi Leipheimer (middle), a former Tour de France top-3 finisher and California cycling legend.

While the Court suggested in a footnote that tender might be excused in the case of a void assignment, the issue of prejudice or harm remains. Ordinarily, this requires a showing that the proper beneficiary would not otherwise have foreclosed – a near evidentiary impossibility when the borrower is otherwise in monetary default under the loan (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 CA4th 75, 85). Viewed in this light, the *Yvanova* decision may be little more than a beacon of false hope – "yes, you have standing, but no, you cannot show any harm if you don't pay your mortgage and someone other than the proper beneficiary forecloses."

Yvanova, continued.

Third, the decision did not address whether the assignment alleged by Yvanova was void or merely voidable, thus leaving that issue for remand. It does not require a great leap of imagination to foresee expensive and protracted litigation on this very issue in the future.

From a policy perspective, there is logical and emotional appeal to the Court's argument that under the bank's reasoning "*anyone*, even a stranger to the debt, could declare a default and order a trustee's sale – and the borrower would be left with no recourse because, after all, he or she owed the debt to *someone*, though not the foreclosing entity. This would be an 'odd result' indeed."

This is a picture of me mid-race at SoNoMas, an epic 35 mile mountain bike race at Lake Sonoma. The course features over 7200 feet of climbing.

While admittedly "odd", there are other policy concerns that weight against the Court's holding, none of which received much analysis.

In my opinion, the biggest concern is giving false hope to borrowers. As discussed above, while it is one thing to meet the *standing* challenge, it is an entirely other thing to *prove prejudice*. Absent highly unusual facts or circumstances, I fail to see how a borrower currently in default can show actionable monetary harm if someone other than the proper beneficiary forecloses. Even in the rare instances where such harm could be shown, in the vast majority of cases, the foreclosed property is "underwater" meaning that the borrower loses no equity, and thus suffers no damage from the wrongful foreclosure.

No doubt there has been widespread abuse in the mortgage industry, but a commonly overlooked abuse also involves a handful of attorneys who prey on people in their moment of need. These attorneys, some of whom were disbarred, make misleading promises of stopping a foreclosure or getting back your house, even when the borrower has not and cannot pay the debt. Misled with this false hope, these unfortunate borrowers spend what is left of their money on frivolous or highly questionable legal claims to the sole benefit of the attorneys who bring them.

"Granting standing in cases where there is almost no hope of successfully prosecuting a claim for wrongful foreclosure simply prolongs the financial and emotional turmoil caused by a foreclosure.'"

Granting standing in cases where there is almost no hope of successfully prosecuting a claim for wrongful foreclosure simply prolongs the financial and emotional turmoil caused by a foreclosure.

From the bank's perspective, such litigation is an expensive and time consuming drain. It makes banks less willing to lend and makes loans more expensive and more difficult to get. As a result, the very few borrowers who bring wrongful foreclosure lawsuits have the effect of harming the majority of borrowers who simply want a loan they can afford.

Yvanova, continued.

My prediction, based on the Court's holding, is that the Court will eventually hold a borrower can sue preemptively to enjoin a foreclosure sale based on an allegation the assignment to the foreclosing entity is void.

Logically there is no reason why the same lawsuit should not be brought before the foreclosure, and legally, new Civil Code §2924(a)(6), cited, but not discussed by the Court in a lengthy footnote, will likely be used as the statutory authority authorizing such a suit.

The real estate market remains strong, but when the next downturn occurs, *Yvanova* and its progeny will play an important part of the ensuing legal battles.

.

Law Offices of Stephen M. Flynn
71 Stevenson Street, Suite 400
San Francisco, CA 94105

Phone:
415.655.6631

Website:
www.smflynn-law.com

E-mail:
smflynn@smflynn-law.com