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Federal Home Loan Mortgage Corp. v. Kelley

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MICHIGAN HOLDS FREDDIE IS NOT THE GOVERNMENT

Federal Home Loan Mortgage Corp. v. Kelley
2014 WL 4232687, Michigan Court of Appeals (revised opinion, August 26, 2014)

This is a residential mortgage foreclosure case. The original foreclosure by CMI (CitiMortgage, apparently Freddie Mac's servicer) was by "advertisement" – i.e., pursuant to the Michigan nonjudicial foreclosure statute. Freddie was the successful bidder at the foreclosure sale. In a subsequent action to evict the borrowers, they raised two defenses.

Their first defense was based on the argument that, even though Freddie Mac was concededly a nongovernmental entity prior to it's being placed into conservatorship in 2008 (see *American Bankers Mortgage Corp v. Fed Home Loan Mortgage Corp.*, 75 F3d 1401, 1406–1409 (9th Cir. 1996)), it had become a federal agency by virtue of the conservatorship with FHFA as conservator. As such, it was required to comply with Due Process in foreclosing, and the borrowers argued that the Michigan nonjudicial foreclosure procedure did not afford due process.

The court rejected this argument, as has every court that has considered it. The test for federal agency status is found in *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 377; 115 S Ct 961; 130 L.Ed.2d 902 (1995), which involved Amtrak. Amtrak was found to be a governmental body, in part because the control of the government was permanent. The court noted, however, that FHFA's control of Freddie, while open-ended and continuing, was not intended to be permanent. Hence, Freddie was not a governmental entity and was not required to conform to Due Process standards in foreclosing mortgages. This may seem overly simplistic, but that's the way the court analyzed it.

There's no surprise here. For other cases reaching the same result, see U.S. ex rel. *Adams v. Wells Fargo Bank Nat. Ass'n.*, 2013 WL 6506732 (D. Nev. 2013) (in light of the GSEs' lack of federal instrumentality status while in conservatorship, homeowners who failed to pay association dues to the GSEs could not be charged with violating the federal False Claims Act); *Herron v. Fannie Mae*, 857 F. Supp. 2d 87 (D.D.C. 2012) (Fannie Mae, while in conservatorship, is not a federal agency for purposes of a wrongful discharge claim); *In re Kapla*, 485 B.R. 136 (Bankr. E.D. Mich. 2012), aff'd, 2014 WL 346019 (E.D. Mich. 2014) (Fannie Mae, while in conservatorship, is not a "governmental actor" subject to Due Process Clause for purposes of foreclosure); *May v. Wells Fargo Bank, N.A.*, 2013 WL

3207511 (S.D. Tex. 2013) (same); *In re Hermiz*, 2013 WL 3353928 (E.D. Mich. 2013) (same, Freddie Mac).

There's a potential issue that the court didn't ever reach. Assume that a purely federal agency holds a mortgage, and transfers it to its servicer (a private entity) to foreclose. Does Due Process apply? The agency is still calling the shots, but the private servicer is the party whose name is on the foreclosure. Don't you think that's an interesting question?

The borrowers' second defense was that Michgan statutes require a recorded chain of mortgage assignments in order to foreclose nonjudicially. See Mich. Comp. L. 600.3204(3). In this case the mortgage had been held by ABN-AMRO, which had been merged with CMI (CitiMortgage), the foreclosing entity. No assignment of the mortgage had been recorded in connection with the merger. However, the court was not impressed with this argument either. It noted that the Michigan Supreme Court in *Kim v. JP Morgan Chase Bank, NA*, 493 Mich 98, 115-116; 825 NW2d 329 (2012), had stated

> "to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute."

The court found that the borrowers were not prejudiced by the failure to record an assignment in connection with the corporate merger, and hence could not set the sale aside.

But this holding raises an interesting issue: When is failure to record a mortgage assignment *ever* prejudicial to the borrower? One can conceive of such a case, but it's pretty improbable. Suppose the borrowers want to seek a loan modification, and to do so, check the public records in Michigan to find out to whom their loan has been assigned. However, no assignment is recorded, and when they check with the originating lender, they are stonewalled. Are they prejudiced?

Well, not if it's a MERS loan, since they can quickly find out who holds the loan by querying the MERS web site. (True, the MERS records might possibly be wrong, but they're correct in the vast majority of cases.) And then there's the fact that federal law requires written, mailed notification to the borrowers of both any change in servicing and any sale of the loan itself. If they received these notices (which are mandatory), there's no prejudice to them in not being able to find the same information in the county real estate records.

So one can postulate a case in which failure to record an assignment is prejudicial to the borrowers, but it's extremely improbable. The truth is that checking the public records is

a terrible way to find out who holds your loan. Moreover, Michigan requires recording of assignments only for a nonjudicial foreclosure; a person with the right to enforce the promissory note can foreclose the mortgage judicially whether there's a chain of assignments or not.

All in all, the statutory requirement to record a chain of assignments is pretty meaningless to everybody involved – a fact that the Michigan courts recognize implicitly by their requirement that the borrower show prejudice in order to set a foreclosure sale aside on this ground.