

DIRT Periodic Development for Monday, June 1, 2013
Robinson v. H & R Block Bank, FSB

Guest Editor: Dale Whitman
James E. Campbell Missouri Endowed Professor Emeritus
University of Missouri School of Law

ROBINSON -- FAILURE TO ENDORSE NOTE OR RECORD ASSIGNMENT ARE IRRELEVANT TO THE RIGHT TO FORECLOSURE

Robinson v. H & R Block Bank, FSB, 2013 WL 2356106 (E.D.N.Y. 2013)

SYNOPSIS: Transfer of note and mortgage were effective, despite defects in allonge and mortgage assignment.

This brief opinion by a federal magistrate neatly disposes of a couple of attacks on a secondary market sale of a mortgage. In 2005 Robinson obtained a mortgage loan from Option One. In 2006 he also obtained a second mortgage loan from the same lender. In 2007, he and Option One agreed to consolidate the two loans into a single loan, and Robinson signed a new note and mortgage for the combined balance.

Option One then sold the loan to H & R Block Bank, delivering the note to Block, but it made two errors in doing so. The first was that the endorsement of the note (which was a "special" endorsement to Block) was placed on an allonge, but the allonge was merely placed behind the note in the file, and was not physically affixed (by stapling) to the note under Block did so in 2013.

However, under the New York version of UCC Article 3, "An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." UCC 3-202(2). Hence, the endorsement on the allonge was not effective as of the date the note was delivered, and in effect the note was unendorsed.

Second, although Option One recorded an assignment of the mortgage to Block in 2008, it mistakenly referred to the original 2005 mortgage rather than the consolidated mortgage of 2007. This error was discovered in 2012, and a "correction assignment" was then recorded with a reference to the correct mortgage.

Later in 2012 Robinson filed an action against Option One and Block, claiming fraud in the mortgage transfer. The court correctly observes that there is no evidence whatever of fraud in any literal sense, but treats the plaintiff's claim as one attacking the validity of the transfer. Even so, it concludes that the errors were harmless and that Block has the right to foreclose the mortgage.

With respect to the unattached allonge, the court observes that

“Any alleged defect concerning the allonge, however, would be immaterial, because an assignment may be made under New York law by physical delivery and not only by written indorsement. ... [S]ee also *In re Idicula*, 484 B.R. 284, 288 (Bankr.S.D.N.Y.2013) (“An assignment of the note and mortgage can be effectuated by a written instrument or by physical delivery of the instrument from assignor to assignee.”).

On this point the court is plainly correct. Under the current version of the Article 3 (New York has not adopted it, but it’s the relevant version for most DIRT readers), one can become a “holder” only by taking delivery of an endorsed note. However, a person with possession of a negotiable note, but without an endorsement, can be a “nonholder with the rights of a holder” under UCC 3-301(2). The 2011 PEB report on mortgage notes explains it this way:

[This can] occur if the delivery of the note to that person constitutes a “transfer” (as that term is defined in UCC Section 3-203, because transfer of a note “vests in the transferee any right of the transferor to enforce the instrument.” Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder.

What’s more, “the transferee has a specifically enforceable right to the unqualified indorsement of the transferor.” See UCC § 3-203(c). Thus, since the note in this case was indisputably delivered, the absence of a valid endorsement really doesn't matter.

The second error, the mortgage assignment with a reference to the wrong mortgage, was equally unimportant. First, it was corrected by a refiling. But even that was unnecessary for purposes of transferring the right to foreclose the mortgage. The reason is the ancient rule that “the mortgage follows the note.” Thus, whoever has the right to enforce the note (Block, in this case) has the right to foreclose the mortgage as well -- whether they have a mortgage assignment or not. As the court says,

Neither is it required that mortgage assignments are recorded, or that they even be in writing, as long as the mortgage and note are actually delivered. In *re Feinberg*, 442 B.R. 215, 223 (Bankr.S.D.N.Y.2010) (noting that the holder’s “possession of the note and mortgage attests to their delivery and is sufficient evidence of a valid mortgage assignment”).

The reference to “possession of the mortgage” is a bit peculiar; there is no legal principle that suggests that possession of the actual mortgage document has any legal

relevance at all. It is possession of the note that is of critical importance, assuming that the note is negotiable (and it's clear that this court is making that assumption).

This is a doctrine that is widely misunderstood. Many people have the incorrect belief that somehow, having a recorded chain of mortgage assignments is essential to the right to foreclose the mortgage. Not so, except in perhaps a dozen states where assignments are necessary to carry out nonjudicial foreclosures. (New York, of course, has no nonjudicial foreclosure, and no requirement for assignments at all.)

This is not to suggest that recording a mortgage assignment isn't a good idea. It can accomplish two significant things for the assignee: (1) It will prevent the assignor from fraudulently releasing or satisfying the mortgage in the public records, allowing the borrower to sell the property free and clear to a bona fide purchaser; and (2) it will ensure that the assignee is entitled to notice of any litigation that might be filed affecting the real estate, such as an eminent domain action or a code enforcement proceeding. But it isn't necessary to foreclose.

THE BOTTOM LINE: two common errors, often raised by foreclosure defense counsel, are simply red herrings: a failure to endorse the note, and a failure to record an assignment of the mortgage. On the other hand, failure to deliver the note would have been a huge problem for the Bank in this case -- but fortunately, the note was indeed delivered.