Daily Development for Monday, November 19, 2012

CAN THE "OWNER" OF A NOTE WHO IS NOT ALSO A HOLDER FORECLOSE A DEED OF TRUST?

Guest Editor: Dale Whitman
Professor of Law Emeritus
University of Missouri-Columbia School of Law

Martin v. New Century Mortgage Company, 2012 Tex. App. Lexis 4705 (Houston 1st Court of Appeals, June 14, 2012).

The following case report was graciously provided by Brian Rider of Austin, Texas. I've appended my comment at the end.

This case is an attempt by defaulting borrower to challenge the right of a lender to foreclose. The loan was made in 2006 on a house in Missouri City, payable to the order of New Century Mortgage Corporation. In 2009, New Century assigned the Deed of Trust and all debts it secured to Wells Fargo as trustee for a Carrington Mortgage Loan Trust series of asset backed pass through certificates. The Note was not endorsed to Wells Fargo. Carrington Mortgage Services LLC serviced the loan, apparently from its inception. The borrowers defaulted and a foreclosure sale was scheduled for April, 2010. This lawsuit was filed the day before foreclosure claiming fraud, RESPA violations, DTPA violations, TIL violations and that Carrington, which was to conduct the foreclosure sale, could not prove standing. Wells Fargo and Carrington moved for summary judgment which the trial court granted.

The Court of Appeals says that Wells Fargo is not the "holder" of the note since it does not have an endorsement of the note to it. But it did demonstrate that it was "owner" of the note and liens securing it and therefore had standing to foreclose, and its servicer, Carrington, could foreclose. The Court of Appeals reviews the other claimed causes of action and finds no evidence in the debtors' summary judgment motion for them, so enters judgment affirming the trial court entry of judgment for Carrington and Wells Fargo.

Dale's comment: After reading the opinion, I concluded that the court got the right result for the wrong reason. The "owner" clearly had possession of the original note, had a contract to purchase it, and paid value for it. Under these circumstances (assuming the note was negotiable, which nobody ever seems to want to analyze), the "owner" was also a "nonholder with the rights of a holder" under UCC Article 3, and hence was actually the "P.E.T.E." (the person entitled to enforce the note).

Courts sometimes will say that the holder is also presumed to be the owner, or vice versa. And it's true that they are usually the same party. But the Texas Court of Appeals

didn’t really understand Article 3 very well; the critical question is not ownership, but the right to enforce. Right result, wrong reason.