DIRT Daily Development for Thursday, November 29, 2012
MetLife Home Loans v. Hansen

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

MetLife Home Loans v. Hansen, 286 P.3d 1150 (Kan. App. 2012)

SYNOPSIS: (1) A mortgage assignment is not necessary to the right of a second market investor to foreclose in Kansas; and (2) even if an assignment were necessary, the separation of the note and mortgage does not impair the right to foreclose if the two documents end up in the same hands.

This is a strange opinion, since it adopts two different (and arguably inconsistent theories) in upholding a secondary market investor's right to foreclose a mortgage. The Hansens borrowed money from Sunflower Mortgage, the loan's originator. MERS was shown on the mortgage as mortgagee of record, and nominee for Sunflower and its successors and assigns.

The note was endorsed and delivered to Ohio Savings Bank, and thereafter twice endorsed from Ohio Savings to First Horizon Loan Corp. and from First Horizon to MetLife (which filed the foreclosure action).

The mortgage was simply held by MERS until MERS assigned it to MetLife prior to the foreclosure. Thus, MetLife obtained both the note and mortgage, but by two different routes. The Hansens (pro se) argued that since the two documents were split, the note became unsecured and the mortgage could not be foreclosed, and that this condition was irremediable. The court disagreed, finding that MERS was the nominee (and hence the agent) of whoever held the note. The fact that MetLife was not a MERS member was irrelevant; MERS would have become the agent of any party that acquired the note, and was fully authorized to assign the mortgage to such a party. Since the note and mortgage both ended up in MetLife's hands, it was entitled to foreclose.

The court also said, in effect, that the assignment of the mortgage was irrelevant to the right to foreclose. This is so because "the mortgage follows the note," as the common law put it, so a formal assignment of the mortgage is unnecessary to the right to foreclose. Here's a flavor of the court's reasoning:

> "MetLife did not need that assignment in order to vest it with a beneficial interest in the Mortgage. As a valid holder of the Note, it already had such an interest sufficient to give it standing to initiate a foreclosure action. * * *

> "The assignment of the Mortgage was merely recorded notice of a formal transfer of the title to the instrument as required by recording statutes, which are primarily designed to protect the mortgagee against other creditors of the mortgagor for lien-priority purposes, not to establish the rights of the mortgagee vis-à-vis the mortgagor. * * *
>
> "Other jurisdictions have recognized that because the mortgage follows the note, formal assignment of the mortgage is not necessary to secure the note holder's rights in the mortgage, albeit in different circumstances."

COMMENT 1. Since the assignment was, as the court explains, completely unnecessary, it is a little difficult to see why the court spent the time and effort to show that MERS was MetLife's nominee or agent, and had authority to assign the mortgage to MetLife. Perhaps some members of the court favored one theory, and some the other, and the drafter of the opinion mollified both by including both theories.

COMMENT 2. The court is certainly correct that under the common law a mortgage assignment is not necessary to the right to foreclose, so long as the foreclosing party is entitled to enforce the note. Of course, this common-law principle can be changed by statute. Some states require a chain of mortgage assignments (usually, a recorded chain) in order to foreclose. The much-discussed Ibanez case (*U.S. Bank Nat. Ass'n. v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011)) is based on such a statute. By my count, there are eleven such statutes: California, Georgia, Idaho, Maine, Massachusetts, Michigan, Minnesota, Nevada, Oregon, South Dakot, and Wyoming. In all cases except Maine, these statutes apply only to nonjudicial (power of sale) foreclosure. (If any readers are aware of any I've missed, I would appreciate your letting me know.) While I don't think these statutes serve any very useful purpose, they can certainly be traps for the unwary.

COMMENT 3. The Hansens argued that, because the original mortgage wasn't recorded until after the note was sold on the secondary market, the mortgage became like a "wild deed" and was therefore unperfected. The court (correctly) held that, for purposes of the right to foreclose the mortgage, this was completely irrelevant. "Perfection through recording is a notice requirement only; it does not affect the validity of an assignment." But the court might also have said that, whether the loan's originator still held the note or not, the recording of the mortgage was perfectly capable of providing notice and establishing the mortgage's priority vis' a vis' other liens, from the date of recording.