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BANKING LAW ALERT

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AREAS OF PRACTICE

Business and Finance

FORECLOSURE NOTICES - WHO ARE YOUR INTERESTED PARTIES?

With a typical foreclosure sale, a lender is required to send notice to all interested parties to the sale. Thus, the notice would be sent to any party that held an ownership interest in the real estate and any other lienholders who had recorded their interest in said property at least ten (10) days prior to the first publication date. The purpose of the notice is to make sure that all parties are fully aware of the sale because their rights in the property may be extinguished or otherwise negatively affected.

The issue of "interested parties" has come up more recently with regard to Mortgage Electronic Registration Systems, Inc. ("MERS"). As you may already know, MERS is a company that many lenders will pay an annual subscription fee to in exchange for electronic processing and tracking of ownership and transfers of mortgages. Lenders in the MERS system will designate MERS as the beneficiary or nominee in the deed of trust. This designation allows the lender to sell or transfer the deed of trust without having to record the transfer with the local register of deeds - avoiding some of the recording costs associated with the transfer of the loan.

For most lenders and attorneys, the normal process has been not to notify MERS of a pending foreclosure sale. However, things changed due to a ruling by the Tennessee Court of Appeals on January 9, 2015. In EverBank v. Henson**,** the Court ruled that MERS was an interested party and should have received notice.

The EverBank case involved a commercial property in Shelby County where Bank of Bartlett held the first priority lien. A second mortgage was later provided to Plaza Mortgage Company, which designated MERS as the beneficiary. After a couple of assignments, EverBank ended up as the holder of the second note and deed of trust, but there was never anything recorded in the register of deed's office to show EverBank as the holder.

Legal counsel for the Bank of Bartlett searched the title records, sent notice to Plaza Mortgage Company, and conducted the sale as the successor trustee. No notice was sent to MERS or EverBank. Bona fide purchasers acquired the property at the foreclosure sale.

Both EverBank and MERS later became aware of the foreclosure sale and filed suit to set aside the foreclosure sale and for damages against the trustee (who was the attorney who did the title work and conducted the sale). At the trial court level, the Bank of Bartlett won on summary judgment.

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On appeal, the Court of Appeals reversed, in part, by determining that summary judgment was not proper as to the damages issue. The Court of Appeals remanded the case back to the trial court, as it found that the trustee failed to notify all interested parties, that MERS was properly listed in the second deed of trust, and that the trustee was subject to potential damages. The Court of Appeals affirmed the validity of the foreclosure sale, ruling that the failure to notify an interested party, in and of itself, is not enough to set aside a foreclosure sale under Tennessee law.

BEST PRACTICE ADVICE: For now, it is best to make sure that all foreclosure notices include MERS until possible further clarification from the Tennessee Supreme Court, which is currently taking up a similar case as to whether MERS is entitled to notice with regard to a tax sale. It is imperative that a title search be conducted to make sure that the proper notices are sent to avoid any potential claims for damages by interested parties.


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