

Merrimack Valley

housingreport

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New Foreclosure Decision by SJC

By: Richard P. Howe Jr.

The Supreme Judicial Court of Massachusetts recently announced its third major decision on mortgage foreclosures during the past eighteen months. In *Eaton v. Federal National Mortgage Association*, the homeowner (Ms. Eaton) raised as a defense in a proceeding to evict her from her former residence that the underlying foreclosure was defective because the entity that conducted the foreclosure was not also the holder of the associated promissory note. In remanding the case to the trial court for additional findings, the SJC held that the entity conducting the foreclosure must also possess the promissory note or at least be authorized to conduct the foreclosure by the holder of the note in accordance with “general agency principles.”

Significantly, the SJC specifically stated that its holding in *Eaton* would be applied prospectively only and not retroactively. Had it been retroactive, title to thousands of already-completed foreclosures would have been thrown into doubt. As it is, *Eaton* raises substantial practical questions going forward. Will foreclosing

lenders feel obliged to pre-emptively record additional documents that establish possession of the promissory note or authority to act on behalf of the holder? Or will things stay as is with the burden on delinquent homeowners to affirmatively raise questions about the status of the note? The SJC decision gives little guidance so the real estate community will have to reach a consensus approach until some future decision is announced or the legislature acts on this issue.

The first decision in this foreclosure trilogy was *U.S. Bank v. Ibanez* which was announced by the Supreme Judicial Court in January 2011. In *Ibanez*, the SJC held that contrary to the practice common in the real estate business, the entity conducting a foreclosure must be the holder of the mortgage at the time the foreclosure proceedings commenced. Because it was and is exceedingly rare for the entity granting the loan to also be the one conducting the foreclosure, valid and timely assignments of mortgages play a critical role in this process.

Con’t. on Pg 3

Deeds, Mortgages, Foreclosures and Orders of Notice Recorded

June 2011 and June 2012 compared

	Haverhill		Lawrence		Lowell		Methuen	
	June-11	June-12	June-11	June-12	June-11	June-12	June-11	June-12
Deeds	103	98	78	93	140	129	88	110
Mortgages	123	182	79	107	173	231	130	199
Foreclosure Deeds	15	12	22	14	22	10	12	6
Orders of Notice	7	14	32	21	30	24	17	15

Monthly, Second Quarter and YTD Results

By: Mike Poore

June marked the end of the second quarter for 2012; year over year statistics as well as Q2 2011 vs. Q2 2012 came back with seemingly positive news. Year over year statistics for the four recording cities seem to point to the possibility of a housing bottom. Lawrence had significant increases in both deeds and mortgages (year over year), with foreclosures and orders down. Lowell also saw similar results, although deeds were down, mortgages were up significantly, foreclosures were down 50% and orders also saw a decline as well. Haverhill is the only recording city to see an increase in foreclosures or orders of notice, June 2011 saw 7, while June 2012 saw 14.

Comparing quarterly results will give us an indication as to how the housing market is doing over the same time period in the previous year. Year to date results will also be compared between 2011 and 2012. Quarter 2 was overall better than last year, Methuen and Haverhill saw 15% and 11% increases respectively for deeds, while Lowell and Lawrence saw slight declines of 6.9% and 3.7%. Mortgages were up across the board both in Q2 results and YTD. Methuen saw the biggest increase of 37.3% while Lawrence saw the smallest increase of 14%. This may be due in part to the stabilization of the labor market as well as historically low interest rates. Home owners who are in the position to refinance to lower rates are doing so in droves.

Foreclosure and orders of notice had interesting patterns, different from both deeds and mortgage results. Q2 results and YTD results for deeds and mortgages were relatively similar; Methuen's deed statistics show similar numbers between Q2 results and YTD results, seeing a 15.4% increase in deeds

in Q2 and a 14.7% increase YTD. There is however a large deviation between foreclosures in Methuen for Q2 and YTD. Q2 saw foreclosures decrease by -.5%, although year to date results show an increase in foreclosures of 9.7%. Seeing these numbers might make one wonder if Q2 results were somehow manipulated regarding when orders or foreclosures are started. Lawrence had a similar situation, with foreclosures down 14.2% in Q2, although only down 2.6% YTD. Orders in Methuen during Q2 were down 35.5%, although only down 5.6% YTD. The biggest deviation however was Haverhill's order of notice results which saw Q2 down 18.6%, with YTD notices up 13.4%.

If just looking at Q2 results, it's fair to say that Haverhill and Methuen are doing better than Lawrence and Lowell. Haverhill and Methuen saw increases in deeds, large increases in mortgages with flat foreclosures and significantly less orders of notice. Although Lowell did see the biggest decrease in orders with -44%, it is also the only recording city with a decrease in deeds (although up 1.7% YTD).

YTD statistics point to Lowell as fairing better than the other three, with foreclosures and orders down 8.4% and 10.7%, but with only a slight increase in deeds, a 16% increase in mortgagees, respectively. These numbers show something much different than Q2 results. YTD Methuen is still doing well, although it saw a 9.7% increase in foreclosures. Next quarter we will take a look at these two sets of data again and see if the deviations stay as large as they are currently. Second quarter and YTD charts can be found on pages 3 and 4. 

Looking to Showcase Your Vacancy or Looking to Move?

Community Teamwork Inc. (CTI) developed a new website designed to help landlords showcase their vacancies, and tenants to easily find them.

This free service is offered throughout the Merrimack Valley and the North Shore.

For more information go to:

www.nearlistings.org or contact Avi Glaser at aglaser@comteam.org

*New Foreclosure Decision by SJC
Con't from Pg 1*

In practice, however, assignments were often executed after the foreclosure auction had been held which, under Ibanez, would invalidate the foreclosure. Unlike the holding in Eaton, however, the SJC did apply Ibanez retroactively which meant that thousands of foreclosures conducted with untimely or missing assignments of mortgage were suddenly rendered invalid, much to the consternation of the third parties who had ultimately purchased such homes from foreclosing lenders.

It was those third parties who were addressed in the other SJC foreclosure case, Bevilacqua v. Rodriguez which was announced in October 2011. Here, Francis Bevilacqua purchased a home previously owned by Mr. Rodriguez from Mr. Rodriguez's lender which had already foreclosed on the property. Bevilacqua argued that his rights as a bona fide purchaser of the property without knowledge of the defective foreclosure should be superior of those of the delinquent borrower/home owner, Mr. Rodriguez. The SJC disagreed with Bevilacqua, rejecting his assertion that he lacked

knowledge of the defective foreclosure since the absence of an assignment of the mortgage to the foreclosing lender was readily apparent in the records

of the registry of deeds which provided Mr. Bevilacqua with at least constructive notice of the problem. That the real estate industry at the time had (incorrectly) concluded that such a state of paperwork had no effect on the title did not change that.

Although the basics of the law of mortgage foreclosure in Massachusetts have been around for a century and a half, many of the relevant statutes were not lacking in ambiguity. In the absence of legislatively created certitude, local practice filled in the gaps. Unfortunately, this type of user-driven evolution does not bind the Supreme Judicial Court in its interpretation of the law. While the practical impact of Ibanez, Bevilacqua and Eaton is somewhat disruptive, it also provides much needed guidance to those in the real estate business. █

Charts accompany article from page 2

Q2 Deeds	Methuen	Lowell	Haverhill	Lawrence
2011	240	390	275	237
2012	284	363	312	228
% Chng	15.4%	-6.9%	11.8%	-3.7%

Q2 Mortgages	Methuen	Lowell	Haverhill	Lawrence
2011	353	499	358	262
2012	563	655	542	305
% Chng	37.3%	23.8%	33.9%	14%

Monthly, Second Quarter and YTD Results
 Con't from Pg 2

Q2 Foreclosures	Methuen	Lowell	Haverhill	Lawrence
2011	19	64	39	49
2012	18	46	40	42
% Chng	-.5%	-28.1%	.25%	-14.2%

Q2 Orders	Methuen	Lowell	Haverhill	Lawrence
2011	59	115	43	73
2012	38	64	35	57
% Chng	-35.5%	-44.3%	-18.6%	-21.9%

YTD Deeds	Methuen	Lowell	Haverhill	Lawrence
2011	409	692	519	432
2012	480	704	570	412
% Chng	14.7%	1.7%	8.9%	-4.6%

YTD Mortgages	Methuen	Lowell	Haverhill	Lawrence
2011	735	1049	754	509
2012	983	1249	1001	565
% Chng	25.2%	16%	24.6%	9.9%

YTD foreclosures	Methuen	Lowell	Haverhill	Lawrence
2011	37	107	61	76
2012	41	98	71	74
% Chng	9.7%	-8.4%	14%	-2.6%

YTD Orders	Methuen	Lowell	Haverhill	Lawrence
2011	88	168	90	124
2012	83	150	104	116
% Chng	-5.6%	-10.7%	13.4%	-6.4%

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