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Mortgage Foreclosure Alert: Attaching Promissory Note in Illinois Sufficient to Show Standing; but HUD Letters Require Proof of Dispatch

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In a foreclosure action, the Illinois Appellate Court recently held that the foreclosing lender established its standing by attaching the blank-indorsed note to its complaint, but reversed judgment and remanded for the trial court to determine if a letter required by the Secretary of Housing and Urban Development ("HUD") regulations was actually dispatched.

In *U.S. Bank Trust National Association v. Hernandez*, 2017 IL App (2d) 160850, the foreclosing lender attached a copy of the promissory note indorsed in blank. The borrowers raised defenses that the lender lacked standing and that its predecessor failed to comply with HUD regulations requiring, among other things, that the lender send a letter to a delinquent borrower offering to have a face-to-face interview.

In support of its summary judgment motion, the lender produced an affidavit that attached a copy of the HUD-required letter and a Federal Express shipping label. The borrowers argued the letter was defective because HUD regulations required the letter to be sent via certified mail from the U.S. Postal Service. The borrowers denied they received a certified letter. *Id.* ¶ 8. The trial court granted judgment in the lender's favor, and borrowers appealed.

The Second District of the Illinois Appellate Court held that attaching a copy of the blank-indorsed promissory note showed standing to foreclose. The court acknowledged the legal force of a blank indorsement under the Uniform Commercial Code: "[t]he presumption of ownership conferred by the indorsement meant that plaintiff could sue on the Note without setting forth its history." Instead, it was the borrowers' burden to provide "as much of that history as necessary" to show that the note was *not* transferred before the plaintiff filed the complaint. In short, nothing the borrowers argued rebutted the presumption that the lender held the note before it sued.

The Court declined to rule on the borrowers' argument that the letter was defective because it was sent via Federal Express, and not U.S. certified mail, instead the Court held that, regardless of who sent the letter or how it was sent, the HUD regulation requires the letter to be "dispatched." It determined that the Federal Express label,

by itself, did not prove that the letter was actually dispatched—for instance, the sender may not actually ship the letter after it generates the label.

The Court walked back certain declarations about substantial compliance in a prior case where it dealt with the same pre-foreclosure HUD notice issue. Just seven months before, in *PNC Bank, N.A. v. Wilson*, 2017 IL App (2d) 151189, the Court held the bank did not need to prove that it complied with the same HUD regulation at issue in *Hernandez* because the defendants' mortgage debt was discharged in bankruptcy, so there was no way a face-to-face meeting could ameliorate the contract. Conversely, the Court in *Hernandez* determined that *Wilson* should be restricted to its specific facts involving an intervening bankruptcy discharge—or at least restricted to similar situations where foreclosure is "inevitable[.]" As a result, the Court in *Hernandez* reversed judgment and remanded the case to see if the lender could establish that the letter was actually dispatched.

In light of this case, foreclosing plaintiffs should make sure they obtain and lay foundation for proof of dispatch when a defendant challenges the foreclosure on the basis of this HUD face-to-face meeting regulation.

Topics

Illinois, Appellate Decisions, Foreclosure, Mortgage, HUD