MASSACHUSETTS LAWYERS WEEKLY

Post-foreclosure eviction case reopened after SJC ruling

'Extraordinary circumstances' justify 2nd look

By: Eric T. Berkman August 13, 2014

A judgment blocking the eviction of a borrower due to a foreclosing lender's alleged failure to properly notify the borrower of the right to cure a default could be reconsidered in light of the Supreme Judicial Court's recent decision in *U.S. Bank National Association v. Schumacher*, a Housing Court judge has ruled.

Prior to *Schumacher*, a number of borrowers successfully challenged post-foreclosure evictions based on lenders' failure to strictly comply with G.L.c. 244, §35A, which requires a bank to notify a defaulting borrower that it has 90 days to cure its default before instituting a foreclosure proceeding. In many of the cases, courts were voiding foreclosures based on minor technical defects in §35A notifications.

The SJC ruled in *Schumacher*, however, that §35A is not part of the foreclosure process and thus can't be raised as an issue in a post-foreclosure summary process action. Instead, the court held, challenges to §35A notice must be raised in a separate equity action. But the SJC also found that a foreclosure may still be invalidated where noncompliance with §35A renders the foreclosure "fundamentally unfair."

In this case, Judge Dina E. Fein of the Western Division Housing Court had granted summary judgment in 2013 to defaulting borrowers in a post-foreclosure summary process action from which neither party appealed.

But the lender, Federal National Mortgage Association, argued in a post-Schumacher motion for reconsideration that "extraordinary circumstances" justified another look.

Fein agreed.

"[*Schumacher]* did not represent a change in decisional law; it was the Supreme Judicial Court's first pronouncement of law in an area previously entirely silent on point," said Fein, granting FNMA's motion.

"Prior to *Schumacher* the trial courts were doing their best to predict where [the SJC's 2011 decision in] US Bank National v. Ibanez and its progeny would lead on the Section 35A issue, and trial court decisions on point differed," the judge continued. "Now having the benefit of the SJC's clear statement in Schumacher, and having learned that the law is not as I implicitly predicted in the summary judgment ruling herein, there is no reason to put the parties through the exercise of filing another summary process case and responding thereto, rather than proceeding in this case."

'Two-tiered' justice?

Lender's counsel David Rhein of Orlans Moran in Waltham declined to comment on the ruling. Borrower's counsel, Joel H. Feldman of Heisler, Feldman, McCormick & Garrow in Springfield, could not be reached prior to deadline.

But Paul R. Collier III of Cambridge, who represented borrowers before the SJC in *Schumacher*, said it's not surprising that FNMA and other lenders that have violated §35A notice requirements would seek to take advantage of the "generous forgiveness" of such violations set out in *Schumacher.*

However, he added, this case represents "anything but the 'extraordinary circumstances' which are required to set aside final judgment." Collier said that a ruling like this suggests two tiers of justice in the foreclosure crisis: one for banks and another for homeowners losing their homes.

"The courts … are not allowing homeowners who relied upon the pre-*Schumacher* state of the law to go back, amend their pleadings and try to prove the new rule of 'fundamental unfairness' the *Schumacher* court announced, but are instead simply entering judgment on the 35A claims in favor of the banks," he said

Max Weinstein, an attorney with the Legal Services Center of Harvard Law School who also represented borrowers in Schumacher, said this case illustrates the reality that *Schumacher* has failed to resolve the issue of contested foreclosures with any kind of finality.

"Everybody can at least agree on the fact that *Schumacher* has perhaps created more litigation and not less," he said. "This case is just one example of that."

On the other hand, Christopher S. Pitt, a past president of the Real Estate Bar Association, found the Housing Court's "double-take" and willingness to look carefully at the issue of foreclosure documentation from both sides to be encouraging.

"As [now-Chief Justice Ralph D. Gants] observed earlier this year in his concurring opinion in [*Schumacher*], the SJC's jurisprudence in the area of foreclosure law has been difficult even for attorneys to understand," said Pitt, who practices with Robinson & Cole in Boston and was not involved in the case. "The *Schumacher* decision signals a turn in the direction of balance, requiring fundamental fairness in the foreclosure process rather than pure technical perfection with the requirements of all applicable statutes, especially where issues of pre-foreclosure compliance are not raised until well after a foreclosure is completed."

Edward M. Bloom of Sherin & Lodgen in Boston, also a former REBA president, said the Guzman case is just one of many brought by lenders following *Schumacher*. He said that motions for reconsideration filed within one year of the Housing Court's prior ruling are being granted, but if a prior decision is more than a year old most attorneys are advising lender clients that it's too late to file a motion to reconsider under Rule 60(b) of the Massachusetts Rules of Civil Procedure.

While lenders may view the ability to reopen such cases as helpful, said Bloom, in reality doing so presents a "mixed bag" because if a lender reopens a case, the defendant/borrower can then contest any counterclaims previously raised but not tried following a summary judgment on §35A noncompliance grounds.

"One might ask why the lenders do not simply commence a new foreclosure process rather than litigate these summary process cases," said Bloom. "The answer is that [G.L.c. 244, the state foreclosure law] was amended effective Nov. 1, 2012, by the addition of §§35B and 35C [which] provide many additional protections for borrowers and place numerous obligations on lenders that did not exist with respect to any foreclosures that occurred before [that date]."

Summary judgment

Defendants Wilfredo Guzman and Brenna McGuire, property owners in Hampden County, defaulted on their mortgage and the defendant, FNMA, foreclosed.

On Sept. 20, 2011, FNMA filed a summary process action in Housing Court seeking to evict the defendants in conjunction with the foreclosure.

The defendants raised various defenses and counterclaims, including a motion for summary judgment on the grounds that the lender had not provided notice of their right to cure as required by §35A.

On June 19, 2013, Fein granted summary judgment for the defendants, ordering entry of judgment for possession in their favor. The judge never ruled on their counterclaims and never entered separate and final judgment for the defendants on FNMA's possession claim.

Instead, the clerk's office entered a form judgment for possession in the defendants' favor, from which neither party appealed.

After the SJC decided Schumacher in March 2014, FNMA filed a motion to reconsider under Rule 60(b). Fein heard the motion on June 9, 2014.

'Extraordinary circumstances'

While granting FNMA's motion, Fein conceded that a Rule 60(b) motion is typically not a proper alternative to appeal, that such a motion is only appropriate in "extraordinary circumstances" and that changes in decisional law by themselves do not generally constitute such circumstances.

Nonetheless, the judge found that extraordinary circumstances justifying reconsideration did, in fact, exist in this case.

First, said Fein, her prior summary judgment did not adjudicate the defendants' counterclaims and it did not sever those claims from the summary process case for transfer and adjudication on the court's civil docket

As such, she said, final judgment shouldn't have entered after the summary judgment ruling, adding that when multiple claims are brought in an action, a decision is subject to revision under Rule 54(b) of the Rules of Civil Procedure absent a final judgment on all claims.

"In this case I clearly contributed to the uncertainty attending the summary judgment ruling by entering a judgment for possession in favor of the defendants," said Fein. "As that ruling did not adjudicate all of the claims, however, I conclude that it was not a final adjudication for the purposes of appeal."

Responding to the argument that changes in decisional law don't justify reconsideration of an earlier ruling on their own, the judge stated that Schumacher was not, in fact, a change in decisional law. Rather, it was the first time the SJC had spoken on that area of law. Now — with the benefit of the SJC's statement — it made more sense to go forward in this case rather than creating inefficiency and confusion by putting the parties through another summary process case.

Finally, Fein said, the defendants would have an opportunity going forward to establish their claim that they never received §35A notice at all, which would make the foreclosure itself fundamentally unfair and entitle them to have the foreclosure sale set aside.

CASE: Federal National Mortgage Association v. Guzman, et al., Lawyers Weekly No. 17-006-14

COURT: Western Housing Court

ISSUE: Can a prior judgment blocking the eviction of a borrower due to a foreclosing lender's alleged failure to properly notify the borrower of its right to cure a default be reconsidered in light of the Supreme Judicial Court's recent decision in U.S. Bank National Association v. Schumacher?

DECISION: Yes

LAWYERS WEEKLY NO. 17-006-14

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