

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-10694

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES
CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2006-Z,
PLAINTIFF/APPELLANT,

v.

ANTONIO IBANEZ,
DEFENDANT/APPELLEE.

WELLS FARGO BANK, N.A.,
AS TRUSTEE FOR ABFC 2005-OPT 1 TRUST,
ABFC ASSET BACKED CERTIFICATES SERIES 2005-OPT 1,
PLAINTIFF/APPELLANT,

v.

MARK A. LARACE AND TAMMY L. LARACE,
DEFENDANTS/APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

**APPELLANT U.S. BANK, AS TRUSTEE'S REPLY
TO THE BRIEF OF APPELLEE ANTONIO IBANEZ**

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ARTHUR L ENO, JR., WILLIAM V. HOVEY, ET AL., 28B MASSACHUSETTS
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I. INTRODUCTION

Appellant U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, ("U.S. Bank, as Trustee") respectfully submits the following reply brief in response to the brief of Appellee Antonio Ibanez ("Ibanez").

In his brief, Ibanez does not discuss or dispute that a securitization agreement can validly assign a mortgage to a securitization trust in compliance with Massachusetts law, conceding that such an agreement can do so. Instead of addressing the issue central to this appeal, Ibanez examines the effect of the "assignment of mortgage" in blank held by U.S. Bank, as Trustee, and the "confirmatory assignment" that U.S. Bank, as Trustee recorded after the foreclosure sale. This is off point. U.S. Bank, as Trustee's possession of these documents, and the original note and the original mortgage, merely confirm and evidence the assignment of the mortgage effectuated by the operative securitization agreements.

Furthermore, in advocating against the purported dangers of "private, undisclosed and unrecorded securitized conveyances" (Ibanez Br. at 14-15), Ibanez

ignores the long-standing principle that an assignment of mortgage need not be recorded to be enforceable. See MacFarlane v. Thompson, 241 Mass. 486, 489 (1922); Montague v. Dawes, 94 Mass. 397, 400 (1866). There is nothing in Massachusetts law that prohibits the "private, undisclosed and unrecorded securitized conveyances" to which Ibanez takes exception. Ibanez, in effect, seeks to have over one hundred fifty years of established law set aside in the name of "integrity of title." Ibanez Br. at 14.

Finally, the Land Court's rulings as to Title Standard No. 58 of the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), were wrong as a matter of law and, if affirmed, must apply prospectively only. Ibanez's attempt to minimize the ramifications of the Land Court's wholesale rejection of Title Standard No. 58, completely ignores the thousands of foreclosures conducted over the past two decades in reliance on the standard.

II. STANDARD OF REVIEW

Ibanez argues that the standard of review for denial of a motion to vacate judgment is abuse of discretion. Ibanez Br. at 16. This appeal, however, challenges the Land Court's interpretation of the

contractual materials before it and the legal conclusions on which it affirmed its entry of judgment U.S. Bank, as Trustee. The Court reviews legal conclusions *de novo*.¹ See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, 456 Mass. 463, 467 (2010); Matthews v. Planning Bd. of Brewster, 72 Mass. App. Ct. 456, 462 (2008).

III. ARGUMENT

A. The Securitization Agreements Assigned The Ibanez Mortgage To U.S. Bank, As Trustee And Vested Legal Authority To Foreclose

1. Securitization agreements, as a matter of law, can effectuate assignment of mortgages to a securitization trustee

Ibanez does not dispute that an assignee may foreclose on a mortgage under the statutory power of sale and issue foreclosure notice per Mass. Gen. L. ch. 244, § 14. U.S. Bank, as Trustee became the assignee of the Ibanez mortgage by virtue of the securitization of the Ibanez loan and the corresponding assignment of the mortgage to the securitization trust. The written securitization agreements conveying the Ibanez loan (including the

¹ Application of an abuse of discretion standard to the Land Court's legal conclusions made in connection with its disposition of the Motion to Vacate would effectively deny U.S. Bank, as Trustee any meaningful opportunity to appeal those conclusions.

mortgage) into the trust served to give U.S. Bank, as Trustee authority to foreclose. Ibanez offers no argument why securitization agreements that satisfy the requirements for assignments under Massachusetts law cannot effect an assignment of mortgage.²

Nor does Ibanez dispute that courts in several jurisdictions have found that securitization agreements act to assign the subject loans (including the mortgages) to a securitization trustee, or meaningfully address the case law cited in the Appellants' Opening Brief. See Apps.' Op. Br. at 23-24. Ibanez's argument that U.S. Bank, as Trustee can cite to only one supporting Massachusetts case, In re Samuels, 415 B.R. 8, 18 (Bankr. D. Mass. 2009),³ is simply wrong. The United States Bankruptcy Court for the District of Massachusetts recently reaffirmed that a securitization agreement can assign a mortgage. See Rubijono v. Ameriquest Mortgage Co., et al., No. 07-

² See Appellants' Opening Brief ("Apps.' Op. Br.") at 24-28.

³ Ibanez's efforts to distinguish Samuels (Ibanez Br. at 37-38) fall short. The court in Samuels found unequivocally that, as a matter of law, "[t]he PSA itself, in conjunction with the schedule of mortgages deposited through it into the pool trust, served as a written assignment of the designated mortgage loans, including the mortgages themselves." In re Samuels, 415 B.R. at 18.

01076-FJB, Supp. Order on Mot. for S.J., at 1 (Bankr. D. Mass. May 27, 2010).⁴

In Rubijono, the plaintiff alleged that Deutsche Bank, as the trustee for a securitization trust, was not the holder of the plaintiff's mortgage and did not have the authority to issue notice of sale pursuant to Mass. Gen. L. ch. 244, § 14, or to conduct a sale. The plaintiff contended that: (1) "Deutsche Trust incorrectly represented to the Land Court that it had the authority to exercise the power of sale based on an Assignment that was invalid;" (2) "[a]t the time Deutsche Trust sent and published statutorily mandated notices . . . , Deutsche Trust did not have a valid written assignment in accordance with the Statute of Frauds;" and (3) "[t]he notices did not meet the statutory requirements because the notices incorrectly identified Deutsche Trust as the holder of the mortgage."⁵ The plaintiff also argued that the

⁴ A copy of the court's Order in Rubijono is attached in the addendum hereto at Tab A.

⁵ Pl.'s Second Am. Compl., dated Apr. 29, 2009, at ¶¶ 186-189, attached in the addendum hereto at Tab B.

securitization agreements were not valid assignments because they were not "in recordable form."⁶

The Rubijono court rejected each of plaintiff's arguments and held that Deutsche Bank, as the trustee of the trust:

became the holder of the note and assignee of the mortgage on or around November 5, 2004, by virtue of the [Mortgage Loan Purchase Agreement] and the [Pooling and Servicing Agreement] of November 1, 20[04]. Deutsche Bank therefore had standing to foreclose the mortgage at all times relevant to this proceeding. No recording of the transfer documents was necessary to make the transfer binding and effective against the debtor.⁷

As a matter of law, an assignment of a mortgage may be effectuated by the securitization of a mortgage loan and the agreements incidental thereto. The Land Court's decision is, thus, at odds with recent decisions of the Bankruptcy Court, as well as other courts that have considered the issue.

2. The Private Placement Memorandum provides sufficient evidence of assignment of the Ibanez mortgage

As evidence of the securitization of the Ibanez loan, U.S. Bank, as Trustee submitted to the Land Court a Private Placement Memorandum ("PPM"), dated

⁶ Pl.'s Opp'n to Def. Deutsche Bank's Mot. for S.J., dated Mar. 17, 2010, at 7-8, attached in the addendum hereto at Tab C.

⁷ Rubijono, Supp. Order on Mot. for S.J., at *1.

December 26, 2006. [A1167-1441]. The PPM describes the securitization process as carried out primarily by the Trust Agreement, dated December 1, 2006, and demonstrates that an assignment of the Ibanez note and mortgage to U.S. Bank, as Trustee occurred. [A1295-98]. The PPM establishes that the Trust Agreement contains operative language of assignment. [Id.].

Ibanez makes much of the fact that the Trust Agreement and the mortgage loan schedule were not submitted to the Land Court. Ibanez Br. at 4, 33-34. U.S. Bank, as Trustee does not purport to introduce new evidence into the record before the Court, and it relies on the Trust Agreement only to the extent that it is described in the PPM. [A1295-98]. Ibanez's request to strike references to the Trust Agreement is without merit. See Section III.F, infra.

In relying on narrow arguments concerning the factual record below, Ibanez avoids addressing the larger issue of whether securitization agreements, as a matter of law, can effect a valid assignment of mortgage. This legal issue was raised and considered by the Land Court in the consolidated Ibanez and Larace actions, and it is presented on appeal here. The evidence in the record from the consolidated

actions provides more than sufficient basis on which the Court can decide the issue. To the extent that the Court believes additional evidence of the securitization of the Ibanez loan is necessary, the Court should decide the legal issue and remand for consideration of the application of its legal ruling on a more complete factual record. Remand would be particularly appropriate in this case as the Land Court entered judgment against U.S. Bank, as Trustee in ruling on its unopposed Motion for Entry of Default Judgment, and denied U.S. Bank, as Trustee an opportunity to amend its complaint. [A594-95, 601-02, 613-17, 1143-45].

3. Ibanez's waiver argument must fail

Ibanez incorrectly contends that U.S. Bank, as Trustee waived its right to argue that the securitization of the Ibanez loan acted to assign the Ibanez mortgage. Ibanez Br. at 34 & n. 28. U.S. Bank, as Trustee expressly raised the issue below in its Motion to Vacate Judgment [A649], at the April 17, 2009 hearing [A690-697, 700-701, 708-713], and in its Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment [A952-955]. U.S. Bank, as Trustee in no way waived this argument.

Dep't of State Police v. Mass. Org. of State Eng'rs & Scientists, 456 Mass. 450, 457 n.12 (2010).

Moreover, the Land Court expressly considered the scope and effect of the securitization agreements in its Memorandum and Order on the Motions to Vacate Judgment [A1146-1161]. The Land Court itself recognized that the issue of whether securitization agreements serve to assign mortgages to a trust "is clearly of importance, not only to the litigants, but also to others" and "that the plaintiffs' new facts and new arguments [should] be addressed on their merits since they are alleged to be common to many securitized loans." [A1146]. As the Land Court noted, this issue is of clear public importance and should be considered here. See Cottam v. CVS Pharmacy, 436 Mass. 316, 320 (2002); McSweeney v. Cambridge, 422 Mass. 648, 653 (1996).

B. The Court Should Disregard Ibanez's Mischaracterizations Of U.S. Bank, As Trustee's Arguments

1. U.S. Bank, as Trustee's financial interest and possession of all indicia of ownership of the Ibanez loan confirm its authority to foreclose as assignee

U.S. Bank, as Trustee does not, as Ibanez argues, rely merely upon some undefined "financial interest,"

"splintered rights" or "indicia of ownership" to demonstrate its authority to issue foreclosure notice or exercise the power of sale. Rather, U.S. Bank, as Trustee had the authority to do so by virtue of the operative securitization agreements that assigned the Ibanez mortgage to it well before it issued notice of sale and conducted the sale.

U.S. Bank, as Trustee cites its possession of all indicia of ownership in the subject loans, including the original note, the original mortgage, and the original "assignment of mortgage" in blank, to both confirm and evidence its status as assignee. See Apps.' Op. Br. at 34-37. Taken alone, these indicia of ownership may not provide authority to foreclose, but taken together they confirm and evidence U.S. Bank, as Trustee's authority to do so.

Ibanez's efforts to distinguish Saffran v. Novastar Mortgage, Inc., No. 4:07-cv-40257-PBS (D. Mass. Oct. 18, 2007), and Nichols v. Cadle Corp., 139 F.3d 59, 62 (1st Cir. 1998), are of no moment. Both cases support the proposition that to determine authority to foreclose, courts should not mechanically determine the holder of a mortgage, but should evaluate each party's financial interest and rights in

a mortgage loan. Saffran, 4:07-cv-40257, at 5-6;
Nichols, 139 F.3d at 62; Apps' Op. Br. at 34-42.

Contrary to Ibanez's argument, U.S. Bank, as Trustee does not seek to "abrogate" statutory law, "expand and obscure" the persons authorized to foreclose on a mortgage, or to create a secret, non-transparent land transfer system. Rather, it is Ibanez who seeks to create a new regime of assignment not supported by the law. Under Massachusetts law an assignment of mortgage need not be recorded to be enforceable, see MacFarlane, 241 Mass. at 489; Montague, 94 Mass. at 400, and Ibanez fails to explain how the unrecorded assignment to U.S. Bank, as Trustee is inconsistent with this long-standing law.

2. Ibanez misunderstands the relevance of the "assignment of mortgage" in blank

Ibanez's discussion of the "assignment of mortgage" in blank (Ibanez Br. at 38-41) misses the point.

U.S. Bank, as Trustee does not rely on the "assignment of mortgage" in blank as vesting its right to foreclose. The "assignment of mortgage" in blank was not the operative legal document acting to transfer the legal right and interest in the mortgage

to U.S. Bank, as Trustee. The securitization agreements themselves effectuated that transfer. The Trust Agreement, as reflected in the PPM, requires an assignment of mortgage in blank solely for the convenience of the parties to the agreement as evidence of the prior assignment. [A1295].

3. Ibanez's challenge to the "confirmatory assignment" is misplaced

Ibanez argues that the "confirmatory assignment," recorded after the foreclosure, does not support U.S. Bank, as Trustee's authority to foreclose. See Ibanez Br. at 33, 42. But Ibanez again misses the point. It is undisputed that a "confirmatory assignment" does not itself convey the mortgage. See Scaplen v. Blanchard, 187 Mass. 73, 76 (1904). Rather, such an assignment "is evidence of the making of the former conveyance as of the time when it was made ... it is only confirmatory evidence of the title which passed by the original [conveyance]." Id.

Thus, recording a "confirmatory assignment" of mortgage after a foreclosure sale acts to confirm, by an instrument in a more easily recorded form, the prior assignment that occurred through the securitization. See In re Samuels, 415 B.R. at 20-22;

In re Almeida, 417 B.R. 140, 149-50 (Bankr. D. Mass. 2009). It also serves as a means to update the public record to reflect the assignment to the ultimate assignee.⁸ While the "confirmatory assignment" is not the conveyance, the recording of such an assignment is in no way contrary to Massachusetts law.⁹

C. Ibanez Makes Speculative Factual Contentions Which Do Not Address The Issue Presented And Should Be Disregarded

Ibanez makes several "fact" arguments, which are irrelevant to the legal issue presented, were not addressed by the Land Court, and have never been tested or challenged by way of discovery. The Court should disregard these arguments.

⁸ Massachusetts law does not require that all assignments in a given chain-of-title be recorded. The Land Court recognized as much when it ruled in Rosario [A580] that an unrecorded assignment of mortgage, which was indorsed from the last assignee of record to the foreclosing entity, was valid. Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C., No. 10-11589, 2010 WL 1956867, at *11 (E.D. Mich. June 14, 2010) ("Notably, even the Ibanez court recognized that an assignment to the bank from the last assignee of record would be sufficient without the necessity to obtain or record assignments for each interim transfer.").

⁹ To the extent that Ibanez challenges the authority of American Home Mortgage Servicing, Inc. to issue the confirmatory assignment, this challenge is immaterial to the legal issue presented here. In reaching its decision, the Land Court assumed the validity of the confirmatory assignment. [A1155].

1. Ibanez's reliance on the "Bloomberg compilation" report is misplaced

Ibanez relies upon a report produced by Bloomberg Professional Service to suggest that the Ibanez mortgage was never assigned to the Trust. Ibanez Br. at 8-9, 47. The report supports no such conclusion, namely because after the foreclosure sale, but before the date of the report, the Ibanez property was sold to a third-party purchaser.¹⁰

In addition, the report is dated May 26, 2009, well after the assignment on December 1, 2006 and the foreclosure sale in July 2007. [Supp. App. 22-54]. The report has no bearing on the validity of the assignment effectuated by the securitization of the Ibanez loan. Even if it did, U.S. Bank, as Trustee never had the opportunity to challenge the report, its creation, or its veracity, or to subject it to the rigors of discovery. It should not be considered.

2. U.S. Bank, as Trustee is the holder of the Ibanez note

Ibanez's challenge to U.S. Bank, as Trustee's status as holder of the Ibanez note must also fail. First, this argument was not a basis for the Land

¹⁰ Information regarding the sale is publicly available at the Hampden County Registry of Deeds, at <http://www.registryofdeeds.co.hampden.ma.us/>

Court's decision, which rested on the assumption that U.S. Bank, as Trustee was the holder of the note.

[A1147-49]. Ibanez cannot raise an argument before this Court that the Land Court did not consider below, nor can he ask this Court to make contrary factual findings. See Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 642 n.20 (2010).

Second, the argument is wrong. U.S. Bank, as Trustee properly submitted the original collateral file for the Ibanez loan to the Land Court,¹¹ which the authenticating affidavits in the record confirm.

[A1071-72; 1078-79; 1082-83]. The collateral file contained, among other things, the original Ibanez note, an allonge to the note indorsed by Rose Mortgage, Inc. (the originator of the Ibanez loan) and payable to Option One Mortgage Co. ("Option One"), and an allonge to the note indorsed by Option One in blank, and thus bearer paper. [A960-66; 948-49].

Both allonges were affixed to the original note contained therein [A953], and U.S. Bank, as Trustee's possession of the original note and the two allonges establish it as the legal noteholder. See Mass. Gen.

¹¹ The Land Court has had possession of the original collateral file for the Ibanez loan since on or about June 8, 2009. [A948, 953].

L. ch. 106, §§ 3-109, 3-204. U.S. Bank, as Trustee, was the holder of the note, further evidencing its ownership of the Ibanez mortgage.¹²

3. Ibanez cannot challenge the validity of the recorded Rose Mortgage assignment of mortgage

Ibanez's suggestion that the Rose Mortgage assignment of mortgage to Option One was altered or invalid is pure speculation. Ibanez Br. at 33, 41-42. To the contrary, the Land Court expressly assumed the validity of the Rose Mortgage assignment of mortgage in rendering its decision. [A1149]. Ibanez cannot now request this Court to make contrary factual findings not considered by the Land Court. See Mahlowitz, 456 Mass. at 642 n.20; Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640 (2005).

Furthermore, the Rose Mortgage assignment of mortgage to Option One was recorded and, thus, is afforded at the very least an inference of validity - an inference which Ibanez has not provided sufficient

¹² Ibanez identifies a third allonge, indorsed by Rose Mortgage in blank. Ibanez Br. at 11, 25, 44. Ibanez has produced no evidence to show that the third allonge was ever affixed to the original note. Speculation as to a contrary conclusion is not enough to establish the fact. See S.W. Resolution Corp. v. Watson, 964 S.W.2d 262, 264 (Tex. 1997).

rebuttal. See NovaStar Mortgage, Inc. v. Saffran, No. 09-ADMS-70017, 2010 WL 2010880, at *2 (Mass. App. Div. May 17, 2010); Mass. Gen. L. ch. 183, §§ 4, 5.

D. Ibanez Lacks Standing To Argue That The Assignment Was Not In Compliance with The Trust Agreement

Despite his contrary suggestions (Ibanez Br. at 36 n.32), Ibanez has no legal basis to challenge whether the assignment of mortgage to the trust failed to satisfy the terms of the Trust Agreement. Ibanez was not a party to the Agreement and is not an intended third-party beneficiary. He thus lacks standing to challenge compliance with the Agreement. See In re Almeida, 417 B.R. at 149 n.4; Livonia Prop. Holdings, 2010 WL 1956867, at *11.

E. Ibanez's Efforts To Minimize The Land Court's Rejection Of Title Standard No. 58 Must Fail

Ibanez's efforts to minimize the significance of the Land Court's rejection of REBA Title Standard No. 58 must fail.¹³ Title Standard No. 58 has served as an authoritative guide for real estate practitioners

¹³ Ibanez does not cite any Massachusetts case law to support the rejection of Title Standard No. 58. Instead, he relies almost entirely on cases from New York state court. See Ibanez Br. at 22 n.17.

since at least 1995.¹⁴ Since then, industry practice has recognized the validity of foreclosures for which assignees have executed and recorded confirmatory assignments only after completion of foreclosure sales. [A1084-92].

Affirming the Land Court's rejection of Title Standard No. 58 with retroactive effect would have significant ramifications for properties sold pursuant to this prior industry practice. This would be especially true with respect to innocent third-party purchasers who might then own property with an arguable cloud on title. And while Ibanez argues that a "doomsday" scenario has not resulted from the Land Court's rulings, the chief of the Boston Housing Authority has already encountered their detrimental consequences, explaining that the Land Court's decisions have:

delay[ed] the city's efforts to clean up areas plagued by abandoned homes ... [which] holds up quite a bit of our work in revitalizing the neighborhoods that have been most devastated.¹⁵

¹⁴ See Eno & Hovey, 28B Massachusetts Practice: Real Estate Law, REBA Tit. Std. No. 58 (4th Ed. 2008).

¹⁵ See Jenifer B. McKim, Ruling Upheld on Sale of Property: Ownership Status of Foreclosures Clouded, in The Boston Globe, dated Oct. 15, 2009, available at <http://www.boston.com/realestate/news/articles/2009/10>

Thus, any rejection of Title Standard No. 58 and the validity of post-foreclosure confirmatory assignments must be applied prospectively only. See Powers v. Wilkinson, 399 Mass. 650, 849 (1987).

Finally, Ibanez's argument that the prospective application argument is waived is incorrect. U.S. Bank, as Trustee raised the effects of the Land Court's rejection of Title Standard No. 58 in its Motion to Vacate Judgment. [A658-59]. The issue was also raised by REBA in its amicus brief to the Land Court. [A1085-91]. Moreover, the rejection of an industry-wide standard is of significant public importance so as to warrant consideration by the Court. See Costa v. Fall River Hous. Auth., 453 Mass. 614, 621 n.11 (2009); Cottam, 436 Mass. at 320.

F. Ibanez's Request To Strike Is Without Merit

Despite Ibanez's blanket request to strike unidentified facts and arguments allegedly not supported in the record, U.S. Bank, as Trustee has not cited to or relied upon any facts or arguments that are not included in the record.

/15/judge_upholds_ruling_on_sales_of_foreclosed_properties/ (a copy is attached at Tab D to the addendum).

With respect to all references to the Trust Agreement, U.S. Bank, as Trustee has relied upon the PPM which was submitted to the Land Court and is in the record on appeal. See Apps.' Op. Br. at 19-22, 27, 33. U.S. Bank, as Trustee's statement of "industry custom," cites to the transcript of the Land Court's April 17, 2009 hearing. Id. at 45-46. Lastly, as discussed above, Ibanez's contention that U.S. Bank, as Trustee waived the right to address the effect of the securitization agreements or the need to prospectively apply the Land Court's decisions are plainly wrong. See Sections III.A.3 & III.E, supra.

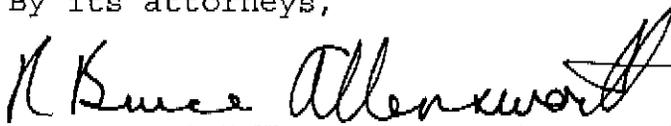
IV. CONCLUSION

For the foregoing reasons, as well as those presented in its Opening Brief, Appellant U.S. Bank, as Trustee respectfully requests that the Court reverse the Land Court's rulings, vacate the judgment entered against it, and remand for consideration of the relevant securitization agreements and any additional evidence the Court deems appropriate.

Respectfully submitted,

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