



U.S. Court of Appeals Affirms Dismissal of Homeowner's Anti-Foreclosure Suit

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A number of lawsuits have been filed in Virginia, and across the country alleging that lenders have improperly handled foreclosures on residential real estate. These suits have been filed on a number of bases including the FDCPA, FCRA and other Virginia consumer protection statutes. This is a summary of one such case recently decided in favor of the lender.

In a major victory for the lending industry, the Richmond-based U.S. Court of Appeals for the Fourth Circuit issued an opinion on May 19, 2011 (Horvath v. Bank of New York, Docket No. 10-1528) affirming the dismissal of a lawsuit filed by a homeowner seeking to invalidate the August, 2009 foreclosure on his home in Prince William County, Virginia on a variety of grounds.

America's Wholesale Lender ("AWL") made the original \$650,000 loan to Horvath in 2006. The loan was secured by a deed of trust recorded against Mr. Horvath's residence. In accordance with the terms contained in the loan documents, the note (which had been endorsed in blank) and the deed of trust were transferred a number of times between 2006 and 2009. These transfers occurred primarily due to the loan's inclusion in a securitization pool. Even though the identity of the "holder" of the note changed several times, the loan was, at all times, serviced by Countrywide. Bank of New York ("BNY") held the mortgage note when Horvath defaulted in 2009. A foreclosure was conducted on August 14, 2009. Horvath filed suit shortly thereafter to overturn and invalidate the foreclosure

In his lawsuit, Horvath argued that under Virginia law, only the original lender (AWL) could foreclose under the deed of trust. Horvath contended that the Deed of Trust had been split from the note and that while BNY as the current holder of the note, may be able to sue under the mortgage note for a money judgment, BNY had no rights under the deed of trust to take the property as collateral for the note and thus could not foreclose. The court called this argument "seriously flawed" pointing to current Virginia statutes as well as decades of Virginia case law that allowed BNY, as the holder of the note, to initiate foreclosure under the deed of trust. The court noted that "there would be little reason for notes to exist in the first place" if "transferring a note stripped it from the security that gives it value."

Horvath also made the argument that the deed of trust document defines the "lender" as AWL and therefore only AWL could have the rights given to the lender under the deed of trust. The court dismissed this argument as "absurd" noting other provisions of the same deed of trust that permitted the sale of the lender's rights without notice to Horvath.

The court also rejected Horvath's argument that any assignment of the lender's rights under the deed of trust must be recorded in the land records, as well as his argument that BNY

needed to prove that it had standing to enforce the mortgage note before BNY could appoint an equity trustee to conduct the foreclosure.

The Court further reasoned that nearly 100 years of Virginia law has clearly established and supported the free transfer of negotiable instruments, particularly those that had been endorsed in blank and effectively made into “bearer” notes. Ultimately, the Court took a common sense approach to its evaluation of Horvath’s arguments and determined that Horvath’s arguments “stem more from his views of what the law ought to be than from what it actually is.”

Jen West and Tim Moore are two of the attorneys at Spotts Fain PC who work with banks in connection with a wide variety of issues including Insolvency, Workouts, Creditors’ Rights, Bankruptcy and Collections.