SUPREME COURT OF ARIZONA

JULIA V. VASQUEZ

Plaintiff/Debtor,

v.

SAXON MORTGAGE, INC.; SAXON MORTGAGE SERVICES, INC.; DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR SAXON ASSET SECURITIES TRUST 2005-3

Defendants.

Arizona Supreme Court
No. CV 11-0091-CQ

U.S. Bankruptcy Court
for the District of Arizona [Tucson]

Chapter 13 Proceedings
Case No.: 4:08-bk-15510 -EWH

Adv. No.: 4:10- ap-00727-EWH

BRIEF OF APPELLANT ON QUESTIONS CERTIFIED BY THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

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I. STATEMENT OF THE CASE

On April 4, 2011 the United States Bankruptcy Court for the District of Arizona, the Honorable Eileen W. Hollowell presiding, certified two questions of Arizona law to this Court pursuant to Ariz. Rev. Stat. §12-1863 and Ariz. S. Ct. Rule 27 (a)(3). By its Order dated May 24, 2011, this Court accepted jurisdiction of the certified questions and directed the filing of simultaneous briefs within forty-five days with oral argument scheduled on September 22, 2011.

II. STATEMENT OF THE FACTS

In September 2005, Plaintiff Julia V. Vasquez, formerly known as Julia V. Escobar [hereinafter "Vasquez"], refinanced her home [the "Home"] with Saxon Mortgage, Inc. ["Saxon"] by signing a promissory note ["Note"] payable to Saxon as the lender. She also executed a Deed of Trust ["DOT"] in favor of Saxon as the lender and beneficiary of the DOT. Ticor Title was designated as the trustee under the DOT. The DOT was recorded in the Pima County Recorder's Office on September 16, 2005.

On or about September 29, 2005, Saxon assigned the Note to Deutsche Bank National Trust Company as Trustee for Saxon Asset Securities Trust 2005-3 ["Deutsche Bank"] by endorsing the Note in blank and without recourse.[1] Saxon neither executed nor recorded an assignment of the DOT to Deutsche Bank at the

[1]On July 7, 2011 it was brought to counsel's attention that the stipulated facts relating to the transfer of the promissory note from Saxon Mortgage directly to Deutsche Bank and the assignment of DOT from Saxon Mortgage directly to Deutsche Bank may be incorrect. Counsel contacted counsel for Deutsche Bank and informed him of the issue.

same time as it transferred the Note.

Vasquez defaulted in her payment obligations under the Note.

On August 28, 2008, Deutsche Bank executed a Substitution of Trustee under the DOT appointing Michael A. Bosco, Jr. of Tiffany and Bosco ["Tiffany and Bosco"] as the substitute Trustee. The Substitution of Trustee was recorded on September 12, 2008, along with a Notice of Trustee's Sale for the Property. The Notice of Trustee's Sale named "Deutsche Bank/2005-3" as the beneficiary of the DOT however the beneficiary of record was Saxon. No assignment of the DOT from Saxon to Deutsche Bank was executed or recorded at the time the Notice of Trustee's Sale was filed.

Not until two months after the Notice of Trustee's Sale was recorded, did a Saxon agent execute an assignment of DOT to Deutsche Bank. On October 29, 2008, Saxon's Vice President executed an Assignment of Deed of Trust ["Assignment"], transferring all beneficial interest in the Note and DOT to Deutsche Bank. The assignment of DOT was recorded on November 7, 2008, three years after the Note was purportedly transferred to Deutsche Bank in 2005. The Assignment of DOT sets forth an effective date of August 11, 2008.

III. ISSUES ON APPEAL/CERTIFIED QUESTIONS

The Bankruptcy Court framed the certified questions to this Court as follows:

> 1. Is the recording of an assignment of deed of trust required prior to the filing of a notice of trustee's sale under A.R.S. §33-808 when the assignee holds a promissory note payable to bearer?

2. Must the beneficiary of a deed of trust being foreclosed pursuant to A.R.S. §33-807 have the right to enforce the secured obligation?

IV. ARGUMENT

A. An Assignee of a Promissory Note secured by a Deed of Trust Must Have a Beneficial Interest of Record in the Deed of Trust Prior to Initiating a Trustee's Sale.

As discussed in detail below, Arizona's statutes, the terms of the DOT and public policy require that all transfers of interest in property be recorded to impart notice to all interested parties, including assignments of a beneficial interest in deeds of trust.

Statutory law mandates that a mortgage or deed of trust must be created in writing. It must also be executed with the same formalities required of a grant of real property and recorded in a like manner.[2] If not recorded as directed by Arizona law, unrecorded deeds of trust or mortgages are void as to creditors and subsequent purchasers for valuable consideration without notice. [3] If the equitable or legal interest in the deed of trust is transferred, the transferor of the beneficial interest must record that interest within sixty days.[4]

Arizona's recording laws[5] establish a framework requiring that all transfers of real estate, or any interest therein, be recorded within sixty days of such transfer. This requirement is set forth as follows:

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[2]Ariz. Rev. Stat.§§33-701and 33-805

[3]Ariz. Rev. Stat.§§33-411(A) and 33-412(A).

[4]Ariz. Rev. Stat. §33-411.01

[5]Ariz. Rev. Stat.§§33-411through 33-412.

> Any document evidencing the sale, or other transfer of real estate or any legal or equitable interest therein,. . ., shall be recorded by the transferor in the county in which the property is located and within sixty days of the transfer. Ariz. Rev. Stat. § 33-411.01 [Emphasis added].

Once recorded, an assignment of a beneficial interest in a deed of trust imparts notice to all persons of the beneficiary's claim against specific property, including subsequent purchasers and encumbrancers for value.[6] As applied to the grantor, even more is required. An assignee of a beneficial interest under a deed of trust must give actual notice of the assignment to the trustor.[7]

Arizona laws specifically governing deeds of trust and trustee sales are set forth in Ariz. Rev. Stat. §§33-801 et seq. ("Deeds of Trust"). Said Deeds of Trust statutes, along with Ariz. Rev. Stat. §§33-701 et seq. ("Mortgage Statutes"), establish the procedures which must be followed by a trustee, at the direction of a lienholder, for foreclosure or sale of the trustor's property in the event of default by the mortgagor or trustor.

Pursuant to Ariz. Rev. Stat.§33-807A, upon default of the underlying obligation, the beneficiary has the option to foreclose on the realty secured by the deed of trust either through a trustee's sale or judicial foreclosure. If the beneficiary opts to initiate a trustee's sale then it may direct the trustee to execute the power of sale granted to the trustee in the deed of trust. "Beneficiary" is defined as:

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[6]Ariz. Rev. Stat. §§33-706; 33-818.

[7]*Id.*

> ...the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest. Ariz. Rev. Stat. §33-801(1) [Emphasis added].

The holder of the note secured by the Deed of Trust is not included in the legal definition of a beneficiary as found in Arizona's Deed of Trusts statutes. Only the beneficiary or the beneficiary's successor in interest as recorded in the land records can command the trustee to act upon the trustee's power of sale.

If the holder of the promissory note secured by the deed of trust and the beneficiary named in the deed of trust are not the same, then the holder of the note is without power under Arizona's Deed of Trust statutes to command a trustee's sale. The holder may have other legal remedies against the trustor/debtor, but not the right to initiate a trustee's sale. Only the beneficiary of the deed of trust, as defined by Arizona's Deed of Trust statutes, may appoint a successor trustee.[8] Without a recorded assignment of deed of trust, the holder of a note does not fit the definition of "beneficiary" and is therefore without authority to exercise the option of a judicial foreclosure or designate a successor trustee to initiate a non-judicial sale under Arizona statutory law.

When Deutsche Bank directed the substitution of trustee and started its non-judicial sale of Vasquez's Home by recording its notice of trustee's sale on September 12, 2008, it was not a beneficiary in the chain of title as defined by Ariz. Rev. Stat. §33-801(1). Deutsche Bank neither had an assignment of all beneficial interest in the DOT nor a recorded interest in Vasquez's Home which

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[8] Ariz. Rev. Stat. §33-804.

would have authorized Deutsche Bank to appoint the successor trustee or initiate the trustee sale. By its actions it created a cloud on the title, violated Ariz. Rev. Stat. §33-420(A) and created confusion as to who had the authority to act against Vasquez's Home.

In Eardley v. Greenberg, 164 Ariz. 261, 792 P.2d 724 (1990), this Court was asked to resolve issues regarding the procedures required under Arizona law for substitution of a trustee prior to initiating a trustee's sale. Rejecting an argument that the trustor had no standing to question the relationship of the principal and agent involved in the sale, this Court, in *dicta*, stated:

> The trustor, trustee, and beneficiary are inextricably interconnected links in the chain of title to real property. Each has certain rights, legal or equitable, separated from the complete bundle of real property rights. Although a trustee's range of authority is severely limited, the trustee is the holder of legal title. The beneficiary holds an enforceable lien on the property. The trustor possesses the bulk of the bundle of rights, but it is obvious that the trustor's ability to deal with those rights can be effectively eliminated by uncertainties in the chain of title concerning either the beneficiaries or the trustee.
>
> The statutory scheme is designed to insure that the identities of beneficiaries and the authority of a trustee can be ascertained from an examination of the record.

Eardley v. Greenberg, Id at 265, 728 (1990).

This Court in Newman v. Fidelity Savings and Loan, 14 Ariz. 354, 357-358, 128 P. 53, 54-55 (1912) addressed the question of whether Arizona law required the recording of an assignment of a mortgage. It answered the question affirmatively, stating that a party:

> . . . has the right to presume that public records speak the truth and to act thereon in all matters affected by instruments required by law to

> be recorded. If the law requires or provides for the recording of certain instruments, and they are not recorded, a party searching the records is justified in concluding that no such instrument exists, and the law bears him out in the presumption.

An analysis of Arizona's recording statutes in conjunction with Arizona's Deed of Trust, Mortgage Statutes and case law supports the conclusion that, prior to initiating a trustee sale, the acting party must have a beneficial interest of record in the real property to have the right to sell the property. The stipulated facts of this case show Deutsche Bank was neither the beneficiary of record nor did Deutsche Bank have an executed assignment of beneficial interest in the DOT when Deutsche Bank designated a successor trustee to initiate a trustee's sale of Vasquez's Home.

The terms of the DOT between Vasquez and Deutsche anticipate actual notice of a change in ownership to Vasquez as well. For example, in the definitions section of the DOT the borrower/trustor is identified as Vasquez with the lender/beneficiary revealed as Saxon Mortgage, Inc. [See DOT page one, ¶¶(B)(C)]. Paragraph 15 of the DOT addresses notices and specifically states:

> Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender <u>until actually received by Lender</u>. [Emphasis added].

If the lender/beneficiary is never revealed to the trustor then the trustor's compliance with this provision is impossible.

Other provisions of the DOT require actual notice to the Lender of changes

in the secured property, e.g. paragraph five, "Property Insurance" [requiring the Borrower to give prompt notice to the Lender in the event of loss]; paragraph six, "Occupancy" [requiring Borrower to use the premises as a principal residence unless Lender agrees otherwise in writing], and paragraph seven, "Preservation, Maintenance and Protection of the Property; Inspections" [requiring the Borrower to communicate with the Lender as to whether damage should be repaired or restored]. Although Paragraph 20 of the DOT indicates the Note could be sold to another entity without prior notice to the Borrower, the DOT implies some form of notice will be given after the sale of the Note. It does not state notice to the Borrower/Trustor is unnecessary.

Disregarding these statutes and the express terms of the DOT, Deutsche Bank argued that its possession of the Note alone gave it the right to foreclose on Vasquez's Home. In support of its argument to the Bankruptcy Court, Deutsche Bank cited Rodney v. Arizona Bank, 172 Ariz. 221, 836 P.2d 434 (Ct. App. Ariz. 1992) which, it stated, supports the premise that the transfer of the promissory note and mortgage/deed of trust cannot be separate. Deutsche Bank argued that it is not required to follow the procedural formalities set forth in Arizona's recording laws and Deed of Trust statutes. Based on Rodney, Deutsche Bank argues that recording of an assignment of a beneficial interest in a deed of trust is never required because the mortgage follows the note.

The facts in Rodney are not the same as the facts presented in this case. Rodney involved a dispute between two parties who claimed the right to receive

payments under a note secured by an interest in real property. The Court of Appeals determined the right to receive the stream of income from the note was a personal property interest governed by the Uniform Commercial Code ("UCC")[Ariz. Rev. Stat. §§47-9101 et seq.]. Neither party was attempting to foreclose on the realty securing the obligations in the note. The Court of Appeals distinguished perfection of an interest under the UCC from the requirement of perfecting an interest under Arizona's recording statutes, stating:

> ....We hold that Article Nine of Arizona's Commercial Code applies to creation and perfection of a security interest in a promissory note, when the note itself is secured by a deed of trust in real property. Accordingly, recording the document assigning an interest in the note and the deed of trust that secures it under A.R.S. § 33–411 does not perfect the security interest in the note. This holding poses no conflict, in our opinion, with the rule that A.R.S. § 33–411 governs perfection of a security interest in real property, as evidenced by deed of trust.

Id. at 225, 438. The Court of Appeals clearly recognized the distinction between perfecting an interest in commercial paper under the UCC and perfecting an interest in realty under Arizona's recording statutes.

Rodney does not involve the issues at bar, which are analyzed under Arizona's Deed of Trust and recording statutes. The UCC does not address or govern the procedures required to be followed prior to initiating a judicial or non-judicial foreclosure on real property. Arizona foreclosures are governed by Arizona's Deed of Trust and Mortgage statutes.

Recently, the U.S. Bankruptcy Appellate Panel for the Ninth Circuit examined the application of the UCC in determining whether or not a litigant was

a real party in interest in a bankruptcy case and had standing to make a claim on a promissory note secured by realty. See In Re: Veal, __B.R.__, 2011 WL 2304200 (BAP Nos. AZ-10-1055 MkKiJu; AZ-10-1056 MkKiJu June 10, 2011). The Ninth Circuit Bankruptcy Appellate Panel relied heavily on a recent Draft Report by the Permanent Editorial Board (PEB) of the Uniform Commercial Code. See http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_Notes-Circulation_Draft.pdf. The PEB Draft Report states, at 9:

> In some states, a party without a recorded interest in a mortgage may not enforce the mortgage non-judicially. In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage, [footnote omitted] this may be insufficient as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment.

In footnote 42 of its report, the PEB added, "Of course, UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage."

Deutsche Bank also cited this Court's language in Hill v. Favour, 52 Ariz. 561, 568, 84 P.2d 575, 578 (1938) to support its position in this case. Hill is also distinguishable from the instant case because it focuses on the right to execute on a mortgage. In Hill, the transferor failed to transfer the note along with the mortgage and then attempted to levy on the security based on the mortgage alone without proper transfer of the note. Id. This is the exact opposite scenario than the case at bar. When read in full, Hill supports Vasquez's position. Hill holds that

because of procedural insufficiencies regarding the underlying debt obligations, the judgment creditor had no right to enforce a mortgage. In fact, this Court in Hill stated:

> When the statutes provide how property may be attached as security to pay any judgment obtained, that method must be substantially followed.

Id. at 570, 578. The holding in Hill supports Vasquez's position that an assignee of a promissory note secured by an interest in realty must record that interest prior to initiating a trustee's sale against the realty. Neither Saxon nor Deutsche Bank properly followed proper procedures. They failed to execute and record an assignment of beneficial interest in the Note and DOT prior to initiating the substitution of trustee and notice of trustee sale, actions which are required by Arizona's recording and Deed of Trust statutes. Because defendants failed to follow proper procedure, Deutsche Bank was not entitled to initiate the trustee sale.

Vasquez submits that Deutsche Bank had to have an assigned and recorded interest under the DOT, and not mere possession of a "payable to bearer" promissory note, before initiating a trustee sale in a non-judicial foreclosure.

Based on the foregoing the first question certified to this Court should be answered in the affirmative.

B. The Beneficiary of a Deed of Trust Must Have the Right to Enforce the Secured Obligation to Initiate a Trustee's Sale.

Saxon, after transferring its interest in the debt secured by the DOT, no longer had authority to initiate a trustee's sale of Vasquez's Home in 2008.

As explained by this Court in Hill v. Favour, *supra*, 568:

> The rule is very well stated in First National Bank of Saco v. Vagg, 65 Mont. 34, 212 P. 509, 510, as follows: "A mortgage is a conveyance within the meaning of the record laws of this state, though it is a conveyance of a chattel interest only. Title to it passes to an assignee by assignment of the debt or obligation secured by it; for the mortgage is but an incident-a security-and, independent of the debt, has no assignable quality. Such assignment is a mere nullity. Where there is no written evidence of the debt or obligation, the mortgage is evidence both of the debt and security for its payment. Nevertheless the debt is the principal thing, and the title to the mortgage must follow an assignment of it. [Emphasis added][9]

Saxon's transfer of Vasquez's Note to Deutsche Bank in September 2005 effectively dissolved any right it had to enforcement of the terms of the DOT for the simple reason that Saxon was no longer owed any funds from Vasquez.

If no specific statute or case law deals with an issue, this Court has looked to the Restatement of Laws. Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc. 189 Ariz. 206, 209, 941 P.2d 218, 221. Comments in the Restatement (Third) of Property (Mortgages) § 5.4 (1997) follow the above analysis and state:

> *e. Mortgage may not be enforced except by a person having the right to enforce the obligation or one acting on behalf of such a person.* As mentioned, in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. For example, assume that the original mortgagee transfers the mortgage alone to A

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[9]A review of the case law cited in Hill indicates this principle is based on a line of cases establishing this as an equitable principle dating back to the 1800s. Runyan v. Mersereau, 11 Johns. 532 (NY 1814) discusses the role of a court of equity in these circumstances. It determined that a doctrine of a court of equity is that the debt is the principal and the mortgage the incident, and that a transfer of the note would equitably draw after it the mortgage. See also Johnson v. Hart, 3 Johns.Cas. 322(N.Y. 1802).

> and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage

Accord, Bellistre v. Owcen Loan Servicing, LLC, 284 S.W.3d 619 (Mo. App. 2009), (application for transfer to Mo. S.Ct. denied).

Finally, Ariz. Rev. Stat.§33-817 makes it clear that once a contract [or promissory note as in this case] secured by a deed of trust has been transferred, the security travels with the transfer of the contract. Although Defendants might argue this statute obviates the need for making and recording an assignment of deed of trust such an argument must fail. First, the statute does not declare recordation is no longer required. It merely reiterates that the equitable principle cited in Hill v. Favour, supra, which is applicable to mortgages also applies to deeds of trust [which are statutory creatures]. Any other reading eviscerates the rest of Chapter 6.1 Ariz. Rev. Stat. §§33-801 et seq. Since no legislative history explains this statute, statutory construction mandates that it be read in *pari materia* with the rest of the statutes in the title.[10] Logically, the statute merely reiterates the

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[10]"The general rule is that a court may look to prior and contemporaneous statutes in construing the meaning of a statute which is uncertain and on its face susceptible to more than one interpretation." State ex rel. Larson v. Farley, 471 P.2d 731, 734 (Ariz. 1970). "If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent." Id. "If the statutes relate to the same subject or have the same general purpose - that is, statutes which are in pari materia - they should be read in connection with, or construed together with other related statutes, as though they constituted one law." Id., Moreno v. Jones, 139 P.3d 612 (Ariz. 2006), State v. Sweet, 693 P.2d 921, 925-926 (Ariz. 1985). "As they must be construed as one

equitable concept that the mortgage follows the note and thus has no life separate from that of the underlying obligation, as this Court held in Hill v. Favour, supra. It does not eliminate the requirement that a writing must evidence the transfer of the security interest in land or negate the recording and notice requirements of Ariz. Rev. Stat. §33-818. Recordation to give notice to all persons interested in the land and actual notice to the grantor of a transfer are both required.

For the above reasons Vasquez submits that this Court must answer the second certified question by reaffirming the principle that the beneficiary of a deed of trust must have the right to enforce the secured obligation to initiate a trustee's sale.

C. Impact Of Decision: Policies and Problems.

Vasquez submits that Arizona law requires an assignee of a promissory note, in this case Deutsche Bank, secured by an interest in realty to record its interest in the realty before it can take any action to non-judicially foreclose on the property. Further, Arizona law requires that the beneficiary directing the trustee to act upon a trustee's power of sale under a deed of trust have the proper authority to enforce this remedy.

Defendants' position is that Deutsche Bank's mere possession of the Note, in and of itself, is enough to give it the right to effect a non-judicial foreclosure on Vasquez's Home without first acquiring and recording a beneficial interest in the

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system governed by one spirit and policy, the legislative intent therefor must be ascertained" from both the literal meaning of the words of the statute as well as "the view of the whole system of related statutes." Id.

DOT secured by the property. Defendants assert that an assignee of a promissory note secured by a deed of trust is not required to record its interest in the property before initiating a non-judicial foreclosure. Defendants also assert that an assignee may sit on its rights for years before showing a recorded interest in the property securing the underlying obligation.

Defendants' position ignores the purpose of Arizona law concerning deeds of trust, recording and the importance of notice relating to real property interests. Said stance also ignores the notice provisions typically found in deeds of trust like Vasquez's DOT.

Recording transfers of a deed of trust provides transparency and notice to interested parties thereby protecting any party with an interest in the realty such as equitable owners of the property and lienholders.

Recording an interest in the property also establishes whether a creditor has a secured or unsecured claim against a debtor in bankruptcy. Failure to record and provide proper notice regarding interests in real property creates risks of uncertainty, confusion in the chain of title to the property and the potential for fraud. Failure to record and give notice of a transfer to the trustor also defeats the notice provisions usually contained in typical standard provisions of Arizona deeds of trust.

Proper recording is of particular importance for properties subject to a trustee sale, which is a non-judicial foreclosure, because they lack the procedural formalities and protection to the homeowner provided by a judicial foreclosure.

The risk of a homeowner losing his or her home is a grave matter which requires strict adherence to proper procedure.

Any claim that Vasquez is not hurt by Deutsche Bank's failure to follow Arizona law because she defaulted on her loan ignores the substantive rights a trustor of a deed of trust is entitled to enjoy both under the terms of the deed of trust and statutory law. Those rights, including the need for their transparency in the real estate records, were recognized by this Court in Eardley v. Greenberg, *supra*. Further, misapplying the principle of "the mortgage follows the note" and allowing an entity to ignore Arizona's recording statutes when it seeks to effect a non-judicial sale of realty has a substantial impact on Arizona property owners in general.

As explained by this Court in Krohn v. Sweetheart Properties, Ltd., 203 Ariz. 205, 208; 52 P.3d 774, 777 (2002),

> The deed of trust provisions were added to Arizona law in 1971 following complaints by representatives of the mortgage industry that the "mortgage and foreclosure process in Arizona [was] unnecessarily time-consuming and expensive." It was said at the time that an uncontested $ 25,000 mortgage foreclosure could take eight months and a contested foreclosure twelve to fourteen months. The deed of trust alternative permitted lenders to bypass this time-consuming and expensive judicial foreclosure by simply using their new power of sale authority to sell the property securing a delinquent loan after complying with statutory procedural requirements. There is even a statutory presumption of procedural fairness and accuracy by the mere completion of a sale. "The trustee's deed shall raise the presumption of compliance with the requirements of . . . this chapter . . .." A.R.S. § 33-811(B). Commenting on the two foreclosure methods, this court has said:
>
> > A mortgage generally may be foreclosed only by filing a civil action while, under a Deed of Trust, the trustee

> holds a power of sale permitting him to sell the property out of court with no necessity of judicial action. The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.

Patton v. First Federal Sav. & Loan Ass'n, 118 Ariz. 473, 477, 578 P.2d 152, 156 (1978) (emphasis added).

Allowing the defendants to ignore Arizona's Deed of Trust statutes and recording laws by using the mantra of the "mortgage follows the note" effectively removes any protection homeowners have if their homes are subject to deed of trust.

Arizona property owners have one of the highest foreclosure rates in the country and are suffering tremendous economic hardships with a loss of income and jobs.[11] Inaccurate and even fraudulent mortgage documentation has been the subject of numerous regulatory, law enforcement, and media investigations. See e.g. http://www.azdfi.gov/FraudLine/Intro.htm (Mortgage Fraud Line of the Arizona Department of Financial Institutions); http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-29.html (OCC Bulletin 2011-29 Re: Foreclosure Management [and its "Interagency Review of Foreclosure Policies and Practices", Fed Reserve System, Office of Comptroller of the Currency, Office of Thrift Supervision, Apr. 2011]).

Allowing a lender to hide its identity makes it difficult for a homeowner to negotiate a federally endorsed loan modification [such as a HAMP loan].

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[11] RealtyTrac reports one in every 210 housing units received foreclosure notices in May 2011. See http://www.realtytrac.com/trendcenter/az-trend.html

Although not present in the instant facts of this case, this Court's ruling affects the homeowner who may try to sell his or her property. If the chain of title is clouded by the failure of the original beneficiary to record an assignment of deed of trust to the entity who purchased the promissory note connected to the lien, then a sale may be delayed or even frustrated [particularly if the original lender no longer exists and an assignment cannot be acquired]. These and other problems would be ameliorated by a clear statement from this Court that a party initiating a non-judicial foreclosure must have its security interest timely recorded in Arizona's recorder offices.

The effect of failing to timely record a transfer of interest in realty may also exacerbate the depressed market value of the Arizonan homeowner's property. This concern was noted by the Massachusetts Land Court in U.S. Bank National Association v. Ibanez, 17 L.C.R. 202, 209 Mass. L.C.R. Lexis 41, 2009 WL 795201 (Mass. Land Ct. Mar. 26, 2009) [(affirmed on basis of lack of assignment of the interest prior to initiating the sale, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011)]. The Land Court in Ibanez explained the incalculable damage created by the failure to record assignments before initiating a trustee's sale, stating:

> The purpose of this requirement and the need for "strict compliance" is readily discerned. As even a cursory glance at the current case load of this court reveals, titles arising from mortgage foreclosures can have many problems. These include the most fundamental: Did the party conducting the foreclosure have the authority to do so and, if challenged, can it prove that it had such authority? In short, will a purchaser at the foreclosure sale get good title and will it get it in a prompt fashion?...with so many foreclosure properties available for purchase why bid on a property with even the possibility for such trouble? Why bid on a property when the foreclosing party cannot

> produce all the documents (including proper mortgages assignments in recordable form) that would give good title? Why take the risk that the foreclosing party would be able to produce the documents promptly after the auction takes place, that those documents would be in proper and complete form, or even (in this era of failed and failing institutions) that the foreclosing party will still be in existence, with intact files and knowledgeable employees able to find those files so that the proper paperwork can be completed? Since these concerns affect the ability to obtain clear, marketable title, why bid a reasonable market value instead of a discount price to account for that risk?

Affirming the Land Court's decision that the foreclosing entity initiating the action must hold the mortgage at the time of the notice of sale, the Massachusetts Supreme Court examined many of the same issues present in this case. It noted:

> Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.

U.S. Bank National Association v. Ibanez , 458 Mass. 637, 649, 941 N.E.2d 40, 51-52 (Mass. 2011) Under Massachusetts law, like Arizona law, the statutory power of sale can only be exercised by the mortgagee or its assigns. The Massachusetts Supreme Court held that U.S. National Bank's attempt to correct the problem after the fact through a retroactive assignment was ineffective. *Ibid*, at 54, 653-654. The Court held that at the time of the publication of the notices and the sales, U.S. Bank lacked the authority to foreclose under Massachusetts law. U.S. Bank's published claim to be the present holder of the mortgage when it started the trustee sale was false.

V. CONCLUSION

A statement made by the Massachusetts Land Court regarding U.S National Bank's failure to follow Massachusetts law applies equally to the present case and Arizona homeowners in general:

> The issues in this case are not merely problems with paperwork or a matter of dotting i's and crossing t's. Instead, they lie at the heart of the protections given to homeowners and borrowers by the Massachusetts legislature. To accept the plaintiffs' arguments is to allow them to take someone's home without any demonstrable right to do so, based upon the assumption that they ultimately will be able to show that they have that right and the further assumption that potential bidders will be undeterred by the lack of a demonstrable legal foundation for the sale and will nonetheless bid full value in the expectation that that foundation will ultimately be produced, even if it takes a year or more. The law recognizes the troubling nature of these assumptions, the harm caused if those assumptions prove erroneous, and commands otherwise.

U.S. National Bank Association v. Ibanez, 2009 WL 3297551 (Mass.Land Ct. Oct 14, 2009).

For the above reasons, Julia Vasquez asks that this Court rule that an assignee of a promissory note secured by a deed of trust must have a beneficial interest of record in the deed of trust prior to initiating a trustee's sale. She also asks that this Court rule that the beneficiary of a deed of trust must have the right to enforce the secured obligation to initiate a trustee's sale.

RESPECTFULLY SUBMITTED this 8th day of July, 2011.

Southern Arizona Legal Aid, Inc.

By: /s/
Beverly B. Parker
Anthony Young

CERTIFICATE OF COMPLIANCE PURSUANT TO ARIZ. R. CIV. APP. P. 14(B)

Pursuant to Ariz. R. Civ. App. P. 14(b), I certify the Brief of Plaintiff/Debtor Julia V. Vasquez on Questions Certified by the U.S. Bankruptcy Court for the District of Arizona uses proportionately spaced type of 14 points, is double-spaced and contains less than twenty pages.

Date: July 8, 2011

/s/
Beverly B. Parker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and seven copies of the Plaintiff/Debtor's Brief on Questions Certified by the United States Bankruptcy Court for the District of Arizona was mailed on July 8, 2011, by third party commercial carrier addressed to the Clerk of the Arizona Supreme Court at 1501 West Washington, Phoenix, Arizona 85007.

The undersigned further certifies that two copies of the Plaintiff/Debtor's Brief on Questions Certified by the United States Bankruptcy Court for the District of Arizona were mailed on July 8, 2011 by prepaid United States First Class mail to:

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/s/
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