

27 March 2014

Practice Group:**Financial Institutions
and Services
Litigation**

Penmanship Lesson: Technical Defects in Massachusetts Pre-foreclosure Letters Not Grounds for Voiding Foreclosures

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In a victory for common sense, the Massachusetts Supreme Judicial Court (the “SJC”) has held that Mass. Gen. Laws ch. 244 § 35A (“Section 35A”) does not relate to “the foreclosure of mortgages by the exercise of a power of sale,” and thus failure to “strictly adhere” to its requirements does not void a foreclosure sale. *See U.S. Bank, N.A., as Trustee v. Schumacher*.¹ The *Schumacher* decision will curtail costly and unnecessary post-foreclosure legal proceedings in Massachusetts.

First enacted in 2008, and amended in 2010, Section 35A requires that after a mortgagor has defaulted but before the loan can be accelerated, the mortgagee must serve the mortgagor with a certain notice (the “35A Notice”). The 35A Notice informs the mortgagor, among other things, of his default and right to cure the default within 150 days. The statute specifies the content of the 35A Notice, such as the nature of the default; the date by which the mortgagor has to cure the default;² the name, address, and telephone number of the current mortgagee; and the name of either the mortgage loan originator or broker.³

Before *Schumacher*, Massachusetts courts disagreed on whether the failure to “strictly adhere” with the requirements of Section 35A would void a foreclosure sale. The dispute centered on whether the 35A Notice constitutes a part of the exercise of the “power of sale” contained in a residential mortgage. Under Massachusetts law, the failure to “strictly adhere” to the legal requirements that govern the “power of sale” in a nonjudicial foreclosure renders a resulting foreclosure sale void. *See, e.g., U.S. Bank, N.A. v. Ibanez*.⁴ In *Ibanez*, the SJC defined the “power of sale” as being codified in Sections 11 through 17C of Chapter 244, and in Section 21 of Chapter 183, of the Massachusetts General Laws. Because Section 35A is not one of the statutory sections enumerated in *Ibanez*, some courts refused to find that the 35A Notice is subject to the strict adherence standard applied to the power of sale and thus, held that a mere technical defect in the 35A Notice was insufficient to void a subsequent foreclosure sale.⁵

¹ --- N.E.3d ----, 467 Mass. 421, 430-32 (2014).

² *See* MASS. GEN. LAWS ch. 244, § 35A(b). When it went into effect in 2008, Section 35A provided for a 90-day cure period. *See* 2007 Mass. Legis. Serv. Ch. 206, §§ 11; 21. On August 7, 2010, the statute was amended to enlarge the cure period to 150 days, except that a “creditor” certifying that “it has engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure” is permitted to shorten the cure period to 90 days. 2010 Mass. Legis. Serv. Ch. 258, § 7. Currently, Section 35A has a sunset provision under which it will revert to a 90-day cure period on January 1, 2016. *See* 2010 Mass. Legis. Serv. Ch. 258, § 8.

³ *See* MASS. GEN. LAWS ch. 244, § 35A(h). Additionally, the Massachusetts Division of Banks issued regulations, including a sample form 35A notice. 209 C.M.R. § 56.01 *et seq.*

⁴ 458 Mass. 637, 647 (2011).

⁵ *See, e.g., Sloane v. JPMorgan Chase Bank, N.A.*, 2012 WL 7806163, at *1 (D. Mass. Mar. 27, 2012) (holding strict adherence standard was only applied to “sections 11 through 17C of General Laws Chapter 244”); *Sovereign Bank v.*

Penmanship Lesson: Technical Defects in Massachusetts Pre-foreclosure Letters Not Grounds for Voiding Foreclosures

Yet, in the past several years, former mortgagors facing post-foreclosure eviction sought to void foreclosure sales, and thus avoid eviction, based on purely technical defects with a 35A Notice. Like the mortgagor in *Schumacher*, many argued that the alleged failure to list the current mortgagee or the alleged failure to list either the mortgage originator or mortgage broker on the 35A Notice was sufficient to void a foreclosure sale. Several decisions of the Massachusetts Housing Court, often with little or no analysis, had adopted this position.⁶ The SJC's ruling in *Schumacher* abrogates those decisions.

In *Schumacher*, the mortgagor had been foreclosed upon and the foreclosing entity had brought a post-foreclosure summary process action to evict him.⁷ In defense, the mortgagor asserted that the foreclosure sale was void because of alleged, technical defects in the 35A Notice that was sent prior to the loan's acceleration, namely (1) in the field for mortgage originator, the 35A Notice stated "N/A," and (2) the 35A Notice listed the securitization trust as the current mortgagee, even though a public assignment of the mortgage had not yet been recorded.⁸ Thus, he argued, the foreclosing entity lacked standing to evict him because it purportedly did not hold valid title to the property in light of the alleged defects in the 35A Notice. Notwithstanding *Schumacher*'s identification of the alleged defects, the Housing Court found that "no credible defenses were presented" by the mortgagor, and entered summary judgment against him.⁹

On appeal, the SJC affirmed the Housing Court's ruling and held that Section 35A is merely a "pre-foreclosure undertaking" and not "one of the statute[s] 'relating to the foreclosure of mortgages by the exercise of a power of sale.'"¹⁰ The SJC reasoned that foreclosure is correctly understood to be the "termination of all rights of the mortgagor ... in the property covered by the mortgage."¹¹ Section 35A, however, "is not the first step in terminating the mortgagor's right" because it expressly prohibits the acceleration of the debt during the cure period, which "is a clear indication that foreclosure proceedings do not commence with the issuance of the written [35A] notice."¹² Thus, Section 35A is not part of the "power of sale," and the failure to "strictly adhere" to the requirements of Section 35A is not grounds on which to void a subsequent foreclosure sale.¹³

Sturgis, 863 F.Supp.2d 75, 102-03 (D. Mass. 2012); *Fed. Home Loan Mortg. Ass'n v. Eccles*, S.E. Hous. Ct., No. 11-SP-4845, at 4 (Feb. 28, 2013); *Aurora Loan Services, LLC v. Murphy*, S.E. Hous. Ct., No. 12-SP-00521, at 3 (July 31, 2012).

⁶ See, e.g. *Fed. Home Loan Mortg. Corp. v. O'Connor*, Worcester Hous. Ct., No. 12-SP-3164 (Feb. 20, 2013); *Fed. Home Loan Mortg. Corp. v. Sensini*, N.E. Hous. Ct., No. 12-SP-0871, at 1 (Dec. 31, 2012) (failure to identify mortgage loan broker or originator in 35A Notice rendered foreclosure invalid); *Deutsche Bank v. Gomez*, N.E. Hous. Ct., No. 12-SP-3619, at 2 (March 13, 2013); *Fed. Nat'l Mortg. Ass'n v. Drillis*, N.E. Hous. Ct., No. 11-SP-3640, at 2 (Mar. 21, 2013) (mortgagor argued foreclosure was void because 35A Notice failed to list mortgage originator or mortgage broker); *Fed. Home Loan Mortg. Corp. v. McIntosh*, N.E. Hous. Ct., No. 11-SP-4387 (Feb. 21, 2013) (granting summary judgment against foreclosing entity where the 35A Notice listed a mortgagee that was not the mortgagee of record until a later assignment was recorded); *Fed. Home Loan Mortg. Corp. v. Bisnath*, N.E. Hous. Ct., No. 11-SP-4131 (Dec. 17, 2012); see also *Shin v. Consumer Solutions 3, LLC*, 2013 WL 3778151, at *2 (Mass. Sup. Ct. July 8, 2013); *Bravo-Buenrostro v. Onewest Bank, FSB*, 2011 WL 10818677, at *6 (Mass. Sup. Ct. May 31, 2011) (mortgagor argued foreclosure was void because 35A Notice listed someone other than the current mortgagee of record).

⁷ *Schumacher*, 467 Mass. at 424-25.

⁸ *Id.* at 426, 427.

⁹ *Id.* at 427.

¹⁰ *Id.* at 431 (quoting MASS. GEN. LAWS ch. 183 § 21).

¹¹ *Id.* at 430 (quoting *Levin v. Century Indem. Co.*, 279 Mass. 256, 259 (1932)).

¹² *Id.* at 430-31.

¹³ *Id.* at 431.

Penmanship Lesson: Technical Defects in Massachusetts Pre-foreclosure Letters Not Grounds for Voiding Foreclosures

In his concurrence, Justice Gants spoke about the “practical consequence” of the decision. Justice Gants agreed that because Section 35A is not part of the power of sale, it is not subject to the strict adherence standard. A technical violation of Section 35A, therefore, will not void a foreclosure unless the violation is “so fundamentally unfair that [the mortgagor] is entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale.”¹⁴

The effect of the *Schumacher* decision is likely to be significant in Massachusetts—especially in the context of post-foreclosure summary process actions against former mortgagors. Under *Schumacher*, mortgagees will be able to argue that mortgagors cannot raise technical defects in the 35A Notice as grounds to contest foreclosure or block eviction where the foreclosure complied with the statutory requirements for exercising a power of sale. The *Schumacher* decision, moreover, does not frustrate the legislative intent underlying the 150-day cure period prescribed by Section 35A, which is “to give a mortgagor a fair opportunity to cure a default before the debt is accelerated and *before the foreclosure process is commenced*.”¹⁵

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¹⁴ *Id.* at 431-32.

¹⁵ *Id.* at 431 (emphasis added).

Penmanship Lesson: Technical Defects in Massachusetts Pre-foreclosure Letters Not Grounds for Voiding Foreclosures

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