

NEW MEXICO

A Long Journey to Square One – The Unique Procedural History of One Foreclosure That Changed Foreclosure Litigation in New Mexico

By *Solomon S. Krotzer, Houser & Allison*

The Bank of New York v. Romero judicial foreclosure was filed on April Fool's Day in 2008. After a bench trial in the Bank of New York as Trustee's favor, Romero made its way to the Court of Appeals, then to the New Mexico Supreme Court, back to the trial court, and to the Court of Appeals a second time. On September 22, 2016, after eight years of litigation, the New Mexico Supreme Court denied certiorari. Result? Permission to file a new foreclosure – to start from “square one.” The unique procedural history of one case that ended up transforming foreclosure litigation in New Mexico provides insight not only into the difficult and evolving landscape of judicial foreclosures in New Mexico – but also provides universal lessons in effective advocacy.

Overview of How Romero Changed the Foreclosure Litigation Landscape

Romero primarily impacted the foreclosure landscape in three ways. First, Romero adds a temporal dimension to the evidentiary burden placed on foreclosing plaintiffs – requiring proof of the right to foreclose as of the date the foreclosure is filed. Second, Romero paved the way to the adoption of borrower-friendly public policy, including the notion that “securitization” has caused a “pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property” and this in turn has put homeowners at risk for “double liability such as when the wrong party sells the home and the note holder later appears seeking full payment on the note.” Third, the Romero decision created uncertainty in that it did not explain what evidence must be produced to prove standing, which in turn resulted in inconsistent rulings at the trial and appellate levels.

The Tale of Two Indorsements

In June 2006, the Romeros took out a refinance loan, defaulted a few years later and foreclosure proceedings were initiated. By the time the default occurred, the Romeros' loan had been pooled, securitized and transferred to a mortgage-backed trust, with JP Morgan Chase serving as the original trustee and The Bank of New York becoming the successor trustee. By the time foreclosure proceedings were initiated, two indorsements had been placed on the Romeros' negotiable instrument. One indorsement was a blank indorsement from the original lender, the other a “special indorsement” from the original lender to JP Morgan Chase (as trustee). However, there was no indorsement noting The Bank of New York's transition to successor trustee, which had actually occurred roughly two years before the foreclosure was filed.

At trial, The Bank of New York as Trustee's witness was cross-examined about these indorsements. Pointing to the indorsements, Romeros' counsel asked “So are either of those entities the Bank of New York?” The witness explained: “No sir. But our records do indicate that the owner of record of the note is, in fact, the Bank of New York.” Specifically, the witness explained that the “...pooling and servicing agreement ... assigns for the ownership of the note from Equity One to – if I'm not mistaken, it assigns from Equity One to the Bank of New York.”

Aside from the trial testimony, not much evidence was produced explaining how The Bank of New York took over the role of trustee from JP Morgan Chase, but these facts are public record. For example, according to one SEC filing on “...April 7, 2006 JP Morgan Chase & Co. and The Bank of New York, Inc. entered into a definitive agreement pursuant to which JP Morgan agreed to acquire The Bank of New York's consumer, small-business and middle-market banking businesses in exchange for JP Morgan's consumer and small business trust business plus a cash payment of \$150 million” (“BNY/JP Morgan Deal”).

Even though specific details concerning the BNY/JP Morgan Deal were not developed at trial, the trial court determined there was enough evidence to prove that The Bank of New York as Trustee had the right to foreclose. The Court of Appeals affirmed.

Supreme Court Decision

The New Mexico Supreme Court reversed and remanded with instructions “to vacate its judgement of foreclosure.” While some attorneys have argued that Romero created “new law,” that is not entirely accurate. Romero is

a mixture of established evidentiary principles with established interpretations of the New Mexico UCC, but resulting in practical twists in presentation. In short, the New Mexico Supreme Court determined that the testimony of one witness referring to “business records” and a “pooling and servicing agreement” that was never admitted into evidence at trial was not enough to prove that The Bank of New York (as trustee) had standing to foreclose in light of the special indorsement to JP Morgan Chase (as trustee).

End of the Road?

The Romero opinion left unanswered questions but one question was so important it required a second trip to the Court of Appeals: What happens after a foreclosing plaintiff fails to prove standing at trial? The trial court believed it was the “end of the road” and dismissed the foreclosure “with prejudice.” However, the Court of Appeals disagreed, giving the green light for a new foreclosure, remanded with instructions to dismiss “without prejudice.” The Court of Appeals emphasized that the trial court had improperly merged the doctrines of “claim preclusion” (i.e. foreclosure claim) with “issue preclusion” (i.e. issue of standing to foreclose).

In an enigmatic twist – the Court of Appeals did not decide whether “issue preclusion” bars re-litigating the issue of standing in the future. The answer to this question will have to be determined in a new foreclosure – bringing everyone “back to square one.”

Utah



Robyn Moody SALT LAKE REO

Keller Williams Salt Lake City Real Estate
Sales Agent/Owner
Robyn@SaltLakeREO.com
801-566-8288 Office | 801-859-2539 Mobile
www.SaltLakeREO.com



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In September, the number of properties that received a foreclosure filing in Utah was 1 in every 1243, according to RealtyTrac.