

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

S.J.C. NO. 10880

A.C. NO. 2010-P-1912

FRANCIS J. BEVILACQUA, III

Petitioner-Appellant,

v.

PABLO RODRIGUEZ

Respondent-Appellee

ON APPEAL FROM MASSACHUSETTS LAND COURT
CIVIL ACTION NO. 10 MISC 427157

OPENING BRIEF AND RECORD APPENDIX OF
PETITIONER-APPELLANT FRANCIS J. BEVILACQUA, III

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I. Statement of Issue

Whether a person who holds title to property by virtue of a recorded deed, but whose title is clouded by a possible adverse claim due to deficiencies in a prior foreclosure in his chain of title, has standing to bring a petition to try title under M.G.L. c. 240, § 1, where that statute requires the petitioner¹ to have record title?²

II. Statement of the Case

This case arises from an attempt by the Petitioner-Appellant, Francis J. Bevilacqua III ("Bevilacqua") to require a predecessor in title to assert or waive a potential adverse claim against Bevilacqua's record title to real property.

Bevilacqua filed a Petition to Compel Adverse Claimant to Try Title ("Petition") against Pablo Rodriguez ("Rodriguez"), in the Land Court on April 12, 2010. See Appendix ("App.") at 2-5. The Petition

¹ The try title statute, and this Brief, use the term "petitioner" to refer to a person bringing an action under the statute; however, some courts, including the Land Court below, also use the term "plaintiff" interchangeably therewith.

² While the statute also requires possession, the Land Court did not reach that issue as it determined that Bevilacqua had no interest in the Property. App. at 5.

was brought pursuant to M.G.L. c. 240, § 1. App. at 3.

Bevilacqua had difficulty locating an address at which to complete service on Rodriguez. On May 19, 2010, Bevilacqua filed an Ex Parte Motion for Leave to Serve by Publication ("Motion"). App. at 2, 6. At the hearing on the Motion, in addition to requesting supplemental information regarding Bevilacqua's search for Rodriguez, Judge Long questioned whether Bevilacqua had standing to bring the Petition under M.G.L. c. 240, § 1.

On June 15, 2010 Bevilacqua filed a new Ex Parte Motion for Leave to Serve by Publication and to Extend Tracking Order Deadlines ("Second Motion"), together with an Affidavit of David Glod and a Brief on the Issue of Standing. App. at 2, 8, 10. On July 12, Bevilacqua filed an Amended Second Motion and Affidavit of David Glod. App. at 2, 12, 15.

On August 26, 2010, the Court issued a Memorandum and Order Dismissing Plaintiff's Complaint, on the basis that Bevilacqua "holds no title to the property." App. at 24. The Land Court made this finding despite the existence of a recorded deed conveying the Property to Bevilacqua. App. at 24, 26.

On September 20, 2010, Bevilacqua timely filed his Notice of Appeal. App. at 30.

III. Statement of Facts

Bevilacqua holds record title to property located at 126-128 Summer Street, Haverhill, Massachusetts (the "Property"). App. at 3-4. Bevilacqua acquired the Property by quitclaim deed dated October 17, 2006 from U.S. Bank National Association as Trustee ("U.S. Bank"), which had foreclosed upon a mortgage originally granted by Rodriguez to Mortgage Electronic Registration Systems, Inc. as nominee ("MERS"). App. at 3-4.

The Land Court's holding in U.S. Bank v. Ibanez³ brings the validity of the foreclosure into question because, at the time that U.S. Bank began foreclosure proceedings, there does not appear to be any evidence that MERS had assigned the Mortgage to U.S. Bank. App. at 24.

³ U.S. Bank National Association v. Antonio Ibanez (and a consolidated case), direct appellate review granted, No. SJC-10694 (Mass. argued Oct. 7, 2010). Bevilacqua expresses no position as to the correct outcome in Ibanez, but notes that his claim will be moot if Ibanez is overturned or limited to prospective application.

IV. Argument

A. The Land Court erred in holding that Bevilacqua holds no title to the Property and lacks standing to maintain his Petition to Compel Adverse Claimant to Try Title.

The foundation of the Land Court's error was the finding that Bevilacqua "holds no title" to the Property (App. at 24), where in fact it is clear from the record that Bevilacqua holds record title.

Bevilacqua brought his Petition under M.G.L. c. 240, §§ 1-5, commonly referred to as the "try title" statute. See, e.g., Stamell v. Hancock, No. 250619, 2004 WL 1924357, at n. 1 (Mass.Land Ct. Aug. 31, 2004); DaCosta v. Christina, No. 276034, 2005 WL 715931, at *1 (Mass.Land Ct. March 30, 2005). The statute provides that "[i]f the record title of land is clouded by an adverse claim, or by the possibility thereof, a person in possession of such land claiming an estate of freehold therein" may bring an action to compel an adverse claimant to try title. M.G.L. c. 240, § 1.

If the adverse claimant does not appear to try his claim, the statute further provides that "the court shall enter a decree that they be forever barred from having or enforcing any such claim adversely to

the petitioner, his heirs or assigns, in the land described, and may require them to execute, within such time as the court orders, a conveyance, release or acquittance duly relinquishing the same." M.G.L. c. 240, § 2; see also Mead v. Cutler, 208 Mass. 391 (1911) (predecessor statute "was enacted to enable persons in possession to compel other persons claiming under an adverse title to bring an action to try the title").

1. Record title is title as it appears from the public records after the deed is recorded.

The try title statute has been interpreted as requiring the petitioner to have both possession of the property and record title. Seamen's Savings Bank v. Rogers, No. 175583, 1992 WL 12153317, at *2 (Mass.Land Ct. Dec. 1, 1992) ("Plaintiff must, under G.L. c. 240 § 1, have record title..."); see also Porter v. Town of Harwich, No. 267870, 2008 WL 1903493, at *1 (Mass.Land Ct. May 1, 2008).

Black's Law Dictionary defines record title to mean "title as it appears in the public records after the deed is properly recorded." Black's Law Dictionary (8th ed. 2004). That is, record title is title that "rests on the record alone." Coons v.

Carstensen, 15 Mass. App. Ct. 431, 433 (1983) (noting critical significance of the word "record" in the phrase "good and clear record title").

Massachusetts courts have made clear that record title is distinct from legal title. For example, the holder of record title has standing to apply for a variance, despite the existence of an unrecorded deed which has passed legal title to another. Dion v. Board of Appeals of Waltham, 344 Mass. 547, 554-55 (1962). The payment of a mortgage note terminates the interests of the mortgagee and automatically revests legal title in the mortgagor; but the mortgagor is also entitled to a discharge of the mortgage to clear the record title to the premises. Pineo v. White, 320 Mass. 487, 489 (1946).

2. Bevilacqua holds record title to the Property because there is a recorded deed conveying the Property to him.

The distinction between record title and legal title is critical to the present case. Bevilacqua may not have perfect legal title to the Property, pending the ruling of the Supreme Judicial Court in U.S. Bank v. Ibanez. However, Bevilacqua does at least have record title which "rests on the record alone." Coons, 15 Mass. App. Ct. at 433. A quitclaim deed

conveying an interest to him is recorded at the Southern Essex District Registry of Deeds at Book 26215, Page 273, and is the last recorded instrument pertaining to the Property. App. at 4. Anyone conducting a title search would be led to believe that Bevilacqua is the record owner of the Property.

3. The Land Court incorrectly applied the requirements of the "try title" statute and improperly dismissed the Petition despite the fact that Bevilacqua holds record title.

As discussed above, the try title statute requires Bevilacqua to have possession and record title. The other common method for removing a cloud on title is the "quiet title" or "cloud on title" statute, M.G.L. c. 240, §§ 6-10. Unlike the try title statute, the quiet title statute requires a plaintiff to have possession and legal title. See, e.g., Cowden v. Cutting, 339 Mass. 164, 171 (1959); McCartin Leisure Industries, Inc. v. Baker, 376 Mass. 62, 68 (1978). Though the two statutes plainly provide for distinct procedures, the Land Court erred by conflating their requirements. App. at 26 (citing Daley v. Daley, 300 Mass. 17 (1938), a "cloud on title" case).

The different requirements of the two statutes comport with their different purposes. While a quiet title action asks the court to determine that the plaintiff has superior title as against the defendant, the try title process only asks the respondent to assert what claim he may have. The latter therefore imposes on the petitioner a correspondingly lesser burden - to show an interest of record (record title), but not necessarily the strongest interest (legal title). This provides a mechanism whereby the petitioner can prevent his property indefinitely remaining subject to a claim which may never be asserted. Cf. Town of Yarmouth v. Snowden-Lebel, No. 07-348141, 2009 WL 3235750 at *3 (Mass. Land Ct. Oct. 9, 2009) ("Justice is not served by allowing the heirs or successors of parties once claiming an interest in the property to question the validity of a foreclosure indefinitely.").

The Land Court erred because it dismissed Bevilacqua's Petition on the finding that his title had no "substantive" or "plausible" basis. App. at 25-26. Neither of these concepts is found anywhere in the try title statute or the applicable case law. The

try title statute requires Bevilacqua to have nothing more than possession and record title.

The "adverse claimant" in a try title action may ultimately be found to have better title than the petitioner. Where this is the case, it does not deprive the petitioner of standing to bring the petition - it only means that the respondent should prevail in a quiet title action, provided that he appears and asserts his claim. The procedure under M.G.L. c. 240, §§ 1-5 would have no practical application distinct from a quiet title action, if a petitioner were required to prove the strength of his title in order to compel the adverse claimant to act. This is precisely what the Land Court has improperly required of Bevilacqua. See Blanchard v. Lowell, 177 Mass. 501, 504-505 (1901) ("[I]f the petitioner has, in addition to a record title, possession, the question whether he has a better title or not does not arise, and is not to be determined in these proceedings, but in the actions which the respondents may be ordered to bring.").

4. Contrary to the Land Court's holding, Bevilacqua holds whatever interest U.S. Bank had in the Property when it delivered the foreclosure deed to Bevilacqua.

Bevilacqua recognizes, without conceding, that Rodriguez may have a claim to the Property, depending on the outcome of Ibanez and what discovery reveals regarding the assignment of the mortgage (Bevilacqua would not otherwise have brought the Petition). However, Bevilacqua contests Judge Long's assertion that he "holds no title to the property" and "seeks to create...something from nothing." App. at 24. Bevilacqua unquestionably did acquire "something" from U.S. Bank.

First of all, by virtue of the properly recorded deed indicating that he owns the Property, Bevilacqua has record title. This entitles him to bring a petition to try title, for the reasons discussed above.

Secondly, even if the foreclosure deed did not convey title to Bevilacqua, it did convey the interest unquestionably held by U.S. Bank, Bevilacqua's grantor. That is, the foreclosure deed constituted an assignment of the mortgage on the Property to Bevilacqua. Brown v. Smith, 116 Mass. 108 (1875)

(holding that a foreclosure deed, though invalid, will nonetheless constitute an assignment of a mortgage to the grantee).

For these reasons, Judge Long is incorrect in finding that Bevilacqua has "no plausible claim." App. at 26. Bevilacqua clearly does have some interest in the property. The try title statute exists to provide Bevilacqua a means of perfecting his interest, in the event that Rodriguez has no intention of asserting his potential adverse claim. There is no reason why Bevilacqua's interest should be forever clouded by an adverse claim which will never be asserted. Cf. Snowden-Lebol, 2009 WL 3235750 at *3. As a person in possession of the Property, with a properly recorded deed indicating on its face that he is the rightful owner, Bevilacqua must be entitled to bring this Action, as his is precisely the situation which the try title statute is designed to remedy. See Mead v. Cutler, 208 Mass. at 391.

In fact, if the try title statute is not an appropriate remedy for a property owner in Bevilacqua's position - who could not have known, when he purchased the Property, that this title problem existed - then such a property owner is likely to be

left with no adequate remedy at all.⁴ A post-Ibanez problem will in most cases not be discovered until the property owner attempts to sell or refinance the property. If the owner is required to foreclose on the mortgage (on the theory that he acquired the mortgage, as held in Brown, supra) to clean up his title, this will delay his sale or refinance for a minimum of about seven to nine months.⁵

By contrast, a petition to try title is a simple statutory procedure by which Bevilacqua and others similarly situated can quickly eliminate unasserted post-Ibanez claims against their title.

⁴ While an unasserted post-Ibanez claim could be eliminated through adverse possession, requiring a property owner in Bevilacqua's position to wait 20 years for relief can hardly be termed an adequate remedy.

⁵ M.G.L. c. 244, § 35A provides for a 150-day right to cure default prior to acceleration of a mortgage. Thereafter, upon filing a Servicemembers Civil Relief Act action, it may take two months for a court to issue an order of notice. The order of notice provides a return date six weeks from the date of the order. Entry of final judgment is eight days after the return date. Before the foreclosure sale may take place, notice of the sale must be published for three successive weeks pursuant to M.G.L. c. 244, § 14.

V. Conclusion

For the reasons set forth above, the judgment of the Land Court dismissing Bevilacqua's action, dated August 26, 2010, should be vacated.

Respectfully submitted,
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