28 Massachusetts Practice Series: Real Estate Law with Forms

(4th ed. 2004 & Supp. 2009-2010)

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October 22, 2010

Chapter 10. Mortgage Foreclosure

NOTES:

(1) The following new § 10.2 will appear in the 2010-2011 Supplement

(2) This new section was drafted by Michael Pill, Esq., Green, Miles, Lipton & Fitz-Gibbon, LLC, 77 Pleasant Street, P.O. Box 210, Northampton, MA 01061-0210; phone (413) 586-8218; fax (413) 584-6278; email mpill@verizon.net

§ 10.2 Defending against mortgage foreclosures in Massachusetts

Massachusetts mortgage foreclosures are generally nonjudicial, under a statutory power of sale. G.L. c. 244, §§ 11-17C. G.L. c. 244, § 14 authorizes a foreclosure sale under a statutory power of sale.[1]

Foreclosure under the statutory power of sale does not require any court approval except for a determination under the Servicemembers Civil Relief Act (50 U.S.C.A. App., §§ 501-596) that the borrower is not currently in military service.[2]

A foreclosure sale under the statutory power of sale may be based on incomplete, back-dated, fraudulent, or even forged documentation.[3] Such practices in Massachusetts are subject to challenge under the Consumer Protection Act, G.L. c. 93A, §§ 2 & 9 and the attorney general's regulations at 940 CMR 3.05 & 3.16. In addition, "a court acting under general principles of equity jurisprudence has broad power to reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake, accident, or illegality." *Beaton v. Land Court*, 367 Mass. 385, 392, 326 N.E.2d 302, 308 (1975), *appeal dismissed*, 423 U.S. 806, 96 S.Ct. 16, 46 L.Ed.2d 27 (1975).

The burden is on the homeowner to challenge the foreclosure process. Such challenges may take the following forms, depending in part on how early or late an attorney is brought into the foreclosure process:

(1) The borrower may challenge a purported lender's standing to bring a Servicemembers Civil Relief Act proceeding;

(2) A borrower may challenge a foreclosure proceeding in an independent action against the lender filed in the superior court, land court, or housing court, which may include a request for a preliminary injunction;

(3) One can seek bankruptcy protection and oppose the foreclosing party's motion for relief from the automatic stay;

(4) Title to real estate can be tried in a summary process eviction action brought by the foreclosure sale buyer; or, if all else fails,

(5) Seek to negotiate compensation for moving out, or consider remaining in the home until physical eviction becomes imminent.

Each of these approaches is discussed in more detail below.

(1) The borrower may challenge a purported lender's standing to bring a Servicemembers Civil Relief Act proceeding.

Because the only purpose of a Servicemembers Civil Relief Act proceeding is to determine whether a borrower is in active military service, one cannot use it to raise any issue other than the threshold question of the mortgagee's standing, which is a subject matter jurisdictional prerequisite for any judicial proceeding. When the standing issue is raised by a borrower, it is a burden of proof that the alleged lender must be prepared to assume.[4]

In *Beaton v. Land Court*, 367 Mass. 385, 326 N.E.2d 302 (1975), *appeal dismissed*, 423 U.S. 806, 96 S.Ct. 16, 46 L.Ed.2d 27 (1975), the court explained the reason for limiting the scope of Servicemembers' Civil Relief Act proceedings in these words:

> [A]ctions taken to comply with the 1940 Relief Act, such as the steps prescribed by St.1943, c. 57, as amended, are re not in themselves mortgage foreclosure proceedings in any ordinary sense. Rather, they occur independently of the actual foreclosure itself and of any judicial proceedings determinative of the general validity of the foreclosure. Statute 1943, c. 57, as amended, simply establishes procedures whereby mortgagees, in addition to taking all steps necessary to foreclose, can make certain that there will be no cloud on the title following the foreclosure as a result of an interested party having been in, or just released from, military service and thus under the protective umbrella of the 1940 Relief Act.

367 Mass. at 390, 326 N.E.2d at 305.

A successful challenge to the mortgagee's standing in a Servicemembers Civil Relief Act proceeding will not invalidate a foreclosure sale if the mortgagor is not entitled to the act's protection,[5] but it will render the foreclosure sale buyer's title unmarketable for twenty years.[6]

(2) A borrower may challenge a foreclosure proceeding in an independent action against the lender filed in the superior court, land court, or housing court, which may include a request for a preliminary injunction.

Since Massachusetts foreclosures are nonjudicial (except for the Servicemembers' Civil Relief Act filing), borrowers who seek to challenge a foreclosure must file an action seeking equitable relief in superior court under G.L. c. 214, § 1, land court under G.L. c. 185, § 1(k), or housing court under G.L. c. 185C, § 3, If the claims for relief include G.L. c. 93A, the action must be brought in the housing court or superior court. If the claims for relief include declaratory judgment, G.L. c. 231A, § 1 refers only to the land court and superior court.[7]

Such an action should be filed as early in the process as possible, to allow time for at least initiating discovery before one must seek a preliminary injunction to stop a mortgage foreclosure sale. Document production requests should demand production of all assignments of the mortgage and promissory note, and inspection of the original note.

2(a) Foreclosing lender must have physical possession of the original promissory note.

The lender may try to rely on a purported certified or attested copy of the promissory note, but the Massachusetts Uniform Commercial Code (UCC) requires that "holder" of a mortgage must also be in possession of the original note, and therefore able to produce it for inspection.[8] Consistent with the UCC definition of a holder is the UCC requirement that a valid assignment requires physical transfer of the note.[9]

2(b) There must be a complete chain of assignments of the promissory note.

In addition to physical possession of the original promissory note, a purported holder also must be able to produce a complete chain of assignments. Physical transfer of the promissory note must be accompanied by a proper assignment.[10] Any missing link in the chain of assignments will defeat the alleged holder's claim.[11]

2(c) A lender who claims the original note is lost or destroyed must prove:

(i) how the loss or destruction occurred;

(ii) that the lender had physical possession of the note before it was lost or destroyed; and

(iii) that there existed a complete chain of assignments so that the alleged present holder is entitled to enforce the note.

A lender may try to avoid the requirement of physical possession of the original promissory note by claiming the note was lost, destroyed or stolen. But Massachusetts Uniform Commercial Code (UCC) requires at G.L. c. 106, § 3-309(a)(i) that "(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when the loss of possession occurred…."[12]

2(d) Lender should produce original loan documents for inspection.

In addition to the original promissory note and a complete chain of assignments of the note, the borrower should demand inspection of all original loan documents to see if any legally required papers are missing, or were forged, altered, or falsified by the lender. Original documents must be examined because with modern photocopying and scanning technology, alterations may not be detectable on copies.

2(e) The holder of the promissory note must also be the holder of the mortgage; MERS cannot foreclose.

By definition, "A mortgage is security for a note or other obligation." *Private Lending & Purchasing, Inc. v. First American Title Insurance Co.*, 54 Mass. App. Ct. 532, 537, 766 N.E.2d 532, 537 (2002). Stated another way, "The mortgage was but an incident to the debt." *Perry v. Oliver*, 317 Mass. 538, 541, 59 N.E.2d 192, 193 (1945). That means the mortgage cannot be separated from the debt, a rule which the court has set forth this way:

> The mortgage was only an incident to the debt which it secured. The debt was evidenced by the note. A mortgage on real estate transfers a title to the realty, United States Trust Co. v. Commonwealth, 245 Mass. 75, 139 N.E. 794; Geffen v. Paletz, 312 Mass. 48, 43 N.E.2d 133, but the title is defeasible upon the payment of money or the performance of some other condition for which the mortgage was given, **133Depon v. Shawye, 163 Mass. 206, 161 N.E. 243; General Ice Cream

> Corporation v. Stern, 291 Mass. 86, 195 N.E. 890, and the title held by the mortgagee cannot be separated from the note and applied independently of the note by a creditor of the mortgagee in payment of a debt of the latter, leaving the note outstanding as a valid obligation of the mortgagor to the holder of the note who might possibly be a person other than the mortgagee.

Coperstein v. Bogas, 317 Mass. 341, 343-344, 58 N.E.2d 131, 132-133 (1944).

Any attempt to foreclose by a mortgage holder who is not also the holder of the promissory note is contrary to Massachusetts law.[FN13] This means that Mortgage Electronic Registration System (MERS)[14], which acts as a mortgagee of record but is not itself a lender and does not hold any promissory notes, cannot foreclose a mortgage as a purported "nominee" for the holder of the promissory note.[15]

2(f) The foreclosing lender must produce a complete chain of title for assignments of the mortgage.

This requirement is stated as follows in *In Re Samuels*, 415 B.R. 8, 20 (Bkrtcy. D.Mass. 2009):

> A mortgage is an interest in real property, and the statute of frauds accordingly requires that an assignment of a mortgage be in writing. *Warden v. Adams*, 15 Mass. 233 (1818) ("By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a mere delivery of a mortgage deed, without an assignment in writing and by deed."). Deutsche Bank has adduced evidence of an agreement pursuant to which Argent agreed to transfer mortgage loans to Ameriquest, but it has adduced no writing evidencing the assignment of the Samuels Mortgage from Argent to Ameriquest.

The assignment must be by deed because in a title theory state like Massachusetts, a mortgage is a deed which conveys legal title to the property, and an assignment deed is required to convey that interest to another mortgagee.[16]

Beware of a foreclosing lender which attempts to rely on a purported assignment or series of assignments establishing anything less than a complete chain of title. For example, if

the original lender Bank A assigned the mortgage to Bank B, which in turn assigned the mortgage to Bank C, one cannot rely upon a purported assignment from A to C, skipping B. The chain of title must be complete with each link in the chain of title documented by a separate mortgage assignment deed.[17]

Beware also of a purported "Confirmatory Assignment," perhaps backed by a conclusory affidavit claiming that it replaces an original document lost through inadvertence or mistake; the lender must produce supporting facts based on personal knowledge explaining specifically what happened to the original assignment deed.[18]

A blank mortgage assignment is invalid.[19] Similarly, erasing the name of an assignee and inserting another name conveys no title.[20]

2(g) A preliminary injunction may be needed to stop a foreclosure sale while the case is pending.

If a foreclosure sale is held, borrowers will suffer irreparable harm by losing their home. As a matter of fundamental fairness, any request for an interim order to preserve the status quo by literally keeping the roof over someone's head is entitled to serious judicial consideration. Real estate is unique; its loss cannot be compensated by turning over foreclosure sale proceeds; this is especially true where the real estate at issue is one's own home.[21]

Federal cases[22] expressly hold that in the context of preliminary injunctive relief, evicting a family from their home constitutes irreparable harm.[23] This rule has been specifically applied to mortgage foreclosure sales.[24]

The presence of such irreparable harm reduces the "likelihood of success on the merits" showing required for a preliminary injunction. Without a preliminary injunction, there is a virtual

certainty of irreparable harm to borrowers faced with loss of their home. With an injunction in effect, there is no irreparable harm to the mortgage lender, who stands to lose only money.

Under these circumstances, "a substantial possibility of success on the merits warrants issuing the injunction." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980).[25] The meaning of the phrase "substantial possibility of success on the merits" is explained by a federal case cited in *Packaging Industries Group, Inc. v. Cheney, supra*.[26]

(3) One can seek bankruptcy protection and oppose the foreclosing party's motion for relief from the automatic stay.

A bankruptcy filing creates an automatic stay of actions to collect debts. 11 U.S.C. 362(a). A foreclosing lender generally responds with a motion filed in the bankruptcy court seeking relief from the stay.

In order to obtain relief from the automatic stay, the mortgagee must prove it has standing as the current holder of the mortgage.[27]

While a mortgage assignment need not be recorded to be valid, it must be executed prior to commencement of foreclosure proceedings; otherwise the foreclosure is invalid and a motion for relief from the automatic stay will be denied.[28]

In a case where a motion for relief from the automatic stay was filed by a purported mortgage holder, but an assignment of the mortgage was dated "four days after the filing of the Motion for Relief," the bankruptcy court expressed concern about "lenders who, in their rush to foreclose, haphazardly fail to comply with even the most basic legal requirements of the bankruptcy system," and warned that "[l]enders must take care in their haste to obtain relief from stay to ensure that the factual statements they make in their motions are true, have

evidentiary support and support their claims." *In re Maisel,* 378 B.R. 19, 20-22 (Bkrtcy. D.Mass. 2007).

The bankruptcy court may impose sanctions (including substantial monetary fines) upon mortgage lenders and their attorneys for misrepresentations concerning the holder's identity.[29]

A borrower must demand production of complete and original documentation for all representations made by lenders and their attorneys. A borrower simply cannot accept at face value what the lender says, even in writing in an affidavit or over an attorney's signature. Such assertions may prove inaccurate, or may omit significant facts, or both.

(4) Title to real estate can be tried in a summary process eviction action brought by the foreclosure sale buyer.

If there was ever a situation calling for extreme caution on the part of prospective buyers of real estate, it is the prospect of purchasing, either at a foreclosure sale or afterwards, from a mortgage lender who may not in fact be the actual holder of the mortgage and promissory note. A mortgagee can convey only what title it has and if it is not the holder of the mortgage and promissory note, the foreclosure sale buyer gets nothing.[30]

The lack of title may not become apparent until the buyer seeks to recover possession or try title to the property.[31]

A foreclosure sale buyer cannot simply throw out the foreclosed homeowners, but must use the statutory summary process action.[32]

In a summary process action, title to the property may be put in issue.[33]

If a foreclosure sale buyer's title is challenged in a summary process action, one must conduct discovery or have in hand some evidence to refute an assertion in the foreclosure affidavit that the sale was conducted by the proper holder of the note and mortgage.[34]

(5) Seek to negotiate compensation for moving out, or consider remaining in the home until physical eviction becomes imminent.

Congresswoman Marcy Kaptur of Ohio's 9th Congressional District offers the following advice to foreclosed homeowners on her website (www.kaptur.house.gov) in a 2009 article by Amy Goodman, entitled "Facing foreclosure? Don't leave. Squat":

> [S]he is recommending a radical foreclosure solution from the floor of the U.S. Congress: "So I say to the American people, you be squatters in your own homes. Don't you leave."
>
> She criticizes the bailout's failure to protect homeowners facing foreclosure. Her advice to "squat" cleverly exploits a legal technicality within the subprime-mortgage crisis. These mortgages were made, then bundled into securities and sold and resold repeatedly, by the very Wall Street banks that are now benefiting from TARP (the Troubled Asset Relief Program). The banks foreclosing on families very often can't locate the actual loan note that binds the homeowner to the bad loan. "Produce the note," Kaptur recommends those facing foreclosure demands of the banks.
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> "[P]ossession is nine-tenths of the law," Rep. Kaptur told me. "Therefore, stay in your property. Get proper legal representation ... [if] Wall Street cannot produce the deed nor the mortgage audit trail ... you should stay in your home. It is your castle. It's more than a piece of property. ... Most people don't even think about getting representation, because they get a piece of paper from the bank, and they go, 'Oh, it's the bank,' and they become fearful, rather than saying: 'This is contract law. The mortgage is a contract. I am one party. There is another party. What are my legal rights under the law as a property owner?' "If you look at the bad paper, if you look at where there's trouble, 95 to 98 percent of the paper really has moved to five institutions: JPMorgan Chase, Bank of America, Wachovia, Citigroup and HSBC. They have this country held by the neck."

Filmmaker Michael Moore's documentary "Capitalism: A Love Story," features a foreclosed family being paid $1,000 to vacate their home peacefully, leaving it in good condition. From a foreclosure sale buyer's perspective, paying the former owner to leave is cheaper than risking damage to the property, which can take the form of removing and selling

the furnace, air conditioning, plumbing and electrical fixtures, doors and windows, and even landscaping.

It is also cheaper than calling in the local sheriff's civil process division to carry out a physical eviction, which requires paying not only the sheriff's personnel, but also bonded movers and storage in a licensed bonded warehouse.[35] When municipal budgets are strained to the limit, local police may be justifiably reluctant to drag citizens from their home under the glare of news media publicity, especially if they are elderly, disabled, or have young children. The police would be fully justified in insisting that the foreclosure sale buyer must hire off-duty police officers at private expense, rather than burden the public purse over a private civil matter. The police may properly decline to become involved in civil matters.

The sheriff must give at least 48 hours advance notice of a physical eviction, and the eviction cannot occur "after five o'clock p.m. or before nine o'clock a.m., nor on a Saturday, Sunday, or legal holiday."[36]

Conclusion

The lender's response to efforts to defend against mortgage foreclosures may call to mind the old law school maxim that "If you have the facts, pound the facts; if you have the law, pound the law; if you have neither, pound the table." One federal judge put it this way: "The Court has had to expend time and resources, as have debtors already burdened in their attempts to pay their mortgages, because of the carelessness of those in the residential mortgage industry and the bombast this Court and others have encountered when calling them on their shortcomings."[37]

If an opposing lawyer clearly crosses the line and becomes personally involved in lender fraud or other misconduct, one should review Mass.R.Prof.Conduct 3.3 “Candor toward the tribunal,” where subsection (a) states as follows:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3(e) [which applies only to criminal cases];
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

While most judges and practicing lawyers are reluctant to report ethical violations to the Board of Bar Overseers, fraud on the court in mortgage foreclosure cases appears to have reached epidemic proportions.

An attorney defending against a foreclosure should not let the legal struggle become an emotional or personal one, even in the face of insult or ridicule from the other side. An opponent who stoops to such tactics demonstrates why the Supreme Judicial Court has expressed concern about a breakdown in civility in these words: "The plaintiffs' brief has an inappropriately hostile tone in places, asserting derogatory facts about the appellant that are irrelevant and, in any event, not supported by record references." *Mayo v. Key Financial Services, Inc.,* 424 Mass. 862, 863 n. 3, 678 N.E.2d 1311, 1313 n. 3 (1997).

Lender’s counsel should keep in mind that casting aspersions on the borrowers or their attorney does nothing to assist the court in ruling on the issues before it: "'[T]he judge found that

'[a]t times, [the lawyers'] conduct was of no assistance in determining the issues at hand and disrupted the judicial process.' The degree of civility to which lawyers should aspire was found entirely lacking in this litigation." *Hernandez v. Branciforte,* 55 Mass. App. Ct. 212, 223, 770 N.E.2d 41, 50 (2002).

[FN1] The "power" itself is set forth in full in G.L. c. 183, § 21 with a provision that it "may be incorporated in any mortgage by reference." G.L. c. 183, App., Form 5 suggests the following language for mortgage deeds: "This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the statutory power of sale."

[FN2] A limited Servicemembers Civil Relief Act judicial proceeding should not be confused with foreclosure by statutory action (G.L. c. 244, §§ 3-8; *Carleton & Hovey Co. v. Burns,* 285 Mass. 479, 189 N.E. 612 (1934) or by an action in equity (G.L. c. 185, § 1(k); *Lynn Inst. For Sav. V. Taff,* 314 Mass. 380, 50 N.E.2d 203 (1943)), which are rarely, if ever, used today.

[FN3] The Introduction to Michael W. Hudson, The Monster: How a Gang of Predatory Lenders and Wall Street Bankers Fleeced America and Spawned a Global Crisis (Time Books: 2010; ISBN: 978-0-8050-9046-8, ISBN10: 0-8050-9046-0) describes the following practices at Ameriquest Mortgage:

-- Forging borrower signatures on government required disclosure forms such as those disclosing APR (Annual Percentage Rate) and the total amount of interest paid over the life of the loan, in order to avoid disclosing that information to borrowers;
-- Placing fixed rate loan documents on top of a pile of adjustable rate loan documents, then throwing away the fixed rate documents and processing the variable rate documents, to deceive customers who were promised fixed rate loans;
-- Telling unsophisticated borrowers they were signing "preliminary paperwork" which were actually "final loan papers;"
-- Use of "scissors, tape, Wite-Out, and a photocopier to fabricate W-2s, the tax forms that indicate how much a wage earner makes each year." Scanners and printers were used "to do a better job of creating phony paperwork … ."
-- Falsifying borrower income on mortgage applications, in order to make loans salable on the secondary mortgage market;
-- Using hard-sell tactics to peddle mortgages to borrowers whom the lenders knew could not repay the loans, because the mortgages would be pooled with thousands of others and sold to investors as "mortgage-backed securities."

[FN4] Attorney Glenn F. Russell, Jr. Esq., 38 Rock Street #12, Fall River, MA 02720; phone (508) 324-4545; FAX (508) 938-0244; email: russ45esq@gmail.com; website www.foreclosuresinmass.com) has been filing motions in the Land Court to dismiss these

actions on the grounds that the foreclosing lender lacks standing as the proper holder of the mortgage deed and promissory note. Attorney Russell states:

> I believe I have broken new ground in defending mortgage foreclosures in Massachusetts. I have the Land Court listening to my argument that standing is a condition precedent in the Servicemembers Civil Relief Act action, and I currently have approximately 20 challenges to the complaint to foreclose filed by "lenders" whereby I have brought a motion to dismiss; no positive rulings yet, however a great deal of these cases are under advisement. I have taken a different approach than Colin F. Beaton, and the court is listening
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> Two interesting cases were decided by Judge Long in the summer of 2010 (*HSBC Bank, U.S.A., N.A., as trustee of Ace Securities Corp. Home Equity Loan Trust, Series 2005-HE4 vs. Matt,* 2010 Misc. 421195, "Memorandum and Order on Defendants' Motion to Dismiss" (July 8, 2010), and *U.S. Bank, N.A., as trustee of CSMC Mortgage-Backed Trust 2006-7 vs. Hanlon,* 2010 Misc. 429997 "Memorandum and Order on Defendants' Motion to Dismiss" (August 20, 2010)). He affirmed my argument that standing is a threshold issue prior to ever reaching the military question (even though he ultimately ruled that the "lender" had standing). One of the cases (*Matt*) I am appealing and may ask the SJC for direct appellate review.

Copies of the two Land Court rulings cited above may be obtained by emailing attorney Russell at russ45esq@gmail.com, or they may be available on his website at www www.foreclosuresinmass.com. The reference above to Colin F. Beaton is to the plaintiff in *Beaton v. Land Court*, 367 Mass. 385, 326 N.E.2d 302 (1975), *appeal dismissed,* 423 U.S. 806, 96 S.Ct. 16, 46 L.Ed.2d 27 (1975).

[FN5] *Randle v. GMAC Mortgage, LLC,* 2010 WL[Westlaw] 3984714 at page *6, Land Court Case No. 2009 Misc. 408202, "Decision" (October 12, 2010) (Piper, J.).

[FN6] REBA[Real Estate Bar Association of Massachusetts] Title Standard No. 7, "Mortgage foreclosures not complying with the Soldiers' and Sailors' Civil Relief Act." That standard is set forth in full in 28B Mass. Practice: Real Estate Law with Forms, ch. 58 "REBA Title Standards."

[FN7] If the lender moves to dismiss on jurisdictional grounds, one can respond by pointing out that instead of dismissal, the case or the judge, or both, should be transferred to the appropriate trial court department. *Konstantopoulos v. Town of Whately,* 384 Mass. 123, 424 N.E.2d 210 (1985).

[FN8] The Massachusetts Uniform Commercial Code (UCC) makes it clear at G.L. c. 106, § 1-201(20) that a "holder" must be in physical possession of the promissory note, in these words: "'Holder' with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." This is consistent with prior Massachusetts case law . *Geffen v. Palatz,* 312 Mass. 48, 54-55, 43 N.E.2d 133,138 (1942) ("The intestate never had

possession of the $40,000 note, and, consequently, is not a 'Holder' or 'Bearer' of it within the definitions contained in G.L.(Ter.Ed.) c. 107, § 18.").

[FN9] The governing statutes were summarized this way in a First Circuit bankruptcy case, *In re Gavin,* 319 B.R. 27, 31 (1st Cir. B.A.P. 2004):

> Under Massachusetts law, Article 3 of the Uniform Commercial Code is used to determine questions of title to negotiable instruments. Under the U.C.C., a negotiable instrument is:
>
> > (a) [...] an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
> >
> > (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
>
> Mass. Gen. Laws ch. 106, § 3-104. Here, the instrument is a promissory note which contains the Debtor's unconditional promise to pay $50,000 to Fleet. App. at 186. As such, the Note is a negotiable instrument, and any transfer of its ownership is subject to the requirements prescribed in Article 3. *See* Mass. Gen. Laws ch. 106, § 3-104.
>
> Article 3 provides that where a negotiable instrument is payable to an identified person, transfer of ownership of the instrument requires endorsement by the holder, and transfer of possession of the instrument. Mass. Gen. Laws ch. 106, § 3-201. Article 3 also provides that an instrument is "transferred" when it is delivered by the holder for the purpose of giving the recipient the right to enforce the instrument. Mass. Gen. Laws ch. 106, § 3-203(a). Proper transfer of the instrument vests in the recipient any right of the transferor to enforce the instrument, Mass. Gen. Laws ch. 106, § 3-203(b), and a transferor cannot transfer greater enforcement rights than it holds. *See id.*

[FN10] *New Haven Savings Bank v. Follins,* 431 F.Supp.2d 183, 194 (D.Mass. 2006) ("A proper negotiation of an instrument payable to an identified person--as is the case here--requires the holder's written endorsement on the instrument itself or on a separate paper that is firmly affixed to the promissory note. [Citations omitted.]").

[FN11] *In re Gavin,* 319 B.R. 27, 32 (1st Cir. B.A.P. 2004), where the court stated the rule this way:

> Here, Premier has produced the original Note as executed with Fleet, and the assignment of the Note by Sovereign to Premier, but failed to produce any evidence of an assignment of the Note by Fleet to Sovereign. Moreover, Premier failed to produce either evidence of the endorsements required to establish its ownership of the Note or substitute evidence permitted under applicable state law. To the

> contrary, Premier admitted at trial and at oral argument that it had no direct evidence of an assignment of the Note from Fleet to Sovereign. Absent such evidence, Premier has failed to establish title to the Note, and thus has no enforceable obligation against the Debtor. Without an enforceable obligation Premier has no claim, and therefore is not a creditor for purposes of Bankruptcy Rule 4007(a). Accordingly, it has no standing to bring a § 523(a)(2)(A) action against the Debtor.

[FN12] Anyone filing an affidavit that the original note has been lost or destroyed should be able to provide specific facts, based on personal knowledge, of the following:

(1) When and how the loss or destruction occurred;
(2) When and how the alleged holder came into physical possession of the note prior to its loss or destruction; and
(3) Complete documentation of the chain of assignments establishing that the person who had possession of the note when it was lost or destroyed was entitled to enforce it.

[FN13] A leading Massachusetts treatise, Howard J. Alperin, 14C Massachusetts Practice: Summary of Basic Law, § 15.126 (4th ed. & Supp. 2009-2010), summarizes rule as follows:

> Both the obligation (the note) and the security interest (the mortgage) must be transferred to the same person,[FN8] because "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it."[FN9] That is, as leading commentators have stated, " ... the security is worthless in the hands of anyone except a person who has the right to enforce the obligation; it cannot be foreclosed or otherwise enforced."[FN10]
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> > [FN8] Restatement, 3d, Property (Mortgages), § 5.4 and Comment a; 1 Nelson and Whitman, Real Estate Finance Law, 5th Ed. (Thomson/West, 2007), § 5.27, p. 530.
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> > [FN9] Merritt v. Bartholick, 36 N.Y. 44, 51, 34 How. Pr. 129, 1867 WL 6406 (1867). See 5-Star Management, Inc. v. Rogers, 940 F. Supp. 512, 520 (E.D. N.Y. 1996) (applying New Mexico law) (" ... an assignment of a mortgage without the underlying debt is a nullity, and therefore unenforceable ....").
> >
> > [FN10] 1 Nelson and Whitman, Real Estate Finance Law, 5th Ed. (Thomson/West, 2007), § 5.27, p. 533.

[FN14] The MERS publication MERS Recommended Foreclosure Procedures, at pages 4-6 (Updated 2002) by MERS Corporate Offices, 1818 Library Street, Suite 300, Reston, VA 20190; phone (800) 646-6377; fax (703) 748-0183; www.mersinc.org states as follows:

What is MERS?

MERS serves two purposes. First, it is a national electronic registry for tracking servicing rights and beneficial ownership interests in mortgage loans. Second, MERS acts as nominee (a form of agent) for the servicer and beneficial owner of a mortgage loan in the public land records. MERS is designed to operate within the existing legal framework in all U.S. jurisdictions and did not require any changes to existing laws.

How is this made possible? Its members appoint MERS as the mortgagee of record on all loans that they register on the MERS System. This appointment eliminates the need for any future assignments when servicing rights are sold from one MERS Member to another. Instead of preparing a paper assignment to track the change in the county land records, all subsequent transfers are tracked electronically on the MERS System.

MERS does not create or transfer beneficial interests in mortgage loans or create electronic assignments of the mortgage. What MERS does do is eliminate the need for subsequent recorded assignments altogether. The transfer process of the beneficial ownership of mortgage loans does not change with the arrival of MERS. Promissory notes still require an endorsement and delivery from the current owner to the next owner in order to change the beneficial ownership of a mortgage loan. MERS is a Delaware corporation with a broad base of ownership from the mortgage industry. American Land Title Association is among our owners and has a seat on the MERS Board of Directors. Other owners with substantial investments in MERS include the Mortgage Bankers Association of America (MBA), Fannie Mae, and Freddie Mac. These parties, along with Ginnie Mae, decided several years ago that MERS would be a major benefit to the mortgage industry and worked together to create the MERS of today.

How does MERS become the Mortgagee of Record?

MERS is put in this position in one of two ways: the first is by an assignment from a lender or servicer to MERS. This method is usually associated with bulk transfers of servicing. The second way is with the lender naming MERS as the mortgagee of record as nominee for itself (and its successors and assigns) in the original security instrument at the time the loan is closed. We call this second option “MOM”, which stands for MERS as Original Mortgagee.

“MOM” was a significant milestone for MERS and the mortgage industry. Fannie Mae, Freddie Mac, and Ginnie Mae have each approved the use of MERS as original mortgagee as nominee for a lender on the security instrument for loans sold to them and registered on the MERS System.

In order to make MOM work, changes were made by Fannie Mae and Freddie Mac to their uniform security instruments allowing MERS to be named as the mortgagee in a nominee capacity for the lender. First, to reflect the interrelationship of the promissory note and mortgage and to ensure these two

instruments are tied together properly, the recital paragraph names MERS, solely as nominee for Lender, as beneficiary. Second, it is made clear that the originating lender rather than MERS is defined as the "Lender". This change was made so that everyone understands that MERS is not involved in the loan administration process. Third, as mortgagee of record, MERS needs to have the authority to release the lien of security instrument, or if necessary, foreclose on the collateral on behalf of the lender. Such authority is provided by adding a paragraph to the security instrument informing the borrower that MERS holds only legal title to the interests granted by the borrower. It also informs the borrower that, if necessary to comply with law or custom, MERS may exercise the right to foreclose and sell the property and may take any action required of the Lender to release or cancel the security instrument.

Once MERS is named in the original security instrument or by way of an assignment, the document is then recorded in the appropriate public land records. From this point on, no subsequent assignments of the mortgage to a MERS member needs to be recorded. MERS remains in the land records, as mortgagee, throughout the life of the loan so long as servicing is not sold to a non-MERS member. All subsequent transfers of ownership in mortgage loans and servicing rights for that loan are tracked electronically between MERS members through the MERS System. This process eliminates the opportunity for a break in the chain of title.

Moreover, unless a MERS member transfers servicing rights to a loan registered on the MERS System to a non-MERS member, the loan stays on the system until it is paid off. The process to transfer servicing rights between MERS members requires an electronic confirmation from the buyer. It begins with the seller entering loan transfer information into the system, including the Mortgage Identification Number (explained below), the new servicer organizational identification number, the sale date, and the transfer effective date. The buyer then must submit a confirmation acknowledgment to the system. The old servicer and the new servicer are still required to notify the homeowner in writing when loan servicing is traded as required under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. *§* 2601 et seq. A loan is de-registered from the system only if its servicing rights to a loan are transferred to a non-MERS member.

With every new loan that is registered on the MERS System, it becomes more likely that you will come in contact with a mortgage loan having MERS as the mortgage holder in the chain of title. MERS is put in this position in one of two ways: the first is by an assignment from a lender or servicer to MERS. This method is usually associated with bulk transfers of servicing. The second way is with the lender naming MERS as the mortgagee of record as nominee for itself (and its successors and assigns) in the original security instrument at the time the loan is closed. We call this second option "MOM", which stands for MERS as Original Mortgagee.

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[FN15] The decision of the Kansas Supreme Court in Landmark National Bank v. Kesler, 289 Kan. 528, 539, 541, 216 P.3d 158, 166, 167 (2009) is consistent with Massachusetts law, as follows:

> The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender." Black's Law Dictionary 1034 (8th ed.2004).
>
> * * * * *
>
> If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right.

The Landmark National Bank case should be studied carefully by anyone confronted with an unlawful attempt by MERS to foreclose a mortgage in Massachusetts.

But see, In re Huggins, 357 B.R. 180, 184 (Bankrptcy. D.Mass. 2006), which the authors believe was wrongly decided; it simply ignored the basic principle of Massachusetts law (discussed herein) that a mortgage and note cannot be separated, because the mortgage is merely an incident of the debt. The court in Huggins incorrectly declined to follow a New York decision which it quoted as follows:

> A recent New York state court decision provides *ostensible* support for the Debtor's position that MERS, as nominee, lacks standing to enforce the mortgage outside of bankruptcy. *LaSalle Bank Nat. Ass'n v. Lamy*, 12 Misc.3d 1191(A), 2006 WL 2251721 (N.Y.2006). In that case, the court denied a foreclosure action by an assignee of MERS on the grounds that MERS had no ownership interest in the underlying note and mortgage but rather acted as nominee and thus did not have the power or right *to assign.* The court observed that
>
> > this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such as Mortgage Electronic Registration Systems, Inc. ("MERS"), may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action.
>
> *Lamy*, 12 Misc.3d at 1191, 824 N.Y.S.2d 769.

In Mortgage Electronic Registration Systems, Inc. v. Saunders, 2010 Me. 79, 2 A.3d 289 (2010), the court distinguished the Huggins case on the grounds that it involved nonjudicial foreclosure, while holding that MERS did not have standing to act as a party in any judicial foreclosure proceeding. The Maine court overlooked the fact that in Massachusetts a foreclosing lender can become a party to litigation in any of the ways discussed in this section (e.g., Servicemembers

Civil Relief Act, independent action to prevent foreclosure, bankruptcy proceeding, and eviction action).

Additional case citations will be found in John R. Hooge & Laurie Williams, "Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS Authority to Act," 2010 No. 8 Norton Bankr. L. Adviser 1 (2010) (WestLaw citation 2010 NO. 8 NRTN-BLA 1).

See also Christopher L. Peterson, "Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System," especially section B entitled "MERS Lacks Standing to Bring Foreclosure Actions," 78 U.Cin.L.Rev. 1359 (2010) ("Any sensible economic analysis of MERS's role suggests that MERS does not own any mortgage loans. But even if a court is willing to accept MERS' dubious claim that it owns legal title to liens, this purely nominal ownership does not give rise to an actual injury in fact, as required by the latest standing precedent.").

Some cases favoring the proposition that MERS can foreclose a mortgage are set forth in Dale A. Whitman, "How Negotiability has Fouled Up the Secondary Mortgage Market, and what to Do About It,: 37 Pepp. L. Rev. 737, 764-766 & nn. 155-161 (2010), but the author also acknowledges that there may be "incurable" and "fatal" problems in these words:

> Of course, failure to produce the note is not the only reason a court might dismiss a foreclosure action. For example, if the action is brought by a servicer, even one with clear written authority to represent the mortgagee, the court might still dismiss the action for lack of standing [FN155] or failure of the "real party in interest" [FN156] to appear. Similarly, whether a foreclosure may be pursued in the name of MERS [FN157] has been controversial. [FN158] And in a number of states, proof of a recorded chain of assignments of the mortgage to the present holder is essential to a valid foreclosure. [FN159] But these problems can be resolved by appropriate assignments of the note and mortgage and recording of the mortgage assignments, [FN160] while lack of possession of the note may well be incurable and prove fatal to the foreclosure. [FN161]

[FN16] Title theory was explained as follows in *Faneuil Investors Group, Ltd. Partnership v. Board of Selectmen of Dennis*, 75 Mass. App. Ct. 260, 264-265, 913 N.E.2d 908, 912 (2009), *affirmed*, 458 Mass. 1, 933 N.E.2d 918 (2010), in these words:

> *Mortgage theory.* General Laws, c. 260, § 35 inserted by St.1957, c. 370, defines a mortgage as a "conveyance made for the purpose of securing performance of a debt...." Under our title theory of mortgages, "[a] mortgage of real estate is a conveyance of the title or of some interest therein defeasible upon the payment of money or the performance of some other condition." *Murphy v. Charlestown Sav. Bank*, 380 Mass. 738, 747, 405 N.E.2d 954 (1980), quoting from *Perry v. Miller*, 330 Mass. 261, 263, 112 N.E.2d 805 (1953). See *Atlantic Sav. Bank v. Metropolitan Bank & Trust Co.*, 9 Mass.App.Ct. 286, 288, 400 N.E.2d 1290 (1980). See also Eno & Hovey, Real Estate Law § 9.2 (4th ed. 2004); Mendler, Massachusetts Conveyancers' Handbook § 20.1 (4th ed. 2008). "Literally, in

> Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt." *Maglione*, 29 Mass.App.Ct. at 90, 557 N.E.2d 756. "The payment of the mortgage note ... terminates the interests of the mortgagee ... and revests the legal title in the mortgagor." *Pineo v. White*, 320 Mass. 487, 489, 70 N.E.2d 294 (1946).

[FN17] G.L. c. 183, §§ 1 & 4.

[FN18] *In Re Samuels,* 415 B.R. 8, 19 & n. 11 (Bkrtcy. D.Mass. 2009).

[FN19] *Flavin v . Morrissey,* 327 Mass. 217, 219, 97 N.E.2d 643, 644 (1957) ("The deed signed by her, incomplete because of failure to name the grantee, whether given by the plaintiff to her father or, as the defendant contentds, to her, the defendant, was invalid as a deed. It conveyed no title. [Citations omitted.]").

[FN20] *Smigliani v. Smigliani,* 358 Mass. 84, 90-91, 260 N.E.2d 917, 921 (1970) ("[T]he altered instrument was ineffective as a conveyance to the corporation. It conveyed no title."). See also, William V. Hovey, Michael Pill & Darren Baird, 28 Massachusetts Practice: Real Estate Law with Forms, § 4.50 "Elements of deeds—filling in blanks" (4th ed. 2004 & Supp. 2009-2010).

[FN21] *See, Greenfield Country Estates Tenants Assoc., Inc. v. Deep,* 423 Mass. 81, 666 N.E.2d 988 (1996) (Granting specific performance, the SJC held that "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land.").

[FN22] Federal case law is valid authority in Massachusetts state courts under the rule of *Rollins Environmental Services, Inc. v. Superior Court,* 368 Mass. 174, 179-180, 330 N.E.2d 814, 818 (1975), where it was held, "the adjudged construction given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content." The Reporters' Notes to Mass.R.Civ.P. 65 (which governs injunctive relief) state as follows: "Rule 65 is taken with little change from Federal Rule 65. The order of the first two sections has been reversed, to conform to the usual sequence of litigation."

[FN23] "Aside from the issue of damages, irreparable injury is suffered when one is wrongfully ejected from his home. Real property and especially a home is unique." *Johnson v. U.S. Dept. of Agriculture,* 734 F.2d 774, 789 (11th Cir. 1984). In that case, a preliminary injunction was granted to prevent an eviction. *Id.* The *Johnson* case was cited in *Brown v. Artery Organization, Inc.,* 691 F.Supp. 1459, 1461 (D. Dist. Columbia 1987) to support the court's statement that "Wrongful eviction, as a matter of law, constitutes irreparable injury." An earlier opinion in the same case said the same thing: "It is axiomatic that wrongful eviction constitutes irreparable injury." *Brown v. Artery Organization, Inc.,* 654 F.Supp. 1106, 1118 (D. Dist. Columbia 1987).

[FN24] *In re Slater,* 200 B.R. 491,495 (E.D.N.Y. 1996), where the court stated as follows:

> The parties do not seriously deny that Slater will suffer irreparable harm if she is evicted from her home. The Debtor has resided on the property for twenty years. If

she is evicted and the premises are resold by the Bank, she will have little if any hope of recovering the property. Accordingly the Court finds that Slater has fulfilled the requirement of irreparable harm. [Citation omitted.]

[FN25] The full quoted footnote from *Packaging Industries Group, Inc. v. Cheney,* 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980)states as follows:

> Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction. See *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) and cases cited.

[FN26] The meaning of the phrase "substantial possibility of success on the merits" is explained with these words in *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 843-844 (D.C. Cir. 1977), cited in *Packaging Industries Group, Inc. v. Cheney,* 380 Mass. 609, 617 n. 12, 405 N.E.2d 106, 112 n. 5 (1980):

> [W]e hold that under *Virginia Petroleum Jobbers* [*Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958)] a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.
>
> This approach is reflected in the *Virginia Petroleum Jobbers* opinion at 925, where the court wrote:
>
> > But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.
>
> The view that a 50% plus probability is required by that opinion, although frequently encountered, is thus contrary to both the language and spirit of that opinion.
>
> Our holding is generally in accord with the movement in other courts away from a standard incorporating a wooden "probability" requirement and toward an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors. In a leading case, Judge Frank, speaking for the Second Circuit, stated:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i. e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (footnote omitted). More recently, the same court declared:

> One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam). To the same effect, see also *Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941 (9th Cir. 1972).

We believe that this approach is entirely consistent with the purpose of granting interim injunctive relief, whether by preliminary injunction or by stay pending appeal. Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Another weakness of adherence to a strict "probability" requirement is that it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation. If, to use Judge Frank's phrase, there exists "a fair ground for litigation and thus for more deliberative investigation," a court should not be required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. The endeavor may be necessary in some circumstances when interim relief would cause substantial harm to another party or person, or when the balance of equities may come to require a more careful heft of the merits. However, it is not required in all cases.

The four preliminary injunction factors from *Virginia Petroleum Jobbers, supra,* were stated as follows by the court in *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., supra*, 559 F.2d at 843 (D.C. Cir. 1977):

> These factors are by now familiar to both the bench and bar in this Circuit.

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.
(2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .
(3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .
(4) Where lies the public interest?

[FN27] In *In re Hayes,* 393 B.R. 259, 269 (Bkrtcy.D.Mass. 2008) a motion for relief from automatic stay was denied where the moving party failed to establish standing by proving it was the holder of the note and mortgage. The debtor's objection to lender's proof of claim was sustained, without prejudice to filing of an amended proof of claim by actual holder of the mortgage. The court expressed concern about the conduct of the lender and its attorneys this way:

> The mortgage lender, its affiliates, assignees, and agents involved in this case, through the convoluted process of securitization, the submission of a 191-page, incomplete PSA [pooling and servicing agreement], and reliance upon back-dated, unrecorded assignments, have confounded the identity of the current holder of the mortgage for the purpose of filing the Motion for Relief from Stay, as well as the proof of claim. The Court and the Debtor are entitled to insist that the moving party establish its standing in a motion for relief from stay through the submission of an accurate history of the chain of ownership of the mortgage. Absent such proof, relief from stay is unwarranted and a proof of claim filed by the wrong party, to which an objection is filed, must be disallowed.
>
> Massachusetts Local Bankruptcy Rule 4001-1(b)(2)(f) *requires* a movant to state "the original holder of the obligations secured by the security interest and/or mortgage and every subsequent transferee, if known to the movant, and whether the movant is holder of that obligation or an agent of the holder...." Inaccurate representations about the moving party's status as a holder may constitute a violation of Fed. R. Bankr.P. 9011 and may warrant sanctions under 28 U.S.C. § 1927. Given the tangle of inconsistent and incomplete documents introduced into evidence purporting to establish Deutsche Bank as the holder of the Debtor's mortgage, which were submitted during a two-day trial and required intensive scrutiny of hundreds of pages of documents, sanctions may be appropriate. *See In re Nosek,* 386 B.R. 374 (Bankr.D.Mass.2008).

[FN28] *In re Schwartz,* 366 B.R. 265, 269-270 (Bkrtcy.D.Mass. 2007) (The court noted that under Massachusetts law, "While 'mortgagee' has been defined to include assignees of a mortgage, in other words the current mortgagee, there is nothing to suggest that one who expects to receive the mortgage by assignment may undertake any foreclosure activity.").

[FN29] *In re Nosek,* 386 B.R. 374 (Bkrtcy.D.Mass. 2008) (Mortgage lenders fined $250,000 each; attorney and law firms fined $25,000 - $100,000 each), *affirmed in part and vacated in part,* 406 B.R. 434 (D.Mass. 2009) (Upholding $100,000 fine on one lender and $25,000 fine on one law firm), *affirmed as modified,* 609 F.3d 6 (1st Cir. 2010). The court may award substantial damages for lender misconduct toward the borrower. *In re Nosek,* 363 B.R. 643 (Bkrtcy.D.Mass. 2007) (Court awarded debtor $250,000.00 for emotional distress and $500,000.00 punitive damages based on mortgage lender's misconduct.), *vacated and remanded,* 544 F.3d 34C.A.1 (1st Cir. 2008) (Both damage awards vacated.).

[FN30] William Hovey, Michael Pill & Darren Baird, 28 Massachusetts Practice: Real Estate Law with Forms, § 10.1 (4th ed. 2004 & Supp. 2009-2010), citing *Brooks v. Bennett,* 277 Mass. 8, 177 N.E. (685) (1931) & *Goldman v. Damon,* 272 Mass. 302, 172 N.E. 226 (1930).

[FN31] In *Bevilacqua v. Rodriguez,* 2010 WL[WestLaw] 3351481, Land Court Case No. 2010 Misc. 427157, "Memorandum and Order Dismissing Plaintiff's Complaint" (August 26, 2010) (Long, J.), the foreclosure sale buyer knew by the time he sought to try title that the sale was invalid because the foreclosing lender was not the holder of the mortgage. That meant the lender "therefore had nothing to convey, and its purported conveyance to Mr. Bevilaqua was a nullity." 2010 Misc. 427157 at *1. In dismissing the complaint, the court stated as follows (2010 Misc. 427157 at *3):

> I have great sympathy for Mr. Bevilacqua's situation - *he* was not the one who conducted the invalid foreclosure, and presumably purchased from the foreclosing entity in reliance on receiving good title - but if that was the case his proper grievance and proper remedy is against that wrongfully foreclosing entity on which he relied.

[FN32] G.L. c. 239; *Attorney General v. Dime Savings Bank of New York, FSB,* 413 Mass. 284, 596 N.E.2d 1013 (1992)

[FN33] G.L. c. 239, § 1; *Wayne Investment Corp. v. Abbott,* 350 Mass. 775, 215 N.E.2d 795 (1966) ("The purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be shown and legal title may be put in issue. [Citation omitted.] Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject to challenge. If there are other grounds to set aside the foreclosure the defendants must seek affirmative relief in equity. [Citation omitted."); *Sheehan Construction Co. v. Dudley,* 299 Mass. 51, 53, 12 N.E.2d 182, 183 (1937) ("Since the enactment of St.1879, c. 237, now included in G.L. (Ter.Ed.) c. 239, § 1, summary process has been available to the original purchaser at a foreclosure sale. In proceedings to that end it is incumbent upon such purchaser to establish his right of possession. The legal title in those circumstances plainly may be put in issue. [Citations omitted.]").

[FN34] *Novastar Mortgage, Inc. v. Saffran,* 2010 Mass. App. Div. 117, 2010 WL[WestLaw] 2010880 at *3 (2010):

> [A] mortgage deed made in pursuance of a power of sale contained in the mortgage deed and an affidavit recorded with the deed constitute prima facie evidence of legal title. Although such evidence can be challenged, in this case Saffran, once again, introduced nothing to rebut, or contradict, the recorded documents stating that Novastar was the holder of the mortgage by assignment when the Premises were advertised for sale and when the foreclosure sale took place.

[FN35] G.L. c. 239, § 4.

[FN36] G.L. c. 239, § 3.

[FN37] *In re Nosek,* 386 B.R. 374, 380 (Bkrtcy.D.Mass. 2008), *affirmed in part and vacated in part,* 406 B.R. 434 (D.Mass. 2009), *affirmed as modified,* 609 F.3d 6 (1st Cir. 2010).