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AL: Circuit Court Confirms Note Holder's Right to Foreclose

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In a case that will be sure to have far-reaching positive effects for the mortgage lending industry if upheld on appeal, an Alabama circuit court has confirmed a lender's right to foreclose where the lender was in possession of the promissory note via an endorsement, but did not have an assignment of mortgage executed at the time foreclosure was initiated. In this case, the plaintiff filed a complaint in the circuit court, seeking ejectment of the borrower from the property after the foreclosure. The plaintiff obtained its interest in the property by being given a special warranty deed to the property by the lender after the foreclosure sale, wherein the lender was the highest and best bidder at the sale. The borrower filed an answer, contending that there was a defect in the foreclosure sale because the lender began the foreclosure process prior to the assignment of the mortgage out of MERS into the lender.

It was undisputed that the MERS assignment was executed after the notice of acceleration and first publication, but prior to the actual exercise of the power of sale in the mortgage. The lender was in possession of the note at the time of the acceleration. Under Alabama's foreclosure statute, if there is a power of sale contained in a mortgage, then any party who is "entitled to the money" secured by the mortgage may exercise the power of sale.

Pursuant to Alabama's Uniform Commercial Code, a party is "entitled to enforce" a negotiable instrument, if that party is in possession of the instrument either endorsed in blank, or specifically endorsed to the party in possession. In other words, the party in possession is considered a "holder," is entitled to enforce the instrument, and therefore is "entitled to the money" secured by the mortgage.

Consequently, the court agreed that the lender was able to exercise the power of sale, despite the fact that the assignment of mortgage was not executed at the time the foreclosure process was initiated. This holding meshes with the longstanding rule that the mortgage follows the debt instrument, even if there is not a separate specific assignment of the mortgage itself. The assignment of mortgage is for title purposes only, and is not necessary to accomplish the transfer of the debt or an assignment of the right to exercise the power of sale.

The ruling in this case is expected to be appealed by the borrower. If the case is affirmed on appeal, and an opinion rendered that discusses the holder rule and agrees with the circuit court, this area of law will finally be settled favorably for the mortgage servicing industry.

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