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This week we bring you a case from the Alabama Court of Civil Appeals, a key holding of which regards the assignability of a mortgage and note by a nominee of the lender. Also included is a case from the Alabama Supreme Court on the effect of leaving an ampersand out of a mortgagor's name when recording a mortgage.

Crum v. LaSalle Bank, N.A., Alabama Court of Civil Appeals (No. 2080110 Sept. 18, 2009) (Designation of nominee of lender in mortgage authorizes nominee to perform any act on the lender's behalf as to the property.) This case was successfully handled by Sirote & Permutt attorneys Gregg Deitsch and Jeff Miller for LaSalle Bank. The holding in this case is extremely important with regard to the enforceability and assignability of mortgages which name a nominee for the lender. The validity of assignments of these mortgages by the nominee has been repeatedly challenged by borrowers in pre and post foreclosure actions.

In 2006 Deidra Crum ("Crum") gave a mortgage on real property to Nationpoint, a division of National City Bank, N.A. The mortgage recognized Nationpoint as the lender, but actually named a separate corporation, Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee. The mortgage, like most current mortgage instruments, stated that "MERS is a separate corporation and is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." The mortgage further stated that Crum "irrevocably mortgages, grants and conveys to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, . . . [of] the property . . ." MERS was also authorized by the mortgage to "take any action required of Lender. . . ."

The underlying facts were undisputed. MERS, as nominee for Nationpoint, assigned the mortgage and note to LaSalle Bank. Crum defaulted on the mortgage by failing to make payments, and LaSalle initiated foreclosure proceedings. After the foreclosure, Crum failed and refused to vacate the property and LaSalle filed an ejectment complaint in the Circuit Court, seeking possession of the real property. Crum did not deny that the mortgage was in default, but instead sought to impugn the validity of LaSalle's title by contending that MERS, as merely a nominee in the mortgage, was not "entitled to the money thus secured" by the mortgage. Stated otherwise, because MERS did not actually own the debt, it therefore could not assign anything to LaSalle. This argument was based on Crum's interpretation of Ala. Code § 35-10-12, which states that the power to sell may be exercised only by a person who "becomes entitled to the money [secured by the mortgage]."

The trial court disagreed with Crum, and held that MERS did in fact have the ability to assign the mortgage, including the power of sale, to LaSalle on behalf of Nationpoint. The trial court entered a judgment of possession in favor of LaSalle and Crum appealed. The Alabama Court of Civil Appeals affirmed the trial court's judgment, holding that MERS was "expressly acknowledged by the borrower in the mortgage instrument itself as not only having 'any or all of the [the lender's] interests' in the mortgage property, but also as having the power 'to take any action required of the lender.'" These authorized actions included "selling the note and the mortgage to a third party," such as LaSalle. Thus, the assignment to LaSalle was proper and effectual, vesting LaSalle with the power of sale.

The argument has also been advanced that naming MERS as nominee in the mortgage diverges legal and equitable ownership of the debt (which remains in the lender) and the security for the repayment of the debt (which is given to MERS). The Alabama Court of Civil Appeals addressed this argument, however, and noted the common law rule that "a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise."

Bynum v. Barker (Alabama Supreme Court Sept. 18, 2009) (Leaving the ampersand (&) out of a mortgagors name in a mortgage caused the mortgage to be outside of the chain of title and a subsequent purchaser and mortgagee took the property as bona fide purchasers for value.) Davis & Associates, LLC took title to certain real property in Jefferson County, Alabama, by warranty deed which identified Davis & Associates, LLC as the owner of the property. Frank K. Bynum (Bynum) loaned Davis & Associates, LLC \$43,000.00 secured by a mortgage on the property. The mortgage identified the mortgagor as Davis Associates, LLC, leaving out the ampersand from the owners name. Later that same year, Davis & Associates, LLC conveyed the property to TMS Properties, LLC. TMS then conveyed the property to Angel Barker, who obtained a purchase money mortgage from Homecomings Financial, LLC. Davis & Associates, LLC never paid off the mortgage to Bynum, who notified Barker and Homecomings that he intended to foreclose on the property. Barker and Homecomings then filed an action against Bynum, seeking a declaratory judgment that Barker and Homecomings were bona fide purchasers of the property without notice of the Bynum mortgage. GMAC was subsequently substituted for Homecomings as the mortgage had been assigned to GMAC.

Distilled to the pertinent issue, the question before the court was whether the mortgage which omitted the & from the mortgagors name caused the mortgage to be outside of the chain of title. Based on evidence submitted from the probate court recording supervisor and the vice president of a title research firm, the trial court held that the mortgage was outside of the chain of title. Therefore, Barker and GMAC were held to be purchasers for value without notice, and therefore not subject to Bynums mortgage. Bynum appealed.

The Alabama Supreme Court agreed with the trial court, holding that the omission of the ampersand would cause the name Davis Associates, LLC not to appear in a reasonable search of the grantor-grantee index when the search performed was for Davis & Associates, LLC. There was no fault by the probate court recording clerk and no error in the recording index. Instead, it was Bynum who prepared the mortgage in error, omitting the ampersand and placing the mortgage outside of the chain of title. As noted by the Court, [t]he probate judge properly recorded that incorrect name and placed it in the indices.



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