STATE OF MICHIGAN

COURT OF APPEALS

FIRST NATIONAL BANK OF CHICAGO, as Trustee for BANKBOSTON HOME EQUITY LOAN TRUST 1998-1,	FOR PUBLICATION September 9, 2008
Plaintiff-Appellee/Cross-Appellant,	
v	No. 272431 Court of Claims
DEPARTMENT OF TREASURY and DEPARTMENT OF NATURAL RESOURCES,	LC No. 03-000057-MT
Defendants-Appellants/Cross-Appellees.	Advance Sheets Version

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. This is essentially a case of mistaken identity. Plaintiff is not BankBoston NA, which was the only entity that was even arguably owed, much less deprived of, due process by defendants. Exacerbating this fundamental mistake is the misunderstanding of two basic principles of law: the right to due process is a personal right that does not extend to third parties, and due process only requires *proper* notification of proceedings. Since the majority opinion acknowledges that notices were sent through registered mail, return receipt requested, to BankBoston, and receipt of those notices was acknowledged by signature, I am of the opinion that BankBoston received proper notice. I would reverse the decision of the trial court and remand for further proceedings.

As an initial matter, plaintiff fails to make out any claim that defendants violated any statutory obligation to provide it with notice of the tax forfeiture and foreclosure proceedings. Because the certificate of forfeiture was recorded before plaintiff's mortgage assignment, defendants were not statutorily required to provide plaintiff with notice. See MCL 211.78i(6)(a). However, the majority opinion claims, "BankBoston was an owner of a property interest entitled to notice at the time the state was required to send notices and remained an owner of a property interest when it became the beneficial holder of the mortgage." *Ante* at 8. In my opinion, this statement does not have any support in the stipulated facts submitted below or in any law governing the sale and transfer of mortgage interests.

The mortgage assignment under which plaintiff claims its property interest expressly states that BankBoston transferred all its rights in the property to plaintiff as the trustee for the

BankBoston Home Equity Loan Trust. Nothing in the lower court proceedings suggests that BankBoston's complete transfer of the mortgage to plaintiff left it with any residual status as "beneficial holder of the mortgage." On the contrary, the assignment was plenary and made for "valuable consideration." Therefore, BankBoston had no remaining interest in the property. In other words, BankBoston was, at most, the trust's settlor,[1] and nothing in the record verifies plaintiff's bald assertion that BankBoston and the trust were legally indistinguishable or the majority opinion's equally baseless assertion that BankBoston was the trust's beneficiary.[2]

In fact, BankBoston's disposition of its entire interest in the property and the property's mortgage explains why BankBoston, when it was adequately notified of the proceedings, took absolutely no action to claim any right under the mortgage. It also explains plaintiff's zealous pursuit of its claims as "trustee" of a trust corpus that the assumed "beneficiary" took no action to protect. The fact is that the only entity that had any proven interest in the mortgage was plaintiff First National Bank of Chicago. Unfortunately for this financial institution, its interest in the property was not "identifiable . . . before the date that the county treasurer record[ed] the certificate [of forfeiture]," so defendants simply were not required to send it notice of the foreclosure proceedings. MCL 211.78i(6).[3] Instead, it was incumbent upon plaintiff to review

---

[1] It is entirely possible on the record before us that the "trust" was simply an administrative vehicle for transferring BankBoston's interests to First National Bank of Chicago, in which case, the only entity with a property interest would be FNB Chicago.

[2] Although plaintiff has not proffered any trust documentation to demonstrate its continued relationship with BankBoston, the transaction at issue has all the earmarks of a mortgage pool trust, and some of the documentary evidence presented fully supports this conclusion. A mortgage pool trust is a trust into which a lender may place its existing mortgages (good or bad) with an eye to selling certificates of beneficial interest to investors. Therefore, its beneficiary is the group of investors who have purchased an interest in the trust's pool, not the trust's settlor. See 6 Powell on Real Property § 44A.06. Needless to say, this type of trust would render the validity of BankBoston's notice irrelevant to plaintiff, and the mere possibility that the trust could have existed merely as a mortgage pool underscores how eagerly our courts, so far, have adopted every one of plaintiff's self-serving statements and granted to it rights that an ordinary assignee would never enjoy.

[3] This makes sense, because it puts the onus of discovering the compromised title on the person or entity that is considering whether the mortgage is worth buying, and at what price. That person has a much better opportunity to research the property's history and discover the delinquent taxes than the taxing authority has of detecting the "real" mortgage holder in a stream of serial, and sometimes artificial, financial transactions. This system relieves the unpaid taxing unit of the obligation to monitor, perpetually, the mortgage's progress as it drifts from financial institution to financial institution: sometimes openly traded and recorded, other times lying in wait among innumerable acquisitions, mergers, and financial dealings. In other words, a person speculating on a mortgage's value must research the value of the investment or bear the risk that the security (the real property) has already been forfeited for delinquent taxes or otherwise encumbered. It is not the government's responsibility to divine unrecorded property rights, chase down the real parties in interest, and drag them into court, with their eyes squeezed shut and their fingers stuck in their ears, so they can timely defend their own poorly researched investments.

the register of deeds documents when it recorded its assignment, which would have alerted it to the pending proceedings. Better still, it could have likely reviewed the available documents and discovered the property's tax arrearage before it gave any "Good and Valuable Consideration" to BankBoston and purchased the compromised mortgage. Because it failed to take either approach and essentially disregarded the costly and laborious record systems instituted to protect its rights in the property, I would not entertain plaintiff's claim that the government owed it still more effective forewarning that the property's taxes had not been paid.

In summary, there is no evidence that the single, isolated mortgage assignment imbued plaintiff with any continuing association with BankBoston, endowed it with any derivative entitlement to know BankBoston's affairs, or enabled it to raise BankBoston's legal claims, if any still existed.[4] Nevertheless, the majority opinion allows plaintiff to claim defects in BankBoston's notice as a justification for its own failure to defend itself against the foreclosure of its rights in the property. Recently, in *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005), we reiterated the fundamental concept that "constitutional rights are personal, and a person generally cannot assert the constitutional rights of others." "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). It follows "that the right to notice is personal and cannot be challenged by anyone other than the person entitled to notice." *In re AMB*, 248 Mich App 144, 176; 640 NW2d 262 (2001). Although plaintiff has firmly established BankBoston's right to notice, it has not made out a prima facie case that it was entitled to BankBoston's notice. Stated another way, plaintiff simply has no standing to assert BankBoston's right to notice.

Finally, the majority opinion reforms the long-established standards for providing due process by using hindsight to determine whether notice was adequate and by prejudging defendants' efforts and motives, using their overall success as the operative gauge. This is a flawed standard and an unreasonable approach to the analysis. Instead, "due process requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

---

[4] It is worth noting that plaintiff relies on the assignment to BankBoston to claim a lack of notice, but it does not rely on that assignment to claim that BankBoston was owed any money. Instead, plaintiff asserts BankBoston's assignment to the trust as the source of its own right to receive reimbursement from the property's tax-sale proceeds. BankBoston has never directly asserted any right to proceeds. Its assignment to plaintiff would clearly belie such a claim, and plaintiff would stand as one of its chief opponents. Nevertheless, plaintiff adds BankBoston's apparent right to notice with its own hopelessly tardy claim to the proceeds, and presents these two courses of a Barmecidal banquet as a constitutional excuse for its prolonged absence from the legal proceedings. I am not persuaded. The real shame is that the government, which finally collected its legitimate tax, wound up incurring more court costs to undo the original rulings, duplicating the entire process with the addition of plaintiff's long-dead claim, and paying plaintiff roughly $30,000 more in reimbursement than it received from the property's sale. This certainly does not accomplish the statute's purpose of encouraging governmental units to foreclose on properties that carry neglected tax obligations

In this case, defendants, through their agent, researched the registry and found BankBoston's interest in the property. It also diligently discovered that BankBoston no longer existed, because it had merged with Fleet National Bank. Therefore, it sent notice to the Providence, Rhode Island, address listed for BankBoston (as absorbed into Fleet) on an official Federal Deposit Insurance Corporation (FDIC) website. Fleet, unquestionably responsible for BankBoston's previous affairs, acknowledged receipt of this notice on behalf of the recently dissolved entity.[5] All the parties agree that when the forfeiture certificate was actually filed and recorded at the register of deeds, Fleet was the proper entity to receive notice as the financial institution that inherited BankBoston's previous interests. Defendants later sent a separate notice directly to "BankBoston" through registered mail, return receipt requested, in accordance with additional information found on the FDIC website. Someone managing BankBoston's former interests acknowledged receipt of that notice, too. Interestingly, the same Fleet employee signed both return receipts. Nevertheless, nobody representing Fleet or BankBoston ever took any appreciable action in response to the foreclosure proceedings.[6]

Rather than subjecting this procedure to the test in *Vicencio*, the majority opinion holds that defendants violated plaintiff's constitutional rights by failing to send notice to the defunct, and apparently meaningless, address on the original assignment to BankBoston. Neither the majority opinion nor the lower court mentions that the address on the assignment was simply wrong. Not only was BankBoston fully integrated into Fleet and given a new address, the mortgage assignment from Investaid to BankBoston misprinted BankBoston's original zip code. At the time of the assignment to BankBoston, BankBoston's offices were located within the zip code 02110, but the mortgage assignment recorded at the register of deeds erroneously showed BankBoston's zip code as 02210. Plaintiff concedes the flagrant defect in this address, but still insists that due process required defendants to send notice to this incorrect, and presumably invalid, address, because it was the only mailing address that was "reasonably calculated" to ensure that BankBoston would receive notice of the time-sensitive proceedings. Plaintiff's claim boils down to an argument that defendants should have ignored the best and most current information available and mailed BankBoston's notice to the wrong address. Only then, argues plaintiff, could defendants claim that they fulfilled their constitutional obligation of sending notice to an address "reasonably calculated" to actually notify BankBoston[7] of the pending action.

---

[5] In fact, plaintiff presented an affidavit from the individual responsible for continuing the "BankBoston" address where plaintiff argues defendants should have sent the forfeiture notice. The affiant who continued the office was a Fleet employee.

[6] One could reasonably speculate that the reason BankBoston/Fleet took no action once they received notices of the foreclosure is because a search of their current mortgages revealed that they had transferred their interest in this mortgage to a third party.

[7] As mentioned, because defendants' agent discovered that Fleet had merged with BankBoston and effectively acquired its interests, Fleet was actually the entity that possessed the relevant property interest when notice was due, adding another doubtful link to plaintiff's dubious chain of arguments. The record indicates that Fleet was the appropriate recipient of notice, whether directly or indirectly on BankBoston's behalf. Plaintiff's reliance on *Republic Bank v Genesee*

(continued…)

In sum, the majority opinion concludes that valid notice, sent and actually received at the current and correct address of a record mortgage holder, is not reasonably calculated to give the mortgage holder notice of a pending action. It further concludes that this procedure violates the due process rights of a third party who either purchases the mortgage after the forfeiture was recorded or delays recording its purchase until the forfeiture was on record. Needless to say, I disagree. In my opinion, plaintiff simply fails to demonstrate either a legal right or its violation. I would reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

/s/ Peter D. O'Connell

(…continued)

Co Treasurer, 471 Mich 732, 741-742; 690 NW2d 917 (2005), is misplaced. The holding in *Republic Bank* absolved the government from undertaking extraordinary research to improve its chances of actually notifying an interested party, but it certainly did not deter the practice. See *id*. at 742. As in *Republic Bank*, the notices sent by defendants in this case reached the intended parties and actually informed them of the impending proceedings. If plaintiff acquired the mortgage before the forfeiture was filed, then defendants' ignorance of that fact is completely attributable to plaintiff's failure to record its interest in a timely fashion. If plaintiff did not acquire the interest until after the forfeiture was recorded, then the proper parties were given proper notice. Due process does not require more.