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Mortgage modification: Mabry v Superior Court, 2010

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Borrower has private right of action to enforce mortgage lender's duty to assess and explore options to prevent foreclosure.
Mabry v Superior Court (2010) 185 CA 4th 208

In 2006, the Mabrys refinanced the loan on their home, borrowing approximately $700,000. The lender assigned the right to service the loan to Aurora Loan Services. The Mabrys filed Chapter 11 bankruptcy in September 2008, but the bankruptcy was dismissed in March 2009. Aurora asserted that in July 2008, before missing any payments, the Mabrys contacted Aurora to discuss options to avoid foreclosure, and that after the bankruptcy was dismissed Aurora made several attempts to contact the Mabrys. The Mabrys contended that Aurora never contacted them to discuss foreclosure options.

On June 18, 2009, Aurora recorded and served a notice of default, stating that it had tried to contact the Mabrys, as required by CC §2923.5. On October 7, 2009, the Mabrys filed a complaint asserting that Aurora failed to comply with CC §2923.5 and sought a temporary restraining order to prevent the foreclosure sale. After the court issued the temporary restraining order and set a date for a hearing, the Mabrys amended their complaint, adding a class action and seeking relief for the entire class. The court granted the second temporary restraining order and set a date for a hearing based on the amended complaint. After each respective hearing, the judge dismissed the temporary restraining orders and, without making a finding of fact, concluded that the actions were preempted by federal law, that the Mabrys did not have a private right of action under CC §2923.5, and that the Mabrys were required to tender all payments owing to enjoin any foreclosure proceedings. The Mabrys then filed a writ with the court of appeal.
The court of appeal determined that CC §2923.5 allows for a private cause of action because there is no alternative administrative mechanism to enforce the statute; to deny a private cause of action would leave the statute without any enforcement mechanism. The court noted that CC §2923.5 requires the lender to contact the borrower in person or by telephone to assess the borrower's financial situation and explore options before filing a notice of default. If the lender fails to comply with CC §2923.5, then the court has the power, under CC §2924g(c)(1)(A), to postpone the sale until compliance. This procedure meets the statutory goal of forcing parties to communicate about a borrower's situation and the options to avoid foreclosure.

The court also determined that the borrower need not tender the full amount of the indebtedness before seeking enforcement of CC §2923.5. Because the statute requires the lender to contact the borrower regarding alternatives before beginning foreclosure proceedings, it would defeat the purpose of the statute to require the borrower to tender the full amount before bringing an enforcement action. Case law requiring tender of payment before seeking postponement of

foreclosure proceedings arose in situations when a foreclosure sale could not be avoided absent payment of all the indebtedness. See, *e.g., Arnolds Mgmt. Corp. v Eischen* (1984) 158 CA3d 575, 205 CR 15. Civil Code §2923.5, however, creates a new right to be contacted about the possibility of alternatives to full payment of arrearages.

Further, the court determined that CC §2923.5 is not preempted by federal law. Though Aurora argued that 12 USC §§1463(a) and 1464(a) and 12 CFR §560.2 preempt state law regarding the operation of federal savings associations, the process of foreclosure has been a matter of state law. See *BFP v Resolution Trust Corp.* (1994) 511 US 531, 541, 128 L Ed 2d 556, 567, 114 S Ct 1757. Because there is no right to a loan modification under CC §2923.5, but only a right to postpone the foreclosure process, preemption does not apply.
The court also concluded that the declaration required under CC §2923.5(b) does not need to be made under penalty of perjury. The statutory language mentions a declaration without mention of any required oath. Because of the number of persons who may be involved in seeking to contact a borrower under CC §2923.5, it is logical to conclude that the declaration may track the statutory language and not have to be customized in each case.

The failure of the lender to comply with CC §2923.5 does not affect title to the property after a foreclosure sale has been completed. California's comprehensive foreclosure regulation is designed to ensure stability after the trustee's sale. Nothing in CC §2923.5 provides that failure to comply causes a cloud on title and the only remedy for the borrower is a postponement of the sale before it happens. The court remanded the case to the trial court for a factual determination of whether there had been compliance with CC §2923.5. The court also noted that the case was not suitable for class action treatment as it involved highly individualized facts regarding how many and what types of attempts had been made by each lender to contact each borrower, making certification of a class impossible.

THE EDITOR'S TAKE: Presiding Justice Sills knows mortgage law so well, and writes so persuasively on it, that it is difficult for readers (other than losing parties) ever to feel motivated to disagree with him. Furthermore, his writing style often cleverly—especially in this case—conceals the magnitude of the victory for lenders and the defeat for borrowers in construction of the mandated "assess and explore" prerequisites for trustee sales under CC §2923.5.

Although the court's opinion begins with the ringing assertions that borrowers do have private rights of action for lender noncompliance with the statute and that they need not tender payment of their arrearages to assert those rights, those holdings are rendered effectively meaningless when courts require only unverified pro forma compliance by lenders with pre-notice of default niceties, and do not support class actions or damage remedies or the vacating of trustee sales when even such minimal compliance was lacking. Judicial relief for statutory disobedience is about as meaningless as the statute itself appears to be—brave language, but not much content.

As a matter of statutory interpretation or public policy, it may be quite legitimate to conclude that postponement is the only remedy available to a defaulting borrower when its lender has not properly assessed or explored matters before starting foreclosure. But it is not very likely that this narrow recourse was mandated by the legislature only, as the opinion suggests, to avoid state foreclosure law coming into conflict with federal banking law. From the briefs, this consideration appears to have been raised by the court rather than the parties, even though nothing in the opinion intimated that a federal lender was involved. Nor does the *de la Cuesta* due on sale issue seem that similar to the earlier foreclosure moratorium statutes to which it was compared. (*Fidelity Fed. Sav. & Loan Ass'n v de la Cuesta* (1982) 458 US 141, 73 L Ed 2d 664, 102 S Ct 3014.)

Further, on the question of appropriate relief, refusing to invalidate defective but completed trustee sales fits well within our general policy of sale finality, but that does not explain why an innocent borrower should also be denied monetary relief against the lender when the foreclosure sale had wrongly omitted assessment and exploration. If remedies were to be judicially implied, tort damages seem no less fitting than postponement. (Although the court explicitly avoided the question of attorney fees, it could come up again in any future postponement battle, given the universal presence of fee clauses in loan documents.)

None of these issues is probably that important, given that CC §2923.5 only applies to mortgages that were recorded between 2003 and 2008 and that are subject to foreclosure sales that were commenced between September 2008 (its effective date) and 2013. But Justice Sills's opinion is a learned and readable analysis, even if ultimately not entirely persuasive.—*Roger Bernhardt*