

## REAL ESTATE

# Courts: Overlooking Minor Defects in the Foreclosure Process?

By Nicholas Kanter, Esq.

The chances of successfully challenging a non-judicial foreclosure sale based on minor errors in the foreclosure process are being, well, foreclosed.

California's Civil Code regulates nonjudicial foreclosures pursuant to a power of sale contained in a deed of trust. These sections specify particular requirements and procedures that must be followed in order to ultimately sell a property at a trustee's sale, following an uncured default by the property owner.

One requirement is that the notice of default must identify the beneficiary under the deed of trust. Recently, in *Debrunner v. Deutsche Bank National Trust Co.*, the plaintiff filed a lawsuit against its loan servicer and foreclosure trustee in an attempt to invalidate a pending foreclosure. The plaintiff claimed the notice of default was defective, and therefore the foreclosure was invalid, because the notice of default did not identify the beneficiary.

The beneficiary under the deed of trust was Deutsche Bank. However, the notice of default did not identify Deutsche Bank as the beneficiary. Instead, the notice of default identified "Saxon Mortgage Services, Inc.," an entity acting as attorney in fact for Deutsche Bank and servicer of the loan. The notice of default also informed the



plaintiff that he could stop the foreclosure by making payment to Saxon, and listed Saxon's address and telephone number.

The court was not persuaded by the plaintiff's claim. While the notice of default did not identify Deutsche Bank as the trustee, plaintiff received a Fair Debt Collection Practices Notice attached to the notice of default that identified Deutsche Bank as the creditor, and Saxon as Deutsche Bank's attorney-in-fact. And even though the Fair Debt Collection Practices Notice did not list Deutsche Bank's address or tele-

phone number, the notice of default provided Saxon's telephone number and address.

The plaintiff argued that strict compliance with California Civil Code is required in a nonjudicial foreclosure, and because the notice of default did not strictly comply with the Code, the foreclosure was invalid.

The court easily rejected plaintiff's challenge, finding that strict compliance is not required. Instead, a party challenging a foreclosure sale based on an irregularity must show that the irregularity was prejudicial to the party's interest.

In this case, plaintiff was required to show how the failure to list the beneficiary on the notice of default prejudiced his interests. The plaintiff could not make this showing. -- he could not claim that he was unable to cure the default by making a payment to the beneficiary because the notice of default provided an address for Saxon,

who was acting as the beneficiary's (Deutsche Bank) attorney in fact.

The finding in *Debrunner* (i.e., irregularities are not actionable unless prejudicial) is not novel. Similar decisions have come down as recently as last year, e.g., *Fontenot v. Wells Fargo Bank, N.A.* (2011).

However, the *Debrunner* decision is noteworthy in that it shows that courts are not being persuaded by public outrage towards a perceived universal failure by banks to follow appropriate procedures in both judicial and nonjudicial foreclosures. Instead, the decision further solidifies legal precedent requiring the party challenging the foreclosure to show that any irregularity caused actual prejudice to the challenger, not only that an irregularity occurred.



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