

Massachusetts REO Contested Evictions: How to Win a Changed Game by Using Actual Litigation Skills

On March 12, 2014 the Massachusetts Supreme Judicial Court issued its long awaited notice of default decision in U.S. Bank National Association v. Schumacher, 467 Mass. 421 (2014). In so doing the Court's majority held that REO title will not be void simply because the notice of default failed to "strictly comply" with one of M.G.L. c. 244, §35A's ten parts.

The Court's ruling can be a trap for the unwary, or better yet, the unprepared. Here is why, four months prior to Schumacher, the Court decided in Bank of America v. Rosa, 466 Mass. 613 (2013) that mortgagors can now allege counterclaims as part of REO proceedings. Grabbing hold of this, Schumacher's concurring opinion (which was adopted by the majority in a footnote) ruled that even if a mortgagee doesn't have to prove default to establish the validity of its title, the mortgagor could allege a M.G.L. c. 244, §35A counterclaim whereby if they proved that the "defective" notice to cure letter "rendered the foreclosure sale so fundamentally unfair" they could be entitled to "affirmative relief in equity", including "a setting aside of the foreclosure sale."

So in other words, while a mortgagee does not have to prove default to establish the validity of its title, its title could nevertheless still be invalidated because of a defective notice to cure letter vis-à-vis a mortgagor's counterclaim. Given the dynamic between the majority and concurring opinions, many have categorized Schumacher as an exercise in legal semantics.

To combat Schumacher and Rosa effective discovery will be crucial. While obvious, it is not so simple because in Massachusetts the rules of eviction procedure not only require all written discovery to be propounded on the date the answer is filed (a date set by the rules themselves), but also don't call for the use of deposition. Hardly ideal for litigating complex issues such as whether the notice of default letter is "fundamentally unfair." Furthermore, because of the strict timing requirements written discovery is rarely propounded upon mortgagors by counsel.

Such practices are largely a byproduct of the pre-Schumacher and Rosa litigation model where without counterclaims to contend with a majority of contested cases were resolved through summary judgment. Clearly though, the rules of the game have changed. It will now be imperative for counsel to have written discovery waiting in the wings on the date the answer is filed. It will be even more imperative for counsel to file motions for 'Leave of Court to Conduct Deposition' as soon as a M.G.L. c. 244, §35A counterclaim (or any counterclaim for that matter) is filed. Failing this, counsel will need to file a 'Motion for Leave to File Late Discovery and Take Deposition', and failing this last ditch resort counsel better be prepared to explain to their client why they took a knife to a gun fight at the time of trial.

Simply put, following Schumacher and Rosa, REO evictions are now just like any other type of civil action. If not properly litigated, the client will be forced to do it again which will result in additional delays and costs.