Massachusetts Law and Limitation of Actions Challenging Foreclosure

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Why Foreclosed Property Owners Have 20 Years Under Massachusetts Law in Massachusetts Law and Limitation of Actions Challenging Foreclosure

"An Act clearing title to foreclosed properties," variously numbered from time to time, is intended to prevent challenge to a completed foreclosure one year after the Act's effective date. For future foreclosures, the Act's deadline would be three years after the foreclosure deed is recorded in the Registry of Deeds.

Title insurance industry personnel reportedly say that three years is an appropriate deadline for challenging a foreclosure of real property, because three years is all that anyone in Massachusetts has. Afterward, it's over.

If that were so, of course, they would not need this Act. So, why do they want it?

It's to abolish the 20-year statute of limitations to sue for breach of a contract under seal, but only for mortgages that are or were foreclosed, and to create a new, 3-year statute of limitations for our two types of foreclosure that require no court approval.[1]

One type of non-judicial foreclosure is foreclosure by auction and sale. M.G.L. c. 244, ss. 11 – 17. The other is known as foreclosure by entry. M.G.L. c. 244, ss. 1 & 2.

Typically, a foreclosing party forecloses by sale. This means that it holds a public auction of the property on or near the property. If the foreclosure by sale is valid, it then and there forecloses forever the mortgagor's right to redeem that property. M.G.L. c. 244, s. 14. The successful bidder owns the property, pending issuance of the foreclosure deed or, for registered land, pending recordation in the Registry of the foreclosure deed.

Nonetheless, the foreclosing party then typically walks at once to the property in question and steps on it, in order to initiate foreclosure by entry. M.G.L. c. 244, s. 1 provides:

> "A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, … or by action under this chapter; and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption."

Why do foreclosing banks do this? If a foreclosure by sale was void – meaning that legally it never happened -- then the hope is that a subsequent foreclosure by entry will serve as belt and suspenders.[2] Yet, there is more.

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[1] The Commonwealth's two additional types of foreclosure both require a case in court. These are foreclosure by action, M.G.L. c. 244, ss. 1 & 2; and foreclosure by equity. M.G.L. c. 185, s. 1 (k). Neither is much used. Both are final as soon as the court decides the case and enters an order.

[2] If a foreclosure by sale is valid, the erstwhile mortgagee is a mortgagee no longer. This suggests that, to rely on an ensuing foreclosure by entry, the foreclosing party must first prove up that its preceding foreclosure by sale was void, so that at the time of its entry it still was the mortgagee.

Regardless of the type of foreclosure,

1) Only the Mortgagee has the Right to Foreclose, even for Foreclosure by Entry;
2) The U.S. Constitution Precludes a State from Changing the Mortgage Contract by Allowing a Non-Mortgagee to Enforce it;
3) A Foreclosure by Entry Not Complying With the Mortgage Contract is Void;
4) A Foreclosure by Entry Must Comply with All Massachusetts Law; and
5) The Statute of Limitations for Breach of a Contract Under Seal, e.g., a Mortgage, is 20 Years

1) Only the Mortgagee has the Right to Foreclose, Even for Foreclosure by Entry

A title insurance industry representative has reportedly said that this Act would make foreclosure, even by a non-mortgagee, unassailable if the Act's applicable deadline had passed. This is incorrect.

An authorization to foreclose by entry or by any other means derives from the contract of mortgage. Only a party to the mortgage, therefore, can enforce it by foreclosure.

Paragraph 22 of the standard Fannie Mae and Freddie Mac Uniform Instrument of mortgage, used nationwide, provides in part:

> "**If the default is not cured at or before the date specified in the notice, Lender … may … invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law.**"

Bolding and capitalization in original. Underlining supplied.

Thus even with foreclosure by entry, a "remed[y] permitted by Applicable Law," only the Lender/mortgagee can foreclose. The Supreme Judicial Court reaffirmed this recently:

> "In order to foreclose on a mortgage by entry, BNY must have been the mortgagee at the time of entry."

Bank of New York, trustee, v. Bailey, 460 Mass. 327 (2011), n. 10, citing *U.S. Bank Nat'l Ass'n v. Ibanez,* 458 Mass. 637, 646 n. 15 (2011).

2) The U.S. Constitution Precludes a State from Changing the Mortgage Contract by Allowing a Non-Mortgagee to Enforce it

The U.S. Constitution furthermore precludes foreclosure by a non-mortgagee. A non-mortgagee is a stranger to the mortgage contract. A state statute purporting to accord rights under a contract to a non-party would thus change the obligations under that contract. Article 1, Section 10 in part provides:

> "No State shall … pass any … Law … impairing the Obligation of Contracts …."

A state statute purporting to let a non-mortgagee foreclose on a mortgage would impair the contractual obligations that run to the mortgagee. No state law can do that.

3) A Foreclosure by Entry Not Complying With the Mortgage Contract is Void

A title insurance industry spokesman has reportedly said that, after its applicable deadline, this Act would make unassailable even a foreclosure that failed to comply with the mortgage. That cannot be correct.

Paragraph 22 of the standard Fannie-Freddie mortgage sets forth the terms of the Lender's mandatory notice to the Borrower, before the Lender can foreclose:

> "**The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified … may result in acceleration of the sums secured by this Security Instrument and the sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."**

As recently as this summer, the Supreme Judicial Court held that a notice failing to comply strictly with these terms made an ensuing foreclosure sale void.

> "[T]his court's decisions … indicate that … the notice of default required to be given under paragraph 22 … operates as a prerequisite, to the proper exercise of the mortgage instrument's power of sale. … Emigrant's failure to strictly comply rendered the [foreclosure] sale void."

Pinti v. Emigrant Mortgage Co., 472 Mass. 226, 243 (2015). Underlining supplied.

As indicated above, if the Borrower fails to cure a default by the date that the notice specifies, Paragraph 22 provides that the Lender

> **"may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law."**

Bolding and capitalization in original. Underlining supplied.

Foreclosure by entry is one of the "other remedies permitted by Applicable Law." Are Paragraph 22's prerequisites for a valid foreclosure by entry, or by either of the judicial procedures, less strict? If they were, surely the mortgage would say so. But it does not. Regardless of the type of foreclosure, therefore, a foreclosing party's failure strictly to comply can mean only that an ensuing foreclosure, including by entry, is void.

4) A Foreclosure by Entry Must Comply with All Applicable Massachusetts Law

Title insurance industry spokesmen have given the impression that stepping on the property; filing a certificate of entry in the Registry; and waiting three years are enough for possession to ripen into a foreclosure that cannot be challenged. Even if a foreclosing party meets the requirements set forth above, there is more to it. M.G.L. c. 244, s. 1, provides:

> "A mortgagee may… recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor … and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate [of entry] shall forever foreclose the right of redemption."

First, what about "entry"? The person purporting to make an entry must be either the mortgagee or a "person claiming under him…." M.G.L. c. 244, s. 2. Otherwise a supposed foreclosure based on that "entry" is void. *Bailey*, above.

A title insurance industry lawyer admitted publicly at Senator Chandler's briefing on 12 August 2015[3] that, in some 40,000 Massachusetts cases, the party foreclosing by sale had not owned the mortgage on which it foreclosed: it was not the mortgagee. This was the *Ibanez* case, above. The foreclosing party had in effect sold the Brooklyn Bridge. In such a case, therefore, as *Bailey* held, a purported foreclosure by entry was likewise void.

Second, what about "entry … not opposed…."? The Massachusetts Alliance Against Predatory Lending (MAAPL) has dozens of videos of foreclosures at which the homeowner and supporters vociferously opposed a bank representative's attempt to enter. This makes a supposed entry void. Nonetheless, the sworn certificates of entry for these cases state that "entry" on the property had occurred, and had been unopposed. Really? "[A]n entry is peaceable if not opposed by the mortgagor …." *Thompson v. Kenyon,* 100 Mass. 108, 111 (1868), cited in *In re Silveira,* Bankr. D. Mass., 2013 WL 187472, slip copy at 11 (May 2, 2013).

Then, what about proving up entry? The usual method is via "a certificate, under oath, of two competent witnesses to prove the entry…" M.G.L. c. 244, s. 2. MAAPL notes that there is evidence of certificates supposedly sworn by two "witnesses," where too few people were present at the time for there to have been two witnesses. Without two witnesses both "entry" and "certificate" fail, and with them any consequent "foreclosure."

What about "possession …, if continued peaceably for three years…."? Never does a foreclosing bank "possess" by, e.g., sending a teller to camp on the lawn for three years!

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[3] The author was one of the six lawyers who presented at that briefing. The author has been a member in good standing of the DC bar since 1978. Former general counsel of the Interpol Washington Central Bureau. She was Governor Patrick's appointee for law to the Legislature's Registry of Deeds Modernization and Efficiency Commission (2013).

> "The Bank's entry upon the premises, even though 'open and peaceable,' is not enough. The statute requires that the entry be followed by "possession ... continued peaceably ... What followed its entry could hardly be called peaceable, with threats of eviction … and, finally, litigation."

In re Silveira, above, slip copy at 11 (citing *In re Ledgemere Land Corp.*, 116 B.R. 338, 341 (Bankr. D. Mass. 1990). The bankruptcy judge in *Silveira* said that he "agree[d] with the holding[…] in *Ledgemere* ... and predict[ed] that the Massachusetts Supreme Judicial Court would as well if presented with this issue." *Id.*

It thus looks as though a foreclosing party's threats after entry to evict the homeowner, and of course its bringing summary process in Housing Court for the purpose, would defeat the "peaceable" possession required for entry to ripen into foreclosure. Yet, foreclosing parties typically try, after entry, to evict, and on occasion they succeed.

5) The Statute of Limitations for Breach of a Contract Under Seal, e.g., a Mortgage, is 20 Years

M.G.L. c. 260, s. 1 sets forth the statute of limitations for breach of a contract under seal:

> "The following actions shall be commenced only within twenty years next after the cause of action accrues: First, Actions upon contracts under seal."

The Borrower's signature line on a Fannie/Freddie mortgage ends with "(Seal)." Furthermore, that signature is notarized. The mortgage contract itself, together with the statute, is thus what gives a borrower 20 years from a lender's breach to sue.

This Act, however, tries to convert the end of the three-year period of possession after entry, which applies to foreclosure by entry exclusively, into a three-year statute of limitations for a specialized type of breach, i.e., foreclosure contrary to law, of a specified kind of contract under seal, i.e., a mortgage, *regardless even that a non-mortgagee has purported to foreclose*. On constitutional and other grounds, this cannot be accepted.

If big banks had complied all along with the Commonwealth's centuries old land law and with our foreclosure law, most foreclosures would have been valid, and no one would need this Act now. In *Ibanez,* above, at page 655, the Supreme Judicial Court reaffirmed:

> "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements…."

The Commonwealth's illegally foreclosed families are entitled to the same protection by the Commonwealth's law as are all others. Save for narrow exceptions, this Act would instead absolve perpetrator banks, and shift permanently to their victims the billions of dollars of losses from both void foreclosures by entry and void foreclosures by sale. As *Ibanez* in effect holds, that cost is not the victims' to bear.