

Foreclosure Defense in Colorado: Who Is Suing You?

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A homeowner facing a foreclosure in Colorado may believe - mistakenly - that the only issue is whether the homeowner is in default in making payments on the loan. It is not that simple, especially these days. Colorado law is clear that other issues may be raised in a foreclosure hearing. Perhaps the most significant issue, in these days of securitized mortgages, is whether the party trying to foreclose is the real party in interest in the foreclosure.

In *Goodwin v District Court*, 779 P.2d 837 (Colo. 1989), the Colorado Supreme Court vacated an Order that authorized sale of a home in a foreclosure proceeding, where the evidence showed that the party who had foreclosed on the property had, in fact, assigned its interest in the promissory note secured by the deed of trust. The Court ruled that a party trying to foreclose has the burden of proving that it is the real party in interest. In order to prove that it is the real party in interest, it must show that it holds legal title to the promissory note. *Platte Valley Savings & Loan v Crall*, 821 P.2d 305 (Colo. App. 1991); *American Surety Co. v Scott*, 63 F.2d 961 (10th Cir. 1933). If the party is not the original beneficiary on the note, and claims that the note was assigned to it, it must prove a full and complete assignment from the assignor - i.e., from the party who held legal title to the note - to convince the Court that the homeowner will not be subject to other foreclosure actions by other parties who actually hold legal title to the note. *Alpine Associates, Inc. v. KP & R, Inc.*, 802 P.2d 1119 (Colo. App. 1990).

If the original note has been sold to one or more other parties - as may well be the case where the note has been sold to a "Trust" under the terms of a "Pooling and Service Agreement," and the Trust has, in turn, created and sold several classes of securities to investors in "Mortgage Backed Securities" - it may be necessary for the Trust or the Investors to initiate the foreclosure action, if they can prove they hold legal title to the note. Or, a representative of those parties may proceed with a foreclosure if the representative is able to prove full and complete assignments from the owner or owners of the note.

Each case is unique, and a homeowner facing a foreclosure should seek legal counsel to review all documentation related to the property and the foreclosure in order to make an informed decision as to how or whether to oppose a foreclosure. The question of "who is suing you" is the first question to ask in defense of a foreclosure these days. It is only the first of many questions that may arise, but it is definitely a wise place to start.