



STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1144

Barry Wayne Beecroft and Tracee Ann Beecroft,  
Plaintiffs/Appellants,

vs.

Deutsche Bank National Trust Company, American  
Home Mortgage Servicing, Inc., Ameriquest  
Mortgage Company, CITI Residential Lending, Inc.,  
AMC Mortgage Services, Inc., and all other  
Persons Unknown Claiming any Right, Title,  
Estate, Interest, or lien in the Real Estate  
Described in the Complaint herein,

Defendants.

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APPELLANTS' BRIEF ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE AND ITS RESOLUTION BELOW

DID DEUTSCHE BANK DID HAVE THE RIGHT AND AUTHORITY TO  
COMMENCE FORECLOSURE ACTION AGAINST THE BEECROFTS?

The District Court Answered: In the AFFIRMATIVE

**Most Apposite Statute:**

Minn. Stat. § 580.02

**Most Apposite Cases:**

*Jackson v. Mortgage Electronic Registration Systems, Inc.*,  
770 N.w.2d 487 (Minn. 2009)

*Soufal v. Griffith*, 198 N.W. 807 (Minn. 1924)

*White v. Miller*, 54 N.W. 736 (Minn. 1893)

## INTRODUCTION

It is important to address one of the matters that was troubling the Court at the outset. The Beecrofts did not make mortgage payments to anyone during the period when the mortgagees were engaging in a game of corporate musical chairs. As a result, the Court felt, and the respondent argued, that they should not receive a windfall by obtaining the right to a house that they had not paid for. Surely, the argument goes, the Beecrofts could have found someone to accept payments, which would have estopped any mortgagee from foreclosing on them.

It is not clear that such a pious hope would always be realized. In the current climate, there are many "scammers" who would take mortgage payments without any credit being given against the balance sheet of the entity which really holds the mortgage, and it is not clear than in such a case the debtor would prevail against the true mortgagor. But even if payments to anyone under the mortgage would estop a mortgagor from claiming a default, there are serious problems created for a mortgagee when the name of the entity having the right to hold the mortgage is unknown or when the right itself is uncertain. Since the financial crisis of 2009 began and worsened, both the State and Federal Governments have instituted a number of programs to assist troubled mortgagees. A precondition to the success of any such program is that the mortgagee, the mortgagor, and for that matter the appropriate assisting agency, knows who

the mortgagor is, where they are to be found, what its interest in the mortgage is, and how much is really owed to that mortgagor to make it whole.

Successful restructure also assumes transparency of information about the name and nature of the mortgagee. Often that mortgagee is little more than an electronic recording service which holds record title to the mortgage only for the purpose of foreclosing it. Often the mortgage interest is passed by and through so many entities so quickly that the mortgagee cannot determine whom to deal with. Sometimes the entity holding the mortgage has already been paid off in a credit default swap and a payoff from the mortgagee would be a double recovery (note that Deutsche Bank here paid in only half the outstanding mortgage value at the sheriff's sale). Whether any of these things (except the rapid assignment of the mortgagor's interest) is the case here is impossible to say. What is possible to say, however, is that a rational mortgagee might well hold off paying any mortgage until it is absolutely clear who she is dealing with and indeed has actually dealt with them so as to know that there is really a bona fide lender willing to negotiate with her in good faith and follow the law.

Hence the strictness of foreclosure law when the foreclosure is to be accomplished by advertisement. It is recognized that advertisement foreclosure is a summary remedy with little

judicial oversight. As a result, it has regularly been held that the statutes and rules regulating such foreclosure be followed strictly by the mortgagor, even if those rules seem unimportant. See, e.g., *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.w.2d 487 (Minn. 2009). If, on the other hand, a mortgagor is doubtful about the propriety of some of its actions, or wants to engage the debtor fully in the process, it always has the option of giving her due process and proceeding by action.

In the instant case, even Deutsche Bank does not seriously contest that there are lacunae in the record of its mortgagor rights. It contests whether these lacunae are prejudicial to the mortgagee and whether they should prevent a mortgagor from collecting on a mortgage which is in default, even if Deutsche was a bit sloppy in its paperwork. The answer to this contention is that it matters a great deal. The current financial crisis was caused in large measure precisely by lending institutions being sloppy in their paperwork. Furthermore, vetting such sloppiness only encourages more of the same, leading to another slippery slope of dubious lending practices.

This case is a perfect example of the problems created by dubious foreclosure practices. The plaintiffs' house was never "under water." Two of the three mortgagees, by contrast, were. If the transactions here had been between a stable local bank and a local debtor such as plaintiffs, it is doubtful if any of this

would ever have happened.

#### STATEMENT OF THE CASE AND FACTS

On September 21<sup>st</sup>, 2009, Deutsche Bank commenced foreclosure against Wayne and Tracy Beecroft by advertisement, and on November 10<sup>th</sup>, 2009, a sheriffs sale was conducted at which Deutsche bank, as mortgagee, bought in for half the mortgage debt (A-89). Plaintiffs then brought an action to quit title to their land, essentially to overturn the mortgage foreclosure and sale (A-11). Plaintiffs brought a summary judgment motion to determine that the mortgage sale was improper because, inter alia, Deutsche Bank did not own the mortgagee interest. This motion was denied (A-23). Deutsche Bank then brought a motion for summary judgment to determine that the foreclosure was proper than it know owned the property. Defendant's motion was granted (A-1). This appeal followed (A-115).

Wayne and Tracee Beecroft purchased their home with a mortgage ("the mortgage") to Ameriquest Home Mortgage Co. ("Ameriquest) on December 23<sup>rd</sup>, 2005 (A-2). Ameriquest assigned the mortgage to CITI Residential Lending, Ind., ("CITI") on September 6<sup>th</sup>, 2007 (A-2). On July 1, 2008, Ameriquest, which by this time had no interest in the mortgage, appointed Linda Green and Tywana Thomas as special officers to process releases and act upon certain specific Limited Power of Attorney documents (A-74). On January 30<sup>th</sup>, 2009, CITI appointed Green and Thomas as

agents to act on a Limited Power of attorney.

On March 4<sup>th</sup>, 2009, Green and Thomas, acting as officers of CITI Appointed these very same persons, who were "Special Officers" of Ameriquest, as officers to act on Limited Power of Attorney documents, but which did not include the power to act with respect to plaintiffs' mortgage (A-71). On March 2<sup>nd</sup>, 2009, Green and Thomas, acting as officers of (probably defunct) CITI Residential Lending, Inc., executed an assignment of the mortgage to Deutsche (A-34). On August 18<sup>th</sup>, 2009, the Beecrofts received a discharge in bankruptcy (A-95). On September 21, 2009, Deutsche bank commenced foreclosure by advertisement, and on November 10<sup>th</sup>, 2009, the sheriff conducted a sale granting the property to Deutsche's bank for about half the amount of the loan (A-85).

#### ARGUMENT

DEUTSCHE BANK DID NOT HAVE THE RIGHT AUTHORITY TO COMMENCE FORECLOSURE ACTION AGAINST THE BEECROFTS.

Ameriquest was a large wholesale lender, operating originally from California. However, it closed its doors in 2007 and transferred much of its servicing business to CITI group. Prior to going out of business, Ameriquest executed a Limited power of attorney to authorize CITI to assign mortgages made in connection with the repurchase of property evidence by loans and to sell off some of its loans. Both Ameriquest, before its fall, and CITI, before its fall, used DOCX, a Georgia-based company, to

generate recordable instruments, such as mortgages, assignments, deeds, foreclosures, etc. It employed Linda Green and Tywana Thomas, for this processing. Ameriquest later executed a document effectively employing Green and Thomas, while they were still employed by DOCX, as special officers of Ameriquest, permitting them to execute documents to process mortgage releases. After Ameriquest's failure, CITI, which bought out some of the assets of Ameriquest, also employed Green and Thomas as special officers, to execute various powers of attorney. None of them permitted the execution of a power of attorney to act with respect to plaintiffs' existing mortgage.

Minn. Stat. § 580.02 sets forth some of the requirements for the valid foreclosure of a real estate mortgage by advertisement:

To entitle any party to make such foreclosure, it is requisite:

....

(3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded....

As noted above, our law requires strict compliance with the statutes. See *White v. Miller*, 54 N.W. 736 (Minn. 1893). The only person authorized to foreclose the mortgage in this case is the mortgagee. But Deutsche Bank is not a proper mortgagee. To be a proper mortgagee, the party having the rights of the mortgagee must have assigned the mortgage to Deutsche Bank.

Deutsche Bank does have an assignment from CITI. What it need to complete the chain as a proper document from Ameriquest to CITI. If there is not, there is no valid document from Ameriquest giving Deutsche the right to foreclose. Simply because the various companies utilize the same people does not complete chain of title.

To see this, consider the Limited Power of Attorney from Ameriquest to CITI. That POA does not refer to plaintiffs' mortgage with Ameriquest. Rather, it attempts to assign many Ameriquest mortgages en masse. But it cannot do so - it least it cannot do so in the matter it attempted to do here.

Minn. Stat. § 580.02 subd. 3 refers to "all assignments *thereof...*" So there must be a specific reference in any assignment of the mortgage which is the subject of the foreclosure action in any assignment document.

Moreover, the September 6<sup>th</sup>, 2007, POA specifically refers to "enumerated transactions, meaning that it only grants the POA with respect to transaction enumerated within itself. The Beecroft mortgage is not one of them. Paragraph 6 of that POA limits the assignments to those "... in connection with the repurchase of the mortgage loan secured and evidenced thereby." The Beecroft mortgage is not one of them. Moreover, the record does not show that the Beecroft mortgage was repurchased by Deutsche or that the assignment from CITI was connected to such a

repurchase transaction, much less that there was evidence of the security.<sup>1</sup> Hence, the Beecroft mortgages is not an "enumerated transaction," and hence it was not properly assigned to CITI. Hence it could not have been properly assigned to Deutsche Bank.

Respondent argues that the Limited POA states that CITI shall have the "full power and authority to execute such instruments and to do and perform all and every act and thing necessary and proper to carry into effect the power or powers granted by or under this Limited Power of Attorney as fully as the undersigned might or could do...." This does not answer the question "what are those powers"? and hence it does not expand the rights granted to CITI under that POA one Iota. As respondent acknowledges:

Should there remain a dispute as to the extent of the powers granted by the Limited Power of Attorney, that issue becomes a material fact that must be heard at trial where the evidence can be properly weighted.

(Defendant's Memorandum, p. 10)

There remained a dispute regarding the extent of the powers granted by the limited power of attorney. Accordingly respondent's motion for summary judgment should have been denied.

The abstract of title, certified to April 13<sup>th</sup>, 2009, does not show an assignment of an "enumerated" mortgage, much less

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<sup>1</sup>Although formal compliance with statute is the principal issue here, it would be helpful to know if the mortgages here were insured, in whole or in part. Was there a credit default swap? Was there payment on the default? By whom? What rights were given to the real party in interest, i.e., the party paying off the default?

plaintiffs' mortgage; a repurchase by Deutsche; or a connection between the assignment and a repurchase transaction. It is impossible to determine from the record title, much less the filings by defendants, whether the POA to CITI relates to the plaintiffs' mortgage. On the record, Deutsche Bank is a stranger to the train of title.

The passage of a statute making it easier for a third party to a mortgage transaction to deal with that mortgage did not change the mortgage foreclosure requirements. *Jackson* made it clear that the MERS Act changed nothing with regard to foreclosure procedures.

By passing the MERS statute, the legislature appears to have given approval to MERS' operating system for purposes of recording. Nonetheless, the MERS statute is a recording statute, and we conclude that it does not change the requirements of the foreclosure by advertisement statute.

(*Id.* at 496)

The foreclosure by advertisement statute requires the recording of a valid assignment of the mortgage. Here, the key word is "valid." The purported assignment is signed by Green and Thomas. But Green and Thomas, in their individual capacities, are strangers to the chain of title. Thus, the validity of any assignments signed by them rests upon any capacity they may have received through their employers. They are appointed as "special officers" by Ameriquest, but the document appointing them did not give them authority to transfer or foreclose

mortgages to the plaintiffs' land. There is a document appointing Green and Thomas (inter alia) as special officers in 2008, but these documents were never recorded, so no one looking at the chain of title would know they had such authority.<sup>2</sup>

Furthermore, even the 2009 certificate which appears to have authorized Green and Thomas to do something is irrelevant to the plaintiffs' mortgage with Ameriquest and the subsequent POA to CITI. The certificate relates only to the POA's enumerated in its Exhibit A, and the POA given to CITI on September 6<sup>th</sup>, 2007 is not on that list. Even if Green and Thomas had authority to act for CITI with respect to the POA's on Exhibit A of that certificate, they did not have it with respect to Document 568232, and that is the only POA which can justify the foreclosure in this case.

The record required by Minn. Stat. § 580.02 does not establish any rights in CITI to the plaintiffs' mortgage. The POA it does have does not name the Ameriquest mortgage signed by the Beecrofts. At the same time, the document which was executed was executed by persons having no authority from the entity holding the mortgage to do so at the time it was executed. Hence, there was no valid assignment of record from CITI to

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<sup>2</sup>Compare and Contrast *Jackson* in this respect. In *Jackson*, the Supreme Court concluded that a mortgage and the underlying note could be assigned separately because the MERS statute allowed for separate recording. Here, however, there is no question of a separate recording or a separate action on two documents. Rather, the question is relates to the proper recording of an assignment document which permits Deutsche to proceed on the mortgage default at all.

Deutsche Bank. What Deutsche Bank needs, and does not have, is a MERS Act for foreclosures.

To this, respondent claims that it did file the Limited Power of Attorney dated October 2<sup>nd</sup>, 2007, in Hennepin County. This is irrelevant. Before an assignee of a real estate mortgage can foreclose by advertisement, its title to it must appear of record to the extent that nothing outside the records is need to put it beyond reasonable question. *Soufal v. Griffith*, 198 N.W. 807 )Minn. 1924). In the absence of a power of attorney to assign a mortgage, the mortgage is invalid. If a document necessary to show the validity of an assignment will not show upon an abstract because it is filed in the wrong county, it does not appear of record to an extent putting its recording beyond reasonable question. What potential purchaser or white knight would know that someone had filed an assignment of mortgage 100 miles away?

The argument that a written power of attorney that is dated and purports to be signed by the principal named in it is presumed to be valid is irrelevant here. The principal who signed the power of attorney purports to be Ameriquest Co., and as a corporation, it can only act through its agents. Here, the agents had no properly documented power to act, so neither did the corporation.

CITI virtually admitted its filing was problematical:

The fact remains that there exist two Limited Power of Attorney that authorize Citi Residential Lending, Inc., to act on behalf of Ameriquest Mortgage. However, for purposes of ensuring that any future title issues are resolved, a certified copy of the Limited Power of Attorney will be filed with the Kandiyohi County Recorder's Office prior to the March 1, 2010 hearing.

(Defendant's Brief, p. 9)

But this does not help. The documents evincing a right to foreclose must be in order at the time of the foreclosure, not at the time of the hearing to undo it.

Respondents claim that their 2009 "Unanimous Written Consent" documents retroactively cure the difficulties pointed up in this brief. If anything, they only compound respondents' problems. Respondents state:

On or about July 1, 2008, Linda Green and Tywana Thomas were elected as Vice President and Assistant Secretary of AHMSI, as evidence by the Unanimous Written Consent of the Board of Directors. Anderson Aff., Exhibit 4. This Unanimous Written Consent specifically references that AHMSI is appointing employees of DOCX, a company in the business of creating and executing mortgage releases and assignments for mortgages services, as officers of the Corporation with limited authority. This consent also specifically references that the limited authority granted is to execute documents on behalf of the corporation. On or about November 16, 2009, AHMSI executed a subsequent Unanimous Written consent of the Board of Directors clarifying the powers granted to the officers it elected. Daniel Aff, Exhibit A. This Unanimous Consent specifically references that the officers have the authority to execute mortgage assignments. The Unanimous Consent also ratifies all actions previously taken by the officers consistent with the enumerated powers.

(Defendant's Memorandum, p. 11)

Besides being a virtual admission that the documents recorded to date were problematical, it is worth noting that by the time the "ratification" had occurred, Ameriquest had been out of business for three years. The authority of its officers to do anything, much less execute documents, is dubious. If Ameriquest was not in business, it did not have authority to give anybody power of attorney to do anything. If Ameriquest was still in business, the election of Ameriquest employees as officers of CITI was an antitrust violation of colossal magnitude.<sup>3</sup>

An assignment of a mortgage must not be prima facie "fishy." To put it less trenchantly, the papers filed with a mortgage foreclosure ought not be such as to frighten away potential purchasers other than the mortgagee. The mortgagor has the right to a fair price at the mortgage foreclosure sale. Now consider the record here and imagine it was all properly filed rather than hidden away in Hennepin County. In addition to the mortgage origination documents, there is a power of attorney by a lender (Ameriquest) to a competitor (CITI) giving it power to release certain mortgages. Then it appoints two individuals as special officers who are employees of yet another corporation, which may

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<sup>3</sup>And in any event, how do major corporate entities get away with electing each other's officers as officers of themselves. Limited purpose or no limited purpose? How can the vice president of General Motors serve on any board of directors of, say, Ford Motor Company? If both entities are viable and operating, the conflict of interest (not to mention the anti-trust problem) is significant. If one or both entity is defunct, how can it elect anyone to do anything for it, at least without the permission of, e.g., a bankruptcy court?

also be a competitor, and who continue to serve as employees of that other corporation. Then it gives those "officers" the authority to sign releases of mortgages. Then the first competitor, CITI, appoints Ameriquests officers as officers of itself while still officers of its two competitors to execute assignments of mortgages from its competitors to another competitor, Deutsche Bank. Would any prudent purchaser buy a used car from these people?

#### CONCLUSION

While it is not always productive to quote from a recent dissent, what Justice Page said in *Jackson* is so appropriate to the facts in this case - a much stronger case for the appellants than *Jackson* itself - that it is worth citing at length:

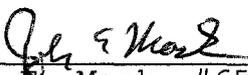
Finally, it is apparent with the benefit of hindsight that the ability of lenders to freely and anonymously transfer notes among themselves facilitated, if not created, the financial and banking crisis in which our country currently finds itself. It is not only borrowers but also other lenders who rightfully are interested in who has held a particular promissory note. For example, a lender who holds a promissory note that has become worthless may have an interest in knowing the hands through which that note passed. Under the MERS system, however, the identity of those previous holders is as shielded from the lender's view as it is from the borrower's. As a result of the court's holding, namely, that mortgage transfers between MERS members need not be recorded before a mortgage can be foreclosed by advertisement, neither borrowers nor lenders will ever be able to hold anyone in the chain of transfers accountable. That is not sound public policy.

(Id. at 504)

This observation applies with more force to assignments by persons acting as "agents" for businesses that are either competitors or effectively non-existent. Hold Ameriquest accountable. Sorry, went out of business four years ago. Hold CITI accountable? Sorry. Not doing lending any more. Hold Deutsche's Bank accountable? Sorry - come to Germany if you have a complaint. We aren't even registered in Minnesota. These people deserve no sympathy, much less aid, from the Courts.

The underlying mortgage was not validly assigned from Ameriquest to CITI. It was not validly assigned from CITI to Deutsche bank. The documents required to be recorded by respondents were not properly recorded, and the documents which were recorded indicated the impropriety of respondents' actions. The case should be reversed and remanded for new trial.

Dated: September 19<sup>th</sup>, 2010

  
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