

ANSWER TO QUESTION NO. 3

1. MRS properly foreclosed on Kerry's mortgage.

Michigan law allows a mortgagee to foreclose by advertisement (also known as foreclosure by exercise of power of sale), which allows a mortgagee to forego judicial proceedings where there has been a default in the mortgage, such as failure to pay. MCL 600.3201; MCL 600.3204. However, in order to do so, certain conditions must be met. First, there must be a power of sale clause in the mortgage and the mortgage must not otherwise be in foreclosure at the time the mortgagee seeks to foreclose. MCL 600.3201; MCL 600.3204(1) (b). Second, the mortgagee must publish notice that the mortgage will be foreclosed by sale "by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold . . . are situated." MCL 600.3208; see also MCL 600.3212. Third, within 15 days after the first publication of the notice, the mortgagee must post a copy of the notice in a conspicuous place upon a part of the premises, and if it is the principal property of the borrower, must *serve written notice* on the borrower. MCL 600.3208; MCL 600.3205a (repeal set to become effective December 31, 2012). A public foreclosure sale must be held on the set date, and the purchaser must record the deed within 20 days of the sale. MCL 600.3216; MCL 600.3232.

In this case, Kerry's property was properly foreclosed by advertisement. The language quoted from the mortgage instrument includes a power of sale clause. MRS properly published notice of the sale for four consecutive weeks in the local newspaper, properly posted notice of the sale on the property, and properly served notice on Kerry personally. Finally, MRS purchased the property on the set date of the sheriff's sale. A mortgagee may, in good faith, purchase the property at the sale. MCL 600.3228. Because MRS followed all appropriate protocol to foreclose by advertisement and purchased the property for the outstanding balance of the mortgage, there is no indication from the facts that it did not act in good faith.

2. MRS is a proper party to foreclose on the mortgage, and may foreclose by advertisement.

Generally, a legal holder of a mortgage is entitled to enforce it because he has an interest in the property. *Lee v Clary*, 38 Mich 223 (1878). The right to foreclose a mortgage belongs to the

mortgagee. Daniels v Eisenlord, 10 Mich 454 (1862). When exercising a power of sale clause, only the person having legal title to the mortgage at the date of foreclosure is entitled to exercise the power of sale contained in it. *Canvasser v Bankers Trust Co*, 284 Mich 634 (1938). However, "the choice of a mortgagee is a matter of convenience" and the security interest and beneficial interest of the mortgage need not be held by the same entity. *Adams v Niemann*, 46 Mich 135, 137 (1881).

In order to foreclose by advertisement, the foreclosing party must be "either the owners of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." MCL 600.3204(1)(d). It would appear that MRS is a designated mortgagee, separate from the lender of record, which thereby allows financial institutions to efficiently buy and sell loans backed by mortgages after their initial issuance without changing the mortgagee. In a case analogous to the one presented here, the Michigan Supreme Court held that a mortgagee such as MRS is the owner of an interest in the indebtedness secured by the mortgage. *Residential Funding v Saurman*, 490 Mich 909 (2011); see also *Residential Funding v Saurman*, 292 Mich App 321 (2011) (Wilder, J., dissenting), adopted in relevant part by the Supreme Court.

As the named mortgagee in this case, MRS owned a contractual interest in the indebtedness, an interest dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured. This qualifies MRS as a proper party to foreclose, and satisfies the requirement that the mortgagee have an interest permitting it to foreclose by advertisement.

3. Even though the property has been properly foreclosed, Kerry successfully redeemed the property.

Michigan provides a statutory right of redemption to homeowners of foreclosed properties. This right allows a

foreclosed homeowner to recover the property from the purchaser by paying the amount that the purchaser paid for the property, plus all taxes, insurance, fees, and interest that has accumulated. MCL 600.3240(1)-(2); *Gerasimos v Continental Bank*, 237 Mich 513, 518-519 (1927).

Redemption has the legal effect of voiding the purchaser's deed. MCL 600.3240(1). In order to exercise the right of redemption, however, a homeowner must act within the time period set by statute. See MCL 600.3240(7)-(13). For a non-abandoned residential home subject to a mortgage executed after January 1, 1965, the redemption period is either 6 months (where the outstanding balance is less than 66-2/3% of the original indebtedness) or 1 month (where the outstanding balance is more than 66-2/3%). MCL 600.3240(8), (10).

Even though the property has been validly foreclosed, Kerry successfully redeemed the property by paying National Bank the purchase price, as well as an amount sufficient to cover the taxes, fees, and interest accumulated within the statutory period. Here, the redemption period will be either 1 month or 6 months, depending on the outstanding balance of the indebtedness. While the facts do not indicate what the level of indebtedness is, in either situation Kerry met the deadline by tendering the redemption amount to National Bank (the assignee of the purchaser, MRS) within two weeks of the foreclosure sale. Thus, Kerry successfully redeemed the property, and thus may recover the property.