

# Power Of Attorney!



## *COUNSEL'S CORNER*

In August 2002 Vinh Nguyen purchased property in Pflugerville Texas which was financed with a loan from Finance America. Finance America sold the loan to Wells Fargo. Wells appointed Ocwen Loan Servicing as Wells' agent to collect loan payments, assure that the tax payments were timely made and that the property was insured.

In July 2003, the property was purchased by Francis Montenegro. Diem Thi Nguyen signed a Warranty Deed to Francis Montenegro as "*Vinh Nguyen, by his attorney in fact, Diem Thi Nguyen.*" Diem's claim to be Vinh's attorney-in-fact was supported by a Power of Attorney document signed by Vinh in June 2003.

The Warranty Deed was recorded with the Travis County Clerk about a week after closing. The Power of Attorney document was not recorded.

Montenegro made monthly payments to Vinh until April 2006; presumably Vinh was, in turn, supposed to pay Ocwen but Vinh failed to do so. In May 2006 Montenegro sent a letter to Ocwen requesting authority to make loan payments to Ocwen instead of Vinh.

Ocwen never expressly allowed Montenegro to make direct payments, but regardless Montenegro sent an \$8128 payment to Ocwen to cure Vinh's default. Thereafter Montenegro made monthly mortgage payments to Ocwen for one year.

In August 2007 Ocwen sent Vinh a Notice of Default and Intent to Accelerate. The notice was not sent to Montenegro. When the default was not cured, Ocwen sent a Notice of Acceleration and Notice of Foreclosure to both Vinh and Montenegro in October 2007.

Montenegro filed a lawsuit to stop the foreclosure sale. A temporary restraining order was granted, but Ocwen foreclosed anyway. So Montenegro sued Ocwen for wrongful foreclosure.

In February 2012 the trial court ruled for Ocwen. Montenegro appealed.

Montenegro claimed that Ocwen should have furnished Notice of Default and Intent to Accelerate to accelerate the loan to Montenegro, not solely to Vinh. That analysis involves *privity*, or a legal connection between Ocwen and Montenegro.

In order to determine if Montenegro had *privity* with Ocwen, the Appellate Court had to review the 2003 transaction to determine its validity. If the Power of Attorney was ineffective, then so was the Deed. If that is true, then Montenegro would have no standing to contest Ocwen's foreclosure.

The Appellate Court first turned its gun turrets towards that lonely piece of paper, the Warranty Deed transferring the Pflugerville property to Montenegro in July 2003, recorded in Travis County the week after. The Deed was signed by Diem Thi Nguyen, purportedly as attorney-in-fact for Vinh Nguyen. Vinh, you will recall, was the true property owner, having purchased the property in 2002.

The Deed appeared to be Ok, subject to the Power of Attorney provisions. So, next up was an evaluation of the POA document.

Texas law provides that Power of Attorney documents must be recorded if they will be used in real property transactions. There was no evidence to show that the Power of Attorney was recorded, at least not in the County that counts – Travis County.

Consequently, the Power of Attorney document failed.

Failure of the Power of Attorney meant that Diem did not have authority to convey Vinh's title to Montenegro. In turn, that means that although Vinh could have properly contested Ocwen's foreclosure despite the existence of a temporary restraining order, Montenegro did not have such standing as Montenegro was, at least in law, a stranger to the transaction.

Hopefully Montenegro received a title policy at the 2003 purchase (or after) so he would have recourse against a title underwriter if his ownership is later challenged. Otherwise, I suppose he might have recourse against Diem and Vinh, but it is unknown if either are solvent and doubtless both will raise statute of limitations and other defenses.

The trial court's Judgment was affirmed for Ocwen Loan Servicing. Ocwen wins; Montenegro loses. See *Montenegro v. Ocwen Loan Servicing, LLC*; No. 07-12-00297-CV, Texas Court of Appeals – Amarillo, November 18, 2013.

#### Lessons learned:

1. Power of Attorney documents are inherently risky business. Sometimes there is no alternative, as the Seller, Buyer, Lender, Landlord or Tenant is unavailable. In other situations such parties will execute a POA simply out of convenience. Avoid the issues presented in a POA by demanding signature of important

- documents by the real parties, not by their agents and attorneys-in-fact through a POA document.
2. Of course title insurance is available in purchase and financed transactions, but did you know that title insurance is also available for leasing, easements and virtually every other estate in land? As a failsafe, always get title insurance. Title policies can insure the Buyer, Lender, Tenant, easement holder and a host of other holders of Texas estates in land.
  3. Always. Get. Title. Insurance. Or did I already write that?

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