

**BANKING ALERT**

July 2018

**[New Jersey Appellate Division Finds Predatory Lending Allegations Sufficient to Sustain Consumer Fraud Act Counterclaim](#)**

In *Bank of New York Mellon v. Kingsbury*, Docket No. A-0249-16T2 (N.J. App. Div. Jul. 13, 2018), following summary judgment, the Bank of New York obtained a final judgment of foreclosure against John Kingsbury's estate. The Bank obtained summary judgment notwithstanding Kingsbury's claim that the court should hold the Bank responsible for the violations of the Consumer Fraud Act committed by Countrywide (the lender who originated the loan and later assigned it to the Bank) in connection with misrepresentations contained in the loan application. The trial court rejected the fraud-based argument, reasoning that the statute of limitations barred the fraud claims and that, by making loan payments for several years, Kingsbury ratified the loan.

Kingsbury appealed, and the Appellate Division reversed. Recognizing that predatory lending may constitute an unconscionable commercial practice under the Consumer Fraud Act, the panel noted that whether the loan application contained material false information and whether Countrywide was complicit in creating and approving a fraudulent application were material facts in dispute -- *e.g.*, there were questions surrounding the representations about Kingsbury's income, employment status, and the use of a discharged mortgage to provide earnest money. The panel found that more complete discovery could "yield a full explanation of the facts and circumstances surrounding the second mortgage, its discharge, and the degree of Countrywide's involvement in the creation or submission of falsified documents."

The panel further held that the statute of limitations did not stand as a bar to the fraud-based defense. The doctrine of equitable recoupment allows a defendant to assert an otherwise-stale claim and avoid the statute of limitations, "where the defendant uses the claim as a shield instead of a sword." Because Kingsbury asserted the fraud claim as a defense, and not as an affirmative claim, it could proceed and, although it would not invalidate the debt, it could reduce the amount of the Bank's recovery. Thus, while the Bank may still be entitled to foreclose, equitable recoupment could limit the recovery to the amount of the foreclosure sale, precluding a deficiency judgment against Kingsbury.

**In This Issue**

New Jersey Appellate Division Finds Predatory Lending Allegations Sufficient to Sustain Consumer Fraud Act Counterclaim

**Pg 1**

New Jersey Appellate Division Affirms Reinstatement of Foreclosure Action Based on no Lack of Prejudice to Borrower

**Pg 2**

New Jersey Appellate Division Affirms Foreclosure Judgment and Rejects Defendant's HOSA Counterclaim

**Pg 3**

**Office Locations**

**New Jersey**

210 Park Avenue  
2nd Floor  
Florham Park NJ 07932  
973.302.9700

**New York**

1185 Avenue of the Americas  
3<sup>rd</sup> Floor  
New York NY 10036  
212.763.6464

**Follow Sherman Wells on**

LinkedIn  Twitter 

### **New Jersey Appellate Division Affirms Reinstatement of Foreclosure Action Based on no Lack of Prejudice to Borrower**

In *Wells Fargo Bank, N.A. v. Harris*, et al., Docket No. A-5611-15T3 (N.J. App. Div. Jul. 9, 2018), the New Jersey Appellate Division affirmed the trial court's order conditionally reinstating the complaint of plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") and granting summary judgment in Wells Fargo's favor, finding no genuine issue of material fact to preclude Wells Fargo's right to foreclose.

In May 2006, defendant Maria Harris borrowed \$543,000 from World Savings Bank to purchase a residential property. The thirty-year note was secured by a mortgage on the property. The next year, Harris borrowed an additional \$150,000 from World Savings Bank, secured by the same property. In December 2007, World Savings Bank changed its name to Wachovia Mortgage, FSB. Two year later, Wells Fargo acquired Wachovia Mortgage, FSB.

Harris provided no evidence to dispute Wells Fargo's contention that both obligations were in default since August 15, 2009. Wells Fargo served its notice of intention to foreclose in a timely manner. On March 14, 2012, after an automatic stay from the Bankruptcy Court was lifted, Harris filed an answer to the foreclosure complaint alleging that Wells Fargo lacked standing because it was neither the original mortgagee nor an assignee of the mortgage. Wells Fargo's motion for summary judgment was granted, and Wells Fargo was directed to request an entry of final judgment of foreclosure through the Office of Foreclosure. However, Wells Fargo failed to request final judgment and the case was dismissed for lack of prosecution. Wells Fargo then sought to reinstate, arguing that changes to Rule 4:64, establishing new certification requirements, took time to implement firm wide. The trial court found good cause and no prejudice and reinstated the action. Wells Fargo then again failed to move for final judgment. The trial court, over Harris objection, gave Wells Fargo another 120 days to move for final judgment. Wells Fargo failed to move again and requested another extension arguing that it had yet to finalize the certification of amount due. Finally, on April 8, 2016, Well Fargo moved for final judgment in the amount of \$989,974.47.

Harris appealed the entry of final judgment. The Appellate Division found that reinstatement of a foreclosure action following a dismissal for failure to prosecute "may be permitted only on a motion for good cause shown." R. 4:64-8. The delay in filing the final judgment was clearly attributable to Wells Fargo, but the trial court allowed reinstatement because Harris was not prejudiced and was living in the house rent-free while the proceedings continued and also dismissing the action would not result in any secured property rights for Harris.

With respect to Harris' argument on standing, the Appellate Division upheld the trial court's finding that Wells Fargo provided sufficient and undisputed documentation that it acquired and merged with Wachovia, formerly World Savings, and, therefore, had standing to foreclose without proof of formal assignment.

### **New Jersey Appellate Division Affirms Foreclosure Judgment and Rejects Defendant's HOSA Counterclaim**

In *U.S. Bank National Association v. Provencher*, Docket No. A-3747-16T3 (N.J. App. Div. Jul. 23, 2018), the New Jersey Appellate Division affirmed a trial court order granting summary judgment to a lender in a residential foreclosure matter and denying the borrower's attempt to amend his answer to include a counterclaim premised on the New Jersey Home Ownership Security Act ("HOSA").

The borrower, Edward Provencher, obtained mortgage financing in June 2006 from JPMorgan Chase Bank, N.A. (“Chase”). Six years later, the mortgage was assigned by Chase to U.S. Bank, National Association (“US Bank”) and the assignment was duly recorded that same year. Shortly before to the assignment, the borrower defaulted by failing to make a May 2011 mortgage payment. Three years later, US Bank filed a foreclosure complaint. In response, the borrower filed a contesting answer that did not dispute the existence of the debt, the validity of the note and mortgage, or the borrower’s default under the terms of the loan; instead, the answer asserted general denials of all allegations, as well as affirmative defenses, including that US Bank lacked standing to bring a foreclosure action. US Bank filed for summary judgment, which was supported by a certification of US Bank’s mortgage servicer, certifying that he had reviewed the loan documentation and that US Bank had acquired the loan. In opposition, the borrower stated discovery was not complete and that he wished to file an amended answer that would include a counterclaim premised on HOSA with respect to alleged late fees charged on the mortgage loan. The trial court granted summary judgment in favor of US Bank and denied the borrower’s cross-motion to amend, finding that the alleged HOSA violation would not preclude US Bank from foreclosing and, in any event, was time-barred as a matter of law.

On appeal, the Appellate Division rejected the borrower’s contention that US Bank’s proofs -- *i.e.*, the certification -- were insufficient to demonstrate that US Bank had standing to pursue the foreclosure. Among other things, the certification properly authenticated the business records demonstrating the assignment, and the assignment was duly recorded and endorsed. With respect to the HOSA counterclaim, the Appellate Division agreed with the trial court that any HOSA claim would be time-barred. The Appellate Division further agreed that, even if the HOSA claim was not time-barred, the HOSA claim concerned late fees allegedly improperly charged by US Bank, which would only go to challenging the amount due when US Bank filed for final judgment.

### **If you have any questions about this Alert:**

#### **Attorney Contact Information**

**Anthony J. Sylvester**  
Partner  
973.302.9713  
asylvester@shermanwells.com

**Craig L. Steinfeld**  
Partner  
973.302.9697  
csteinfeld@shermanwells.com

**Caitlin T. Shadek**  
Associate  
973.302.9672  
cshadek@shermanwells.com

**Anthony C. Valenziano**  
Associate  
973.302.9696  
avalenziano@shermanwells.com

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon with regard to any particular facts or circumstances without first consulting an attorney.

© 2018 Sherman Wells Sylvester & Stamelman LLP. All Rights Reserved.