

CFA Claim Brought By Borrower's Spouse Precluded By Entire Controversy Doctrine

In *Hager v. Selene Finance LP*, 2020 WL 5422825 (D.N.J. Sept. 10, 2020), a federal district court dismissed a complaint brought by the spouse of a borrower claiming alleged misconduct on the part of the defendants servicing her mortgage and asserting a claim under the New Jersey Consumer Fraud Act ("CFA").

In May 2008, the plaintiff's husband obtained a \$195,000 loan from defendant CitiMortgage, Inc. ("CitiMortgage") secured by real property located in Leonardo, New Jersey (the "Property"). Both the plaintiff and her husband executed the mortgage. Ultimately, the plaintiff's husband defaulted on the loan, and a foreclosure complaint was filed in state court in 2010, naming both the plaintiff and her husband as defendants. A final judgment of foreclosure was entered in 2014 and the Property was sold at a sheriff's sale in 2016.

The plaintiff alleged that, immediately prior to the sheriff's sale, CitiMortgage offered her a trial mortgage modification requiring her to make three installment payments, which she claimed she made. The plaintiff further alleged that CitiMortgage sent her a loan modification agreement intended to modify the loan that, without explanation, reflected a significant and unexplained increase in the outstanding principal amount due and owing on the loan. Thereafter, CitiMortgage transferred servicing of the loan to defendant Selene Finance LP ("Selene"), which Plaintiff alleged refused to "honor" the modification agreement and, instead, offered her a trial modification whereby she was required to make additional trial payments that would be applied towards past due escrow amounts. The plaintiff alleged, however, that the past due escrow amounts, pursuant to the terms of the modification agreement, were supposed to be recapitalized into the loan amount.

The plaintiff and her husband filed suit against CitiMortgage and Selene. After the husband was dismissed, the plaintiff filed an amended complaint seeking to replead her claims under the CFA. The defendants moved to dismiss on two grounds: (1) the plaintiff lacked standing as she was not a party to the modification agreement; and (2) the claim was

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barred by the entire controversy doctrine. The federal district court rejected the defendants' first argument, finding that the plaintiff's claim of economic harm relating to her making high loan payments as a result of the defendants' alleged refusal to honor the modification agreement was sufficient to confer standing. Additionally, the plaintiff had signed the mortgage and pledged her home as collateral for the loan; the fact that the plaintiff did not have a direct relationship with either of the defendants did not preclude her, the court noted, from bringing a claim under the CFA. As for the second argument, the court agreed with the defendants that the entire controversy doctrine precluded the plaintiff from bringing a separate action in federal court under the CFA where the allegations were sufficiently germane to the foreclosure action.

[New Jersey Appellate Division Affirms That Defendant in Foreclosure Action Lacks Standing to Challenge Assignment of Mortgage](#)

In *U.S. Bank National Association v. Donato Cilenti*, A-5704-18T3 (N.J. App. Div. Sept. 14, 2020), defendant Donato Cilenti ("Defendant") appealed from the Chancery Division's Order granting the motion for summary judgment of plaintiff U.S. Bank National Association ("Plaintiff") and the final judgment of foreclosure in a residential foreclosure action. Defendant argued that there were "genuine issues of material facts" regarding whether Plaintiff lacked standing to foreclose.

The Chancery Division found that, in March 2018, Defendant's father defaulted on a mortgage note. In April 2018, Mortgage Electronic Registration Systems, Inc., as nominee for lender ("MERS"), executed an assignment of mortgage in favor of Plaintiff, which was recorded on April 17, 2018. Plaintiff filed the foreclosure action and Defendant filed a contesting answer. Plaintiff filed for summary judgment and, in support, submitted a certification from a vice president of Wells Fargo Bank, N.A., which was servicing the loan on Plaintiff's behalf. Attached to the certification were copies of the original note and mortgage and a copy of the original assignment of mortgage, which were in Plaintiff's possession since the filing of the foreclosure action. The Chancery Division found Defendant's contentions that he needed discovery to determine whether the assignment was validly authorized by a MERS officer, among others, were without merit.

On appeal, the Appellate Division affirmed the Chancery Division's orders and held that "[a] defendant in a foreclosure action lacks standing to assert that the assignment of the mortgage to a plaintiff is invalid. Only the parties or third-party beneficiaries to a contract may enforce its terms." The Appellate Division further found that it was undisputed that Plaintiff was in possession of the note prior to the filing of the foreclosure complaint and, thus, any defect in the assignment of mortgage was of no moment.

[New Jersey Appellate Division Refuses to Vacate Sheriff Sale Based on Challenge to Notice of Sale](#)

In *Deutsche Bank N.A. Tr. Co. v. Colbert*, No. A-4967-18T1, 2020 WL 4873735 (App. Div. Aug. 20, 2020), Deutsche Bank filed a foreclosure complaint against Steven Colbert after he defaulted on a mortgage loan, and the litigation was uncontested. Following the entry of final judgment, the property was sold at a sheriff's sale to Deutsche Bank. More than two months later, Colbert moved to vacate the sale, arguing that he did not receive proper notice of the sale. Before deciding the motion, the trial court offered Colbert a 10-day period to reach an agreement with Deutsche Bank on terms to reinstate the mortgage. No agreement was reached, and the trial court denied Colbert's motion. Because Deutsche Bank posted notice in the sheriff's office and on the subject property, the trial court

determined that it followed all requirements for giving Colbert the required notice of the sale. Additionally, the trial court found Deutsche Bank mailed notice to Colbert at the subject property by certified and regular mail. Although Colbert contended that he received all his mail at a New York address, the trial court was “not persuaded at the likelihood that [Colbert] failed to observe the notice posted to his property,” as he “passed in and out of the house on a daily basis.”

Colbert appealed, and the Appellate Division affirmed. The panel explained that a trial court’s discretion to set aside a sheriff’s sale should be “sparingly exercised.” Such discretion, the panel noted, must be based on fraud or another impropriety with the sale itself, and there was no such evidence of fraud in this case. In addition, the panel noted that Colbert’s belated motion was denied only after the trial court offered him a chance to reinstate the mortgage. The Appellate Division found the remainder of Colbert’s arguments meritless.

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