

**BANKING ALERT**

March 2021

**[New Jersey Appellate Division Affirms Trial Court’s Decision After Bench Trial in Favor of Lender in Foreclosure Action](#)**

In *Manufacturers and Traders Trust Company v. Gekhtman*, Docket No. A-3215-19 (N.J. App. Div. Mar. 29, 2021), the Appellate Division affirmed a trial court’s decision striking the answer of the defendant and referring the matter to the Office of Foreclosure.

The following facts were established at a bench trial in the matter. The defendant, Dmitry Gekhtman (“Defendant”), executed a note in favor of the lender, Cuso Mortgage, Inc. (“Cuso”), in the original principal amount of \$912,000 in December 2006. The loan was secured by a mortgage on residential property located in Warren Township (the “Property”). Ultimately, the loan was assigned to Hudson City Savings Bank, FSB (“HCSB”) in June 2015. The plaintiff, Manufacturers and Traders Trust Company, also known as M&T Bank (the “Bank”), became the successor by merger to HCSB after HCSB acquired the loan.

Defendant defaulted on his payment obligations in February 2018. The Bank sent Defendant a notice of intent to foreclose and, thereafter, filed a complaint in foreclosure on July 24, 2018. After being served, Defendant filed a contesting answer asserting nineteen separate affirmative defenses, including lack of standing, lack of privity, unclean hands and unjust enrichment. The matter was tried on May 6, 2019. Defendant, in his opening statement, claimed that the matter should be dismissed because the Bank failed to respond to his discovery requests, including requests for admissions. The trial court denied the application, finding that Defendant failed to file any motion to compel or dismiss due to failure to comply with discovery until the day of trial. Further, the trial court found that Defendant’s requests for admissions were improper because they all went to the ultimate fact issue in the case, namely issues relating to standing and prior history of the assignment of the mortgage.

At trial, the Bank presented a representative from the mortgage servicer, who testified as to the original promissory note, mortgage, assignment of mortgage, and the payment history. Defendant presented no live witnesses and did not testify on his own behalf. After the conclusion of the trial, the trial court entered an order striking Defendant’s answer,

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entering default, and returning the matter to the Office of Foreclosure, finding that the Bank had conclusively established it had standing to proceed with foreclosure.

On appeal, Defendant argued the trial court erred by, among other things, failing to dismiss the matter due to the Bank's failure to produce discovery and respond to Defendant's requests for admissions. The Appellate Division disagreed, finding that while Defendant was pro se, he was still required, like an attorney, to abide by the court rules and the requests for admissions that were served were improper as they went to the ultimate fact at issue.

### **[New Jersey Restarts Commercial Evictions and Post-Judgment Foreclosure Proceedings](#)**

In February, the courts in New Jersey started the process of resuming both commercial foreclosures and evictions.

On February 5, 2021, in a Notice to the Bar signed by the Hon. Glenn A. Grant, the Acting Administrative Director of the Court, the Judiciary announced that "[e]ffective February 15, 2021, courts will resume post-trial activity, including issuance of writs of possession, for commercial foreclosure matters." The notice explained that, although commercial foreclosure trials had been proceeding during the COVID-19 pandemic, the courts had previously withheld post-judgment activity, including the issuance of writs of possession. This order will therefore allow commercial foreclosures to proceed to their final conclusion.

The resumption of landlord-tenant trials in commercial eviction proceedings is more limited, however. The Supreme Court's February 5, 2021 order allows for a landlord to apply for a trial in a commercial landlord-tenant matter by showing exigency via an order to show cause. In a commercial matter, the basis for eviction cannot be nonpayment of rent except when (1) the tenant has vacated the property, (2) the tenant's business is not operating and will not resume operations, or (3) the commercial landlord is facing foreclosure or a tax lien. If the court determines that an emergency exists, it may schedule a trial and, following a trial, an eviction may proceed in the "interest of justice."

### **[New Jersey Appellate Division Affirms Trial Court's Dismissal of Action Based on Dishonored Check](#)**

The New Jersey Appellate Division affirmed the dismissal of a claim premised on a dishonored check in *Triffin v. SHS Group, LLC*, Docket No. 5497-18 (N.J. App. Div. Mar. 3, 2021). On December 2, 2015, defendant SHS Group, LLC ("SHS"), a hair styling school, issued check No. 1483 to one of its students, co-defendant Amanda R. Grzyb-Kelly, in the amount of \$1,431. That same day, the check was redeemed twice, once via electronic deposit in Grzyb-Kelly's Wells Fargo bank account and once at United Check Cashing, a check cashing business. Grzyb-Kelly electronically deposited the check by taking pictures of the front and back through her phone. The check was then paid by Bank of America, SHS's bank. When cashed at the United Check Cashing, the check was indorsed, stamped and relinquished. The check was subsequently dishonored when presented for payment at Bank of America and return for "Duplicate Presentment." The dishonored check was then sold by United Check Cashing to Plaintiff, through an assignment agreement.

Plaintiff brought an enforcement action against Grzyb-Kelly pursuant to N.J.S.A. 12A:3-414(b). Plaintiff argued that defendant had the burden at trial of establishing that the check was paid by Bank of America before United Check Cashing presented it for payment. The check offered by Plaintiff was endorsed by Grzyb-Kelly and indicated it was received by United Check Cashing on December 2, 2015. The second copy offered by defendant, did not contain Grzyb-Kelly's endorsement, but indicated it was electronically endorsed by Wells Fargo and Bank of America on

December 2, 2015. The trial judge concluded the check was deposited into Grzyb- Kelly's Wells Fargo account and paid by Bank of America before it was presented to United Check Cashing. The trial court dismissed Plaintiff's claim.

Plaintiff filed a motion for reconsideration and argued that because the check was not endorsed by Grzyb-Kelly when it was deposited into her Wells Fargo account, negotiation and transfer, as required under the Uniform Commercial Code, did not occur. On reconsideration, the trial judge relied, in part, on N.J.S.A. 12A:3-414(c), which states: "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained." The trial court denied reconsideration because a drawer's obligation to pay a check that had been accepted by a bank was discharged.

On appeal, the Appellate Division affirmed for alternative reasons. The Appellate Division found that N.J.S.A. 12A:4-205 eliminates the endorsement requirement for negotiation and transfer if the customer of a depository bank delivers an item for collection. Grzyb-Kelly was a customer of Wells Fargo, the depository bank, thus, the unendorsed check was effectively negotiated and transferred upon electronic deposit. The Appellate Division affirmed the trial courts finding that defendant had successfully proven the defense that the check was previously paid.

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