

# BANKING ALERT

August 2021

## **United States Supreme Court Strikes Down COVID-19 Tenant Protections in New York**

On August 12, 2021, the United States Supreme Court issued an Order striking down Part A of New York's COVID Emergency Eviction and Foreclosure Prevention Act, specifically the provision that permitted tenants to self-certify financial hardship to avoid an eviction proceeding. The majority of the Supreme Court stated that permitting the tenant to self-certify as to his or her financial hardship "violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." While the petition before the Supreme Court did not involve the similar self-certification process that acts as a bar to the prosecution of foreclosure actions, the Court's determination that such a process violates fundamental due process concerns would potentially apply to any challenge of that provision of the law.

The prohibition on the filing of eviction and foreclosure actions is set to expire on August 31, 2021. However, there has been a bill introduced to extend the period to October 31, 2021.

## **New Jersey Federal Court Dismisses Borrower's Fraud Claims After Exercising Supplemental Jurisdiction**

In *Owoh v. PHH Mortg. Servs.*, No. 21-320 (RMB/AMD), 2021 WL 3400774 (D.N.J. Aug. 4, 2021), PHH Mortgage Services ("PHH") was the servicer for plaintiff Rotimi Owoh's residential mortgage. In his Complaint, Owoh alleged that in December 2019, PHH charged him \$1,400.00 for "Outstanding Unpaid Fees, Returned Item Charges and Shortages." The next month, Owoh disputed the charge though a formal written notice. After PHH did not remove the charge, Owoh mailed additional dispute notices to PHH for each of the next eight months. Owoh filed a complaint in New Jersey state court, alleging that the \$1,400 charge was extinguished by his bankruptcy filing and asserting violations of state and federal law. PHH subsequently removed the matter to the United States District Court for the District of New Jersey. After the matter was removed, Owoh amended his complaint to remove his federal causes of action and to add claims for common law and consumer

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fraud. He also filed a motion to remand the matter to state court. PHH then filed a motion to dismiss.

The Court denied Owoh's motion to remand and granted PHH's motion to dismiss in its entirety. Initially, the Court determined that Owoh's decision to drop his federal claims did not deprive the Court of jurisdiction over the state law claims, reasoning that the Court can exercise jurisdiction over the state law claims when it would serve "the best interests of judicial economy, convenience, and fairness to the parties." Then, the Court determined that Owoh did not state a claim under New Jersey's Consumer Fraud Act or for common law fraud. Because Plaintiff's claim arose out of his 2019 bankruptcy filing, the Court considered documents from that proceeding in deciding PHH's motion to dismiss. The Court explained that Owoh was unable to allege that PHH's inclusion of the \$1,400 charge on his mortgage bill constituted "unlawful conduct" under the Consumer Fraud Act or was otherwise fraudulent. The documents from Owoh's bankruptcy proceeding revealed that the \$1,400 charge was a collection of post-petition fees that PHH incurred during Owoh's bankruptcy. The Court further explained that, contrary to Owoh's contention, a January 16, 2020 Order in his bankruptcy proceeding did not extinguish any duty to pay the \$1,400 charge. According to the Court, that Order neither addressed nor extinguished the \$1,400 in fees in any way. In concluding that Owoh did not sufficiently allege that any bankruptcy court order extinguished the debt, the Court took no position as to whether the \$1,400 charge was later extinguished.

### **New Jersey Appellate Division Finds Defaulting Purchaser at Sheriff's Sale Does Not Forfeit Entire Deposit but was Required to Pay Mortgagee's Out-of-Pocket Costs Attributable to Purchaser's Default**

In *Federal National Mortgage Association v Martha H. Cleaves, et al.*, Docket No. A0158-19 (N.J. App. Div. August 2, 2021), the New Jersey Appellate Division upheld a trial court's ruling that a defaulting bidder was entitled to the return of a portion of its deposit after the bidder abandoned the purchase of unsound property, despite the property being sold "as is." The Appellate Division ruled, however, that the mortgagee of the property was entitled to recover its out-of-pocket costs incurred as a result of the bidder's default.

On November 18, 2016, a final judgment of foreclosure was entered in favor of plaintiff Federal National Mortgage Association ("Plaintiff") in the amount of \$288,607.83 for a property in Hillsborough, New Jersey. Pursuant to a writ of execution, a sheriff's sale was conducted in June 2017 with a starting bid of \$100 and a stopping bid (upset price) of \$297,000 for the property to be sold in its "as is" condition. Defendant AC Property Investments, LLC ("AC Property") was the winning bidder in the amount of \$297,000 and subsequently tendered the minimum \$60,000 deposit (20% of bid) to the sheriff. A week later, AC Property advised Plaintiff that the property was structurally unsound because a load-bearing wall had been removed. AC Property advised Plaintiff that it would not complete the purchase and demanded the return of its deposit.

Plaintiff filed a motion requesting forfeiture of the deposit and the right to resell the property. AC Property cross-moved for a return of its deposit and to vacate the sale. On September 15, 2017, the Court vacated the sale and ordered the property to be resold. The Court ordered the sheriff to retain the deposit and that the measure of damages would be the difference between "the bid at the second sale and the bid at the first, plus the costs of the first sale." The remaining funds would then be returned to AC Property. Plaintiff appealed the Court's ruling and, while the appeal was pending, a second sheriff's sale was conducted. Plaintiff increased the upset price to \$321,000 in the second sale. There were no bidders and Plaintiff purchased the property for \$1,000. Under the Court's September 15, 2017 Order, the difference between the first winning bid (\$297,000) and the second winning bid (\$1,000) would result in a forfeit of the entire deposit to Plaintiff. AC Property requested a stay of the September 15, 2017 Order and Plaintiff cross-

moved to release the sale deposit monies. The Court denied both motions and ordered the Sheriff to continue to hold the money. Plaintiff subsequently sold the property in a private sale for \$290,000.

In December 2018, the Appellate Division affirmed the September 15, 2017 Order and agreed that AC Property could not vacate the sheriff's sale because the property was sold "as is." However, the Appellate Division did not rule as to how the deposit should be distributed. In 2019, AC Property requested the release of the deposit. Using the formula set forth in the September 15, 2017 Order, AC Property requested the difference between the first sale (\$297,000) and the private sale (\$290,000), minus the sheriff's costs from the first sale. Plaintiff cross-moved for the release of the entire deposit. On August 23, 2019, the Court granted AC Property's motion. The Court also rejected Plaintiff's request to consider Plaintiff's out of pocket-expenses including taxes, rehabilitation costs, broker's fees and cleanup costs.

Plaintiff appealed the Court's September 15, 2017 and August 23, 2019 Orders, arguing that the trial court misapplied the law and abused its discretion in its calculation of damages. Plaintiff argued that it should receive the full deposit based on the difference between the first winning bid by AC Property (\$297,000) and the second winning bid by Plaintiff (\$1,000). The Appellate Division disagreed and found that it was "an appropriate exercise of discretion" by the trial court to disallow the use of Plaintiff's \$1,000 bid given that Plaintiff had the ability to control the distribution of the deposit by setting the upset price and, indeed, increased the upset price by \$24,000 even though the property was structurally unsound. The Appellate Division also agreed with the Court's use of the third-party private sale price as that price considered the fair market value of the property in the calculation.

However, the Appellate Division disagreed with the trial court's decision to exclude Plaintiff's out-of-pocket expenses in the calculation of damages. The Appellate Division pointed to the statute that concerns defaulting bidders (N.J.S.A. 2A:50-64(a)(4)), which permits the consideration of "additional costs" due to the default when calculating amounts owed. The Appellate Division ultimately remanded the case for a plenary hearing to determine the out-of-pocket expenses attributable to AC Property's default that were not considered by the Court.

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