

# BANKING ALERT

October 2021

## **Kings County Supreme Court Cancels “Hardship” Conferences in Foreclosure Actions After Legal Challenge**

Less than a week after advising defendants in foreclosure actions that they would be required to attend “hardship” conferences where they would be required to bring, among other things, pay stubs, lists of monthly expenses, recent mortgage and property tax statements, and prior correspondences with their lenders, the Kings County Supreme Court rescinded the notices that were sent in all pending foreclosure actions after certain groups challenged the mandate in state court.

Several groups claimed that the mandatory conferences requiring borrowers to substantiate their claim of COVID-19-related financial hardship violated New York law, stating that the court did not have a right to order such conferences *sua sponte* under current New York law, which only provides that a lender may request a hearing where a hardship declaration is filed can request a hearing challenging the COVID-19-related hardship. After writing to the Chief Administrative Judge protesting the mandatory conferences, an Article 78 proceeding was filed by two homeowners challenging the issuance of thousands of notices in pending foreclosure actions in Kings County.

Thereafter, the Kings County Supreme Court advised that while the conferences would proceed, they would only be “status” conferences and there would be no requirement that the borrower substantiate the claim of COVID-19-related financial hardship in an action where a hardship declaration was filed.

Despite the representations of Kings County court officials, the groups behind the legal challenge intend to proceed with the Article 78 proceeding to obtain a formal ruling on the matter.

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## **Plaintiffs' Claims Against Bank Based on Fraudulent Transfer From Their Account are Dismissed for Failure to Follow Procedural Notice Requirements**

In *Gregor v. TD Bank, N.A., et al.*, No. CV 2:21-05255-KM-ESK, 2021 WL 4490251 (D.N.J. Oct. 1, 2021) the United States District Court for the District of New Jersey dismissed plaintiffs' claims against TD Bank under the Fair Credit Billing Act ("FCBA") and Federal Regulation Z for failure to state a claim.

In July 2020, Carolyn Gregor sought technical assistance for her laptop from an individual who she believed to be a technician, but was later revealed to be a fraudster. The fraudster, who identified himself as an Apple employee, initially collected a charge of \$2.99 from plaintiffs Carolyn and Gerald Gregor's account, but then promised to refund the charge because additional laptop memory was not required. The fraudster claimed to have mistakenly transferred \$29,999.00 (not \$2.99) to the Gregors' account, and asked plaintiffs to return the money to his account at Bank of America. In response, plaintiffs went to their local branch and requested a wire of \$29,470 to the Bank of America account provided by the fraudster. Upon arriving home, plaintiffs realized that funds deposited to their account were not from an external account but were actually from their own TD Bank home equity line of credit ("HELOC"). Plaintiffs "immediately" returned to TD Bank and attempted to recall the wire transfer, but it was too late as the fraudster had already withdrawn the wired funds from the Bank of America account.

In February 2021, plaintiffs filed a complaint in state court against TD Bank asserting negligence (Count 1), violation of the FCBA (Count 2); and violation of Federal Regulation Z (Truth in Lending Act), 12 C.F.R. § 1025.13 (billing error resolution) (Count 3). Plaintiffs also asserted state law claims against Bank of America for Negligence (Count 4) and aiding and abetting fraud (Count 5). TD Bank removed the case to federal court and both defendants subsequently moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

The Court focused its Opinion on plaintiffs' federal law claims against TD Bank. Specifically, plaintiffs alleged that the advancement of funds from the HELOC without their authorization constituted a "billing error" under both Federal Regulation Z and the FCBA. Plaintiffs further argued that TD Bank's "failure to investigate" the billing error claim within 90 days and to make the appropriate correction also violated the FCBA. Finally, plaintiffs alleged that, under Regulation Z, TD Bank could not collect any portion of the disputed advance from the HELOC. The Court held that, under the FCBA, which is implemented through Federal Regulation Z, a creditor's obligation to credit a disputed charge or to conduct a reasonable investigation is triggered by "written notice of billing error within 60 days of receiving the statement that contains the error." The written notice must be delivered to the address specified by the creditor for submitting billing disputes at the time the account was created. A creditor's obligations to investigate and credit the error are only triggered if the consumer complies with the FCBA's procedural notice requirements.

The court further found that plaintiffs failed to plead viable claims against TD Bank because the complaint failed to "allege that the Plaintiffs complied with the specific written notice requirements stated in both the FCBA and Federal Regulation Z." To the contrary, the Court noted the complaint appeared to suggest that any notice provided to TD Bank was oral only, and never put in writing. Accordingly, the Court found that plaintiffs did not sufficiently allege a violation under the federal regulations and dismissed Counts 2 and 3 for failure to state a claim under the FCBA and Regulation Z.

## **New Jersey Appellate Division Reverses Grant of Summary Judgment to Lender on Guaranties**

In *Bock, LLC v. Steelman*, A-0469-19 (N.J. App. Div. Oct. 13, 2021), defendants Paul Steelman and his wife Maryann (“Defendants”) appealed the trial court’s grant of summary judgment. Defendants guaranteed two loans on behalf of Steel Pier Associates, LLC (“SPA”), an entity that owned real estate on the Atlantic City

boardwalk. The loans were extended to SPA by plaintiff Ernest Bock, LLC (“Plaintiff”). After a default on the loans, Plaintiff sought payment from Defendants as guarantors instead of foreclosing on the property and, after non-payment, sued for breach of the guaranties. Defendants counterclaimed alleging Plaintiff breached the implied covenant of good faith and fair dealing and tortiously interfered with prospective economic advantage and filed a third-party complaint alleging that Defendants were deprived of the opportunity to gain from the potential financial upside of a project.

The trial court granted summary judgment to Plaintiff on the unpaid notes and dismissed Defendants’ counterclaims. Defendants appealed arguing that trial court erred in granting summary judgment before discovery was completed. The Appellate Division determined that the main issue was whether Defendants’ non-payment of the guaranties could be justified as a matter of law because of alleged wrongful conduct by Plaintiff or the third-party defendants that impeded the ability of the primary borrowers to pay the loan amounts. The Appellate Division found that the guaranties granted Plaintiff extensive power over the collateral and also expressly waived the defense of impairment of collateral. Nevertheless, the guaranties contained no express language waiving the guarantors’ ability to argue that their payment obligations are excused or diminished by proof of a breach of the implied covenant of good faith and fair dealing. Additionally, the Appellate Division found that the guaranties were not enforceable to the extent Plaintiff engaged in gross negligence or willful misconduct. The Appellate Division held that because guaranties do not contain an express waiver of the implied covenant, and because there are material factual disputes as to whether Plaintiff violated the covenant, the trial court should not have granted summary judgment on the guaranties. The Appellate Division then found that trial court should not have rejected Defendants’ associated counterclaims and third-party complaint. The Appellate Division, thus, vacated the trial court’s grant of summary judgment and remand the matter for continued discovery under the trial court’s supervision. The Appellate Division then reversed the dismissal of Defendants’ counterclaims and the denial of leave to amend those counterclaims and their third-party complaint.

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