

## BANKING ALERT

April 2019

### [New Jersey Appellate Division Affirms Denial of Motion to Set Aside Sheriff's Sale Based on Alleged Agreement to Reinstate Mortgage](#)

In *U.S. Bank NA v. Petraglia*, Docket No. A-4651-16T4 (N.J. App. Div. Mar 27, 2019), the New Jersey Appellate Division affirmed the trial court's denial of a motion to restrain and set aside a sheriff's sale to permit defendant the opportunity to reinstate the mortgage.

In June 2006, defendant borrowed \$1,260,000 from Washington Mutual Bank, F.A., secured by a mortgage on his home in Spring Lake. Defendant defaulted in January 2009 for non-payment and the mortgage was assigned to plaintiff. Plaintiff filed a foreclosure complaint in March 2015. Defendant never appeared. Final judgment was entered in August 2016 and a sheriff's sale was scheduled for March 6, 2017. Defendant moved to vacate the final judgment and stay the sale. The sale was adjourned until May 8. One week prior to the adjourned sale, defendant's counsel wrote to plaintiff's counsel proposing a forbearance agreement. Defendant's counsel also asked the servicer to provide an updated reinstatement quote. Thereafter, on May 3, defendant telephoned the servicer requesting a payoff figure and expedited reinstatement quote. Plaintiff's servicer responded on May 4, but the letter was not faxed to defendant until May 5, advising defendant that the reinstatement amount must be received by May 4 at 5:00 p.m. The letter warned that the servicer could reject or reapply funds received after the expiration. The reinstatement quote was then extended until May 5 at 2:00 p.m. Defendant's counsel appeared on May 8, the morning of the sheriff's sale, seeking an adjournment for 30 days because defendant needed additional time to make arrangements for the reinstatement payment. The adjournment request was denied and the home was sold as scheduled.

Defendant filed an order to show cause with temporary restraints seeking to restrain the sheriff's delivery of the deed and set aside the sale. Defendant argued that the parties had agreed to settle the matter by permitting defendant to reinstate in accordance with the reinstatement letter. The trial court denied the motion, finding there was no obligation for plaintiff to provide defendant with an opportunity to reinstate after

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### [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

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entry of judgment. The trial court found that the bank had nonetheless provided defendant the opportunity to reinstate on more than one occasion and defendant had never shown proof of funds.

Defendant appealed, arguing again that the parties entered into a settlement contract to cure the default and end the foreclosure. The Appellate Division found that the parties never agreed to allow defendant to reinstate his loan after entry of final judgment, but that plaintiff simply offered to permit defendant to reinstate if he had the necessary funds. The Appellate Division agreed that proof of funding was always necessary and defendant did not deposit the funds necessary to reinstate by May 4 or anytime thereafter. The Appellate Division affirmed the trial court's decision denying defendant's order to show cause seeking to restrain the sheriff's sale.

### ***New Jersey Appellate Division Reverses Summary Judgment in Favor of Issuer of Allegedly Dishonored Check***

In *Triffin v. Zurich American Insurance Company*, A-3387-17T4 (N.J. App. Div. Mar. 22, 2019), plaintiff Robert Triffin ("Plaintiff") sought damages from Zurich American Insurance Company ("Zurich American"), stemming from an allegedly dishonored check that Zurich American issued. Plaintiff alleged that the check at issue was initially made payable to Cristian Jerez, who then endorsed the check to Pennsauken Check Cashing. After Pennsauken Check Cashing presented the check, however, Plaintiff alleged that Zurich American stopped payment on the check and it was then dishonored by JPMorgan Chase Bank, NA. Plaintiff then purchased the dishonored check from Pennsauken Check Cashing and brought an action against Zurich American based on the dishonored check.

Zurich American moved for summary judgment, presenting an affidavit from an analyst in its finance and treasury department asserting that Zurich American's records showed that it never stopped payment on the check and that the check was paid in full. In response, Plaintiff submitted an affidavit from Pennsauken Check Cashing's general manager, who stated that Pennsauken Check Cashing presented the check; however, he further stated that the check was dishonored and was not paid. The trial court granted Zurich American's motion for summary judgment, determining that the check was paid in full. The trial court stated that it "did not find [p]laintiff's documents filed in support of his claims to be credible for the truth of the matter asserted at argument." The Appellate Division reversed. According to the Appellate Division, the competing affidavits presented an issue of disputed fact: "was the allegedly dishonored check actually dishonored?" The Appellate Division explained that the trial court improperly resolved that disputed issue of fact by incorrectly weighing the evidence, contrary to the well-settled standards governing motions for summary judgment.

### ***New Jersey Appellate Division Finds Bank Not Required to Disgorge Payments Received from Borrower in Excess of Foreclosure Judgment***

In *CitiBank N.A. v. Masselli*, A-5637-17T1 (N. J. App. Div. Apr. 5, 2019), the Appellate Division affirmed the trial court's denial of a motion by the estate of a borrower seeking to disgorge proceeds paid to a mortgagee in excess of the mortgagee's foreclosure judgment.

The mortgagee, CitiBank, N.A. ("CitiBank"), initiated a foreclosure suit against its borrower, Frances J. Masselli. In May 2015, a foreclosure judgment in CitiBank's favor was entered in the amount of \$68,673.44. Less than one month after judgment was entered, Mr. Masselli passed away and a sheriff's sale was scheduled for June 2016. Several adjournments and delays in selling the property occurred. During that time, between 2015 and 2018, Mr. Masselli's estate (the "Estate") sought a loan modification. Also during this time, CitiBank paid the taxes and insurance on the

property. Ultimately, the Estate entered into a contract to sell the property in April 2018. When asked for a payoff figure, CitiBank advised the Estate that the payoff figure was \$127,204.03, which the Estate paid to CitiBank in connection with the closing of the sale.

Thereafter, the Estate filed a motion for disgorgement of the sums paid to CitiBank in excess of the foreclosure judgment. The trial court denied the motion, finding that the Estate voluntarily paid those amounts after requesting a payoff figure. Additionally, the trial court found that CitiBank was entitled to be paid for post-judgment expenditures, including insurance and property tax payments, as well as interest accrued on the debt after the foreclosure judgment was entered, as memorialized in the loan documents.

The Appellate Division affirmed, rejecting the Estate's argument that CitiBank was obligated to amend the judgment. In so doing, the Appellate Division noted that the underlying loan documents expressly provided CitiBank the right to seek additional interest and expenses that CitiBank ultimately paid for the benefit of the Estate, as well as the fact that the Estate voluntarily paid CitiBank what it requested, rather than objecting to the request and requiring CitiBank to file a motion to amend the 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**

Counsel

973.302.9672

cshadek@shermanwells.com

**Anthony C. Valenziano**

Counsel

973.302.9696

avalenziano@shermanwells.com

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