

BANKING ALERT

February 2019

[New Jersey Appellate Division Upholds Final Judgment of Foreclosure and Request to Affix Amount Due](#)

In *Deutsche Bank National Trust Company as Trustee for Wamu Mortgage Pass-Through Certificates, Series 2005-AR9 v. Gillis*, 2019 WL 490093, Docket No. A-2044-17T3 (N.J. App. Div. Feb. 8, 2019), the Appellate Division affirmed summary judgment in favor of the current note holder.

In 2005, the defendants, a husband and wife, borrowed approximately \$1.2 million secured by a mortgage from Washington Mutual Bank, F.A. (“Wamu”). After Wamu went into federal receivership, its assets, including the defendants’ loan, were sold to JPMorgan Chase Bank, N.A. (“Chase”). In 2009, the defendants defaulted on their loan payments. Six years later, in 2015, Chase assigned the defendants’ loan to Deutsche Bank, N.A. (“Deutsche Bank”). The notice of assignment for the transaction was duly recorded on June 15, 2015. Three months later, Deutsche Bank filed a foreclosure action.

In 2016, Deutsche Bank filed a motion for summary judgment supported by a certification of an employee for the company that serviced the loan for Deutsche Bank. The certification stated that, among other things, based on her review of bank records, Deutsche Bank was the holder of the original note and mortgage through properly executed and recorded assignments. Copies of the note, mortgage and assignment documents were attached to this certification. Based on this documentation, the trial court granted Deutsche Bank’s motion for summary judgment. Over the defendants’ objection, the trial court also relied on a certification from a mortgage servicing company employee to fix the amount due because, according to Deutsche Bank, only half the amount due and owing by the defendants had priority over another loan held by a different bank. The certification included calculations as to the amount due and owing. Notably, the defendants presented no calculation contradicting Deutsche Bank’s request to fix the amount due.

On appeal, the Appellate Division rejected the defendants’ contention that Deutsche Bank lacked standing to enforce the note and mortgage. The Appellate Division noted that the record contained competent evidence in the form of copies of the note, mortgage and assignment

In This Issue

New Jersey Appellate Division Upholds Final Judgment of Foreclosure and Request to Affix Amount Due

Pg 1

New Jersey Appellate Division Reinstates Borrower’s Counterclaims Based on Withdrawn Modification Agreement

Pg 2

New Jersey Appellate Division Holds Recorded Assignment Sufficient to Establish Standing to Foreclose

Pg 2

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documents, as well as a certification from a competent witness, all of which supported Deutsche Bank's position that it possessed standing to foreclose. The Appellate Division also affirmed the trial court's determination that the amount due, as requested by Deutsche Bank, was properly supported by the certification supplied by Deutsche Bank. Finally, the Appellate Division rejected the defendants' argument that the foreclosure action was untimely, noting that the defendants misinterpreted the statute governing the statute of limitations for foreclosures. Specifically, the defendants erroneously argued that Deutsche Bank had six years from the date of default to file a foreclosure when, in fact, the statute provides that Deutsche Bank had twenty years from the date of default, here, 2009, to file a foreclosure action. The six-year statute of limitations for foreclosures only runs from the date of maturity, not default, the Appellate Division noted.

New Jersey Appellate Division Reinstates Borrower's Counterclaims Based on Withdrawn Modification Agreement

In *Wells Fargo Bank, N.A. v. Mount*, Docket No. A-4932-16T2 (N.J. App. Div. Jan. 28, 2019), the borrower, Christopher J. Mount ("Mount"), defaulted on his home mortgage loan with Wells Fargo Bank, N.A. ("Wells Fargo"). After Wells Fargo served Mount with a Notice of Intent to Foreclose, Mount filed a Chapter 13 bankruptcy petition. While the bankruptcy action was pending, Mount negotiated a "Streamlined Modification" agreement with Wells Fargo, under which there was a trial period that included three monthly payments commencing February 1, 2015. Wells Fargo could extend the trial period prior to modifying the mortgage, if, for example Mount needed to clear "other liens" on the property.

Mount began making payments under the trial period plan. However, Wells Fargo served him with a letter stating that its mortgage was not in a first priority position and requiring Mount to obtain a subordination agreement before the modification could be finalized. At that same time, Wells Fargo also provided Mount with a title report indicating that while there was a mortgage with Fulton Bank of New Jersey ("Fulton"), there was also a recorded subordination agreement that subordinated Fulton's mortgage to Wells Fargo's mortgage.

Wells Fargo later notified Mount that he was no longer eligible for assistance because of unspecified title issues with the property. Mount continued to make payments under the trial period plan. Eventually, Wells Fargo refused to accept any further payments and commenced a foreclosure action. Mount filed an answer and asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, violations of federal regulations, and consumer fraud. The trial court granted Wells Fargo's motion for summary judgment, denied Mount's cross-motion for summary judgment, and denied Mount's motion to compel discovery.

The Appellate Division reversed. Explaining that a trial period plan amounts to a unilateral offer pursuant to which a bank agrees to modify a loan if, and only if, the borrower complies fully with his obligations, the Appellate Division determined that there were fact issues as to whether Mount complied with the terms offered by Wells Fargo. As the Appellate Division detailed, although the letter setting forth trial period stated that Mount needed a subordination agreement for the Fulton mortgage, such an agreement was already obtained, and the title report provided by Wells Fargo showed that its lien had priority over Fulton's; thus, the trial court simply and incorrectly accepted Wells Fargo's representation that Mount did not remedy title issues. Accordingly, the Appellate Division remanded the matter for further consideration.

[New Jersey Appellate Division Holds Recorded Assignment Sufficient to Establish Standing to Foreclose](#)

In *U.S. Bank, N.A. v. Bello*, A-1756-17T3 (N.J. App. Div. Feb 7, 2019), the defendant, Michael Bello, appealed from the trial court's order granting plaintiff U.S. Bank, NA ("U.S. Bank") summary judgment in a foreclosure action and denying his motions for reconsideration. In March 2006, the defendant executed an adjustable rate note for \$2,500,000 to Washington Mutual Bank ("Wamu") and granted the bank a first mortgage on a property in Alpine, which was recorded on March 23, 2006. The note and mortgage were transferred in February 2007 to LaSalle Bank, NA as trustee for Wamu. Through a series of transfers in May 2010, the mortgage was transferred to Bank of America, N.A. ("BOA") and was recorded in May 24, 2010. U.S. Bank acquired BOA's trust and administration business, which included the defendant's mortgage. The defendant failed to make monthly mortgage payments and the loan went into default on January 1, 2010.

U.S. Bank filed a foreclosure complaint in 2015. The trial court granted summary judgment to U.S. Bank and the defendant appealed. The Appellate Division found the trial court correctly rejected the defendant's contention that the certification of an employee of plaintiff's servicer and agent was deficient because the employee did not work for U.S. Bank and lacked personal knowledge. The trial court correctly held that a servicing agent can authenticate loan documents where the agent reviewed the business records and has personal knowledge of plaintiff's business practices. The certification did sufficiently establish that U.S. Bank possessed the note prior to the filing of the foreclosure complaint; specifically, the certification attached and authenticated the recorded assignment, which established that the 2010 assignment of mortgage was executed to U.S. Bank nearly five years prior to the filing of the foreclosure complaint. Finally, the Appellate Division found that the trial court correctly rejected defendant's challenges to the validity of the assignment. The Appellate Division then affirmed the grant of summary judgment.

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