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BANKING ALERT

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New Jersey Appellate Division Upholds Striking of Answer in Foreclosure Action

In *JPMorgan Chase Bank, N.A. v. Boyadjian*, A-1305-17T4 (N. J. App. Div. Jan 18, 2019), the New Jersey Appellate Division affirmed the trial court's denial of a motion for reconsideration of an order that granted plaintiff's motion to strike defendants' answer and enforce a note and mortgage possessed by plaintiff. In 2004, defendant Helen Boyadjian and her now-deceased mother, Araxie Boyadjian, executed a mortgage and note in the amount of $2,500,000 to Washington Mutual Bank ("WaMu"). The mortgage was recorded in October 2004. In September 2008, plaintiff entered into a Purchase and Assumption Agreement, in which it acquired all of WaMu's loan assets, including the note at issue. Shortly thereafter, plaintiff lost the note.

In August 2010, Araxie defaulted on the loan. Plaintiff issued a notice of intent to foreclose and no further payments were made on the loan. Plaintiff filed a foreclosure complaint in 2016 and defendants filed an answer asserting affirmative defenses, including lack of standing to foreclose, fraud and predatory lending. Helen's answer asserted that WaMu targeted her mother because she was an unsophisticated borrower and was fraudulently induced to enter an unconscionable mortgage transaction and WaMu knew that Araxie could not repay the loan.

Plaintiff's filed a motion for summary judgment, supported by a certification of a vice president of plaintiff that a search for the note was done in 2013 and it was determined the original note was lost or destroyed. A certified copy of the note was attached to the certification. The trial court granted plaintiff's motion for summary judgment finding that plaintiff had established the terms of the instrument by attaching a copy of the note and copy of the assignment to plaintiff. The trial court struck defendants' answers, finding that predatory lending could not be sustained with unsupported conclusory statements. Defendants filed a motion for reconsideration on the "basis of newly discovered evidence." The trial court denied the motion.

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Defendants appealed, arguing predatory lending and that the plaintiff lacked standing to enforce the note and mortgage. The Appellate Division affirmed, finding the record supported that plaintiff had standing and there was no evidence in dispute. Further, the Appellate Division found that "newly" submitted evidence of Araxie's financial documents need not be considered on a motion for reconsideration because there was no indication they were not in Helen's possession at the time of the original summary judgment motion. Further, the "new" documents did not support any allegations of fraud because they did not address Helen's financial status, who was also a borrower on the loan. Accordingly, the Appellate Division affirmed the trial court's decision granting summary judgment and denying reconsideration.

New York Appellate Division Reinstates Aiding and Abetting Fraud Claim Against Bank Based on Issuance of Written Credit Reference

In William Doyle Galleries, Inc. v. Stettner, --- N.Y.S.3d ----, 2018 WL 6683602 (N.Y. 1st Dep't Dec. 20, 2018), the New York Supreme Court, Appellate Division, First Department, reinstated a Complaint filed against a bank alleged to have aided and abetted a fraud on the part of one of their customers based on the bank's written credit reference provided to an auction house.

The action arose from an auction held by the plaintiff, an auction house, for antique and jewelry. The winning bidder, defendant Brett Stettner, successfully bid over $425,000 to win the auction. A month after providing the winning bid, Stettner tried to pay with a check, which the plaintiff declined to honor without a credit reference. Thereafter, a vice president of the defendant bank, HSBC Bank, N.A. ("HSBC"), contacted the plaintiff and advised that the bank had a longstanding relationship with Stettner. In response, the plaintiff stated that it would require a written credit reference from the bank in order to process the check and release the items won at auction. HSBC provided a letter, which stated that Stettner had maintained worldwide average balances in his accounts with HSBC between $1 and $20 million dollars and that HSBC had maintained a good relationship with Stettner for over four years. Based on that representation, the plaintiff released the items and accepted the check, which was ultimately declined for insufficient funds. Subsequently thereafter, Stettner was arrested for perpetrating crimes against the plaintiff and other auction houses across New York City. In his plea allocution, Stettner admitted that he knew the representations made in the credit reference were false. The plaintiff subsequently filed suit against Stettner for fraud, as well as HSBC for aiding and abetting Stettner's fraud by providing the written credit reference. On a motion to dismiss, the trial court dismissed the claims against HSBC for failing to state a claim.

On appeal, a divided First Department reinstated the aiding and abetting fraud claim against HSBC, finding that the complaint adequately alleged the elements of an aiding and abetting claim, including adequately pleading the underlying fraud on the part of Stettner. The First Department noted that HSBC was the source of several representations, *i.e.*, the daily average balances of Stettner's accounts, which was ultimately untrue, and relied upon by the plaintiff in proceeding with the transaction. In dissent, one Justice noted that the representations in the credit reference letter were insufficient to establish a claim for aiding and abetting as they were not specific to the account the check was drawn on.

New Jersey Trial Court Does Not Award 18% Default Interest to Lender as Damages

In *802 Absecon Boulevard v. Fairview Investment Fund II, LP*, Docket No. BER-C-49-17, the defendant Fairview Investment Fund II, LP ("Fairview") filed a motion for an assessment of damages, and the plaintiff, 802 Absecon Boulevard ("Plaintiff"), the borrower on various notes and mortgages, Plaintiff, objected. Plaintiff defaulted on the notes. The court determined that because of Plaintiff's default on the notes, Fairview could collect default interest at the rate of 9.69% -- up two percent from the contract rates -- and was entitled to $151,189.06 in attorneys' fees; Fairview could not, however, collect late fees or additional interest. Fairview then submitted a proposed order in which it sought $1,237,698.33 in interest, default interest, late fees, and penalties, and Plaintiff objected, arguing that it did not conform with the court's prior order.

The court requested a breakdown of each side's computation of damages. Plaintiff's calculation used a 9.69% default interest rate, while Fairview used an 18% interest rate, the default rate contained in the underlying promissory notes. The court explained that its prior order authorized default interest at 9.69% -- not 18%. Indeed, Fairview had never previously argued for an 18% rate of default interest. Still, the court then considered Fairview's argument that an 18% percent default rate (or an increase of about 10% from the contract rate) was reasonable. The court explained that a default interest rate providing for an unreasonable increase in the contract interest rate is unenforceable as a penalty. Highlighting that prior cases had recognized that an increase of 8.58% from the contract rate was unreasonable and unconscionable, the court determined that the 10% increase to 18% was likewise unreasonable and not a reasonable estimation of Fairview's damages. Thus, the court allowed default interest at the rate of 9.69%, in accord with its prior order.

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