BANKING ALERT

September 2018

Third Circuit Affirms Denial of Bank's Motion for Mutual Judgment Satisfaction Under Federal Rule of Civil Procedure 69

In *U.S. Bank, N.A. v. Rosenberg*, the Third Circuit affirmed the denial of U.S. Bank's motion for mutual judgment satisfaction pursuant to Federal Rule of Civil Procedure Rule 69.

This case grew out of equipment leases between U.S. Bank's predecessors in interest and National Medical Imaging ("NMI"). After NMI defaulted and U.S. Bank instituted litigation against NMI and its principal Maury Rosenberg, U.S. Bank and NMI entered into a settlement, whereby "Rosenberg would be personally liable for approximately $7,600,000 in the event of another default, but Rosenberg's liability would be reduced by about $127,000 for each monthly payment NMI made under the modified equipment leases."

NMI defaulted, leaving Rosenberg responsible for about $5,000,000. In response, U.S. Bank-related entities brought an involuntary bankruptcy suit against Rosenberg that was ultimately dismissed. Rosenberg then filed an adversary action in the bankruptcy court, seeking damages for the bad faith filing of an involuntary bankruptcy by U.S. Bank. Rosenberg ultimately recovered a judgment against U.S. Bank for $6,120,000. While that action was pending, U.S. Bank filed an action against Rosenberg seeking to collect on the lease defaults and was eventually awarded $6.5 million in damages, fees, and costs.

U.S. Bank then filed a motion for mutual judgment satisfaction in the Eastern District of Pennsylvania, requesting that the $6,120,000 judgment against it be set off against the $6.5 million judgment it obtained against Rosenberg, so that U.S. Bank would owe Rosenberg nothing. The District Court denied the motion, and the Third Circuit affirmed. The Third Circuit noted that the District Court's decision was subject to an abuse-of-discretion review and that the court had a sound basis for its decision: "the equitable principles embodied in § 303 of the United States Bankruptcy Code preclude setoff." The panel explained that §303(i) -- the provision under which Rosenberg recovered against U.S. Bank under -- "plays a key role in deterring bad faith filing and remedying the negative effects of improperly-filed petitions." § 303(i)'s equitable

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purpose, the Third Circuit added, "would be frustrated if bad faith filers were allowed to offset a § 303(i) judgment." Accordingly, the Third Circuit affirmed.

District Court Grants Loan Servicer's Motion to Dismiss Claims Stemming From Decision to Deny Loan Modification

In *Bello v. Bayview Loan Servicing, LLC*, No. 17-cv-13700 (D.N.J. Sept, 14 2018), the United States District Court for the District of New Jersey granted the motion filed by defendant Bayview Loan Servicing LLC ("Bayview") to dismiss plaintiff's claims under the Real Estate Settlement Procedures Act ("RESPA"), the New Jersey Consumer Fraud Act ("NJCFA"), and negligence claim.

In April 2017, plaintiff submitted an application for a loan modification to Bayview (the "Application"), with further documentation sent in by May 2017. On May 24, 2017, Bayview denied plaintiff's Application because of insufficient income. On June 1, 2017, plaintiff challenged the denial of her Application. On June 21, 2017, Bayview informed plaintiff that it affirmed its previous denial of the Application. Bayview instituted a state court proceeding to foreclose on the property securing the loan.

Plaintiff then filed an action in the District Court of New Jersey alleging violations of RESPA and NJCFA by Bayview. Bayview moved to dismiss, which was unopposed. The District Court found that Bayview did not violate RESPA simply by denying plaintiff's Application. Under the provisions of RESPA, Bayview was not required to grant plaintiff's Application merely because she filed one. Further, by instituting a foreclosure proceeding, Bayview did not violate RESPA. RESPA only prevents a loan servicer from conducting a foreclosure sale while the borrower's loan modification application is pending, but does not require the servicer to completely withdraw pending foreclosure proceedings. The District Court then dismissed the claim for "negligently and repeatedly breaching all of [Bayview's] duties under RESPA", because the state law claim was entirely dependent upon the viability of the RESPA claim.

Finally, the District Court dismissed plaintiff's NJCFA claim that Bayview failed to address plaintiff's June 2017 appeal of the denial of her loan modification in a timely fashion. The District Court found that plaintiff's characterization of her June 2017 appeal was not a notice of error, but instead an appeal of the denial of her Application. Additionally, the District Court found that Bayview responded within 43 days, which was not unreasonable especially given that Bayview advised plaintiff within five days of receipt of her correspondence that a response would be forthcoming.

New Jersey Appellate Division Affirms Denial of Motion to Stay Sheriff Sale

In *HSBC Bank USA National Association v. Adesina Ogunlana*, Docket No. A-0688-17T2 (N.J. App. Div. Sept. 19, 2018), the Appellate Division denied an emergent application for a stay of a pending sheriff sale.

The plaintiff, HSBC Bank USA National Association ("HSBC"), commenced a foreclosure action against the defendant after the defendant defaulted on the loan securing a mortgage on her home. The defendant subsequently failed to answer the complaint and HSBC was awarded final judgment in June 2015, with a sheriff sale scheduled for September 10, 2017. On September 19, 2017, however, the defendant requested a stay on the basis that she had filed a Chapter 13 bankruptcy petition a day earlier. After hearing arguments from counsel on the application, the Chancery Court denied the requested stay because the defendant had filed two previous bankruptcy petitions in April and July 2017, each of which were dismissed as a result of the defendant failing to file the necessary schedules.

Specifically, the Chancery Court cited Section 362(c)(4)(A)(i) of the Bankruptcy Code, which provides an exception to the automatic stay provision where, as was the case here, the petitioner had filed two or more prior petitions which had been dismissed within the year. Without the automatic stay, there was no basis for a stay of the sheriff sale.

In a short opinion, the Appellate Division affirmed the decision, noting that the Bankruptcy Code makes plain that the automatic stay provision is not triggered by a third bankruptcy filing within the same calendar year.

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