

[New Jersey Appellate Division Determines Foreclosing Bank is not a “Mortgagee in Possession” of Condominium Unit](#)

In *Union Hill Condominium Association v. Wells Fargo Bank, N.A.*, (N.J. App. Div. Nov. 15, 2017), the New Jersey Appellate Division held that a bank, prior to a final judgment of foreclosure, was not a “mortgagee in possession” responsible for the payment of condominium association fees based on the bank’s actions in performing minimal repairs to the premises.

In *Union Hill*, the mortgagor became delinquent on both his mortgage obligations and condominium association assessments. Wells Fargo Bank, N.A. (“Wells Fargo”) filed a foreclosure action, but the mortgagor passed away a year later. At the time of the mortgagor’s death, Wells Fargo had not obtained a final judgment of foreclosure.

During the pendency of the foreclosure action, Wells Fargo performed certain repairs and maintenance at the mortgaged premises, including “winterizing” the premises, changing the locks, landscaping, and repairing to the door and a handrail. The condominium association filed an application seeking to find Wells Fargo directly responsible for the payment of association assessments as a mortgagee in possession based on the above-referenced repairs. The Trial Court disagreed, and the association appealed.

The Appellate Division noted that whether a bank is a “mortgagee in possession” is a case-by-case determination, echoing the Court’s recent decision in *Woodlands Community Association v. Mitchell*, 340 N.J. Super. 310 (App. Div. 2017), in which the Appellate Division found that minimal repairs to mortgaged premises were insufficient to find that the bank was a “mortgagee in possession.”

Based on *Woodlands Community Association*, the Appellate Division held that Wells Fargo had not engaged in sufficient activity to be considered in “possession” of the mortgaged premises, *i.e.*, renting the premises to a third party. Instead, the minimal repairs outlined above were merely actions taken by the bank to protect its security in the property, rather than to exercise possession. While the Appellate Division found the repairs here to be more extensive than those taken in *Woodlands Community Association*, the Appellate Division found no “material difference” in the facts that would warrant a different conclusion.

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[Office Locations](#)

[New Jersey](#)

210 Park Avenue
2nd Floor
Florham Park NJ 07932
973.302.9700

[New York](#)

54 W. 40th Street
New York NY 10018
212.763.6464

Follow Sherman Wells on

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New Jersey Appellate Division Remands Trial Court's Denial of Motion to Intervene Filed by Alleged Assignee of Mortgage in Foreclosure Action

In *Kearney Federal Savings Bank v. Diane Roberts, LLC, et al.* (N.J. App. Div. October 27, 2017), Grace Wong appealed from the Trial Court's order denying her motion to intervene in a 2012 foreclosure action. In the complaint, plaintiff Kearny Federal Savings Bank (the "Bank") alleged that defendant Diane Roberts LLC defaulted on a note in the amount of \$950,000 that was secured by a mortgage on property in Toms River, New Jersey (the "Property"), which was recorded in 2009. The complaint named defendant Stephen L. Wong based on his subordinate interests in the Property. At some point, Grace Wong asserted that she received an assignment from Stephen Wong of the rights he possessed in a mortgage, which was allegedly recorded on the Property in 2011, and her assignment, which was allegedly recorded in 2013.

The Appellate Division found that the record on appeal did not contain all relevant filings. Ms. Wong argued that her rights in the Property had priority over the Bank and, additionally, that the Trial Court made rulings in contravention of an applicable bankruptcy stay. Specifically, Ms. Wong sought appeal of the denial of a January 8, 2016 Order that denied her motion to amend a November 20, 2015 Order, which denied a motion to reconsider. The confusing procedural history indicated that Ms. Wong sought to intervene, but did not file an answer, as required by a September 12, 2013 Order.

Another request by Ms. Wong to intervene was denied because Ms. Wong "did not provide sufficient evidence that intervention was necessary at the time"; however, no order was entered to that effect. Given the lack of any real explanation for denying Ms. Wong's motion to intervene, the Appellate Division remanded to the Trial Court to "allow the interested parties an opportunity to fully assert their positions regarding [Ms. Wong's] attempts to intervene and provide a thorough explanation for the court's disposition of that question."

New Jersey Appellate Division Holds That Bank Can Foreclose After Several Assignments of Mortgage Loan

In *IndyMac Venture, LLC v. Giordano* (N.J. App. Div. Nov. 9, 2017), the Appellate Division determined that a financial institution had standing to foreclose on a mortgage loan after several assignments of the mortgage loan. In 2003, IndyMac Bank FSB made a \$340,000 loan to defendants Carmine and Sheryl Giordano ("Defendants") and took a mortgage as security. Later, during the financial crisis, IndyMac Bank failed, and the FDIC became its receiver. The FDIC assigned Defendants' mortgage to IndyMac Venture, LLC, which then assigned the mortgage to OneWest Bank, FSB.

In 2012, OneWest filed a foreclosure action against Defendants in the Superior Court of New Jersey, Chancery Division, alleging that Defendants defaulted on the mortgage loan in 2009 and remained in default. However, while the foreclosure action was pending, OneWest assigned the mortgage back to IndyMac Venture, LLC. After the mid-litigation assignment, the Trial Court entered an order, stating that the complaint and all other pleadings were amended to reflect that IndyMac Venture, LLC was the new plaintiff.

IndyMac Venture then filed a motion for summary judgment, arguing that it was entitled to a judgment of foreclosure because it held Defendants' mortgage, Defendants were in default, and there were no facts supporting any of the

defenses in Defendants' answer. In response, Defendants argued that the Notice of Intention to Foreclose was defective because the notice stated that IndyMac Mortgage Services, not OneWest, held the mortgage. Rejecting that argument, the Trial Court determined that the technical error in the notice was insignificant. The Trial Court relied on the fact that IndyMac Mortgage Services was a division of OneWest, and, accordingly, the court did not require a new notice based on the technical deficiency. Thus, the Trial Court allowed the matter to proceed to the Office of Foreclosure.

On appeal, Defendants argued that OneWest lacked standing to file the initial complaint, there was an inadequate certification to support summary judgment, the Notice of Intention to Foreclose was defective, and the complaint should have been dismissed under the unclean hands doctrine. The Appellate division dismissed Defendants' arguments as lacking sufficient merit to warrant discussion in a written opinion. Adding only a brief comment, the panel noted that OneWest showed its standing to file the initial complaint based upon the assignment from IndyMac Venture, an assignment that predated the filing of the complaint. Thus, OneWest had standing to file the complaint and enforce the mortgage.

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

Associate

973.302.9672

cshadek@shermanwells.com

Anthony C. Valenziano

Associate

973.302.9696

avalenziano@shermanwells.com

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