SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

October 2017

New Jersey Appellate Division Reverses Trial Court's Dismissal of Bank's Claim of Holder in Due Course Status

In *Wells Fargo Bank, N.A. v. Northern Executive Motor Club, LLC*, the New Jersey Appellate Division reversed the dismissal of a claim asserted by the plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), against one of the defendants, Navy Federal Credit Union ("NFCU"), based on NFCU's alleged refusal to honor a check drawn on NFCU based on a missing indorsement.

The facts of the case were relatively straightforward. Wells Fargo deposited a check in the amount of $64,000 drawn on an NFCU account made payable to Jennifer Aldridge and Northern Executive Motor Club, LLC ("Northern Executive"), into Northern Executive's account maintained at Wells Fargo. The check, however, lacked an indorsement from Northern Executive. Based on the missing indorsement, NFCU refused to honor the check, creating an overdraft, which Northern Executive did not pay, resulting in the filing of a complaint by Wells Fargo against both Northern Executive and NFCU. On a motion to dismiss, NFCU argued that Wells Fargo was not a holder in due course because it failed to exercise due care in its handling of the check, *i.e.*, Wells Fargo's failure to catch the missing indorsement. The Trial Court agreed and determined that Wells Fargo failed to exercise ordinary care and, as a result, could not maintain holder in due course status.

On appeal, the Appellate Division reversed, finding that the Trial Court failed to apply the appropriate statutory provision of the Uniform Commercial Code, 12A:4-205, which provides the standard by which a depository bank may become a holder in due course. The Appellate Division noted that the provision did not preclude Wells Fargo from becoming a holder in due course based on the missing indorsement. The Appellate Division further noted that the determination of Wells Fargo's lack of ordinary care was a premature factual finding best reserved for trial, not a motion to dismiss.

New Jersey Appellate Division Clarifies Scope of Home Ownership Security Act

In *Emigrant Mortgage Company, Inc. v. Costa*, the Appellate Division charted the scope of the Home Ownership Security Act ("HOSA"). As held by the Appellate Division in *Emigrant*, if a contractor arranges for financing in connection with home improvement work, HOSA allows the

In This Issue

New Jersey Appellate Division Reverses Trial Court's Dismissal of Bank's Claim of Holder in Due Course Status
Pg 1

New Jersey Appellate Division Clarifies Scope of Home Ownership Security Act
Pg 1

U.S. District Court Dismisses Action Based on Alleged Violation of HAMP
Pg 2

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
Linkedin **Twitter**

homeowner to assert any claims he or she may have against the contractor as a defense in any collection action by the creditor.

In this case, Karen Costa entered into a contract for home improvement work with Full Spectrum Remodeling. A Full Spectrum representative promised to arrange for financing for the work. A mortgage broker, Merit Finance, later contacted Costa, asked her some questions for a loan application, and submitted a loan application to Emigrant Mortgage Company. Emigrant approved the loan in the amount of $115,000. However, only $23,000 was eventually remitted to Costa; the remaining balance was disbursed to Full Spectrum. Full Spectrum never completed the home improvement work. It was later learned that most of the documents submitted in connection with the mortgage application were forged.

Costa defaulted on the loan, and Emigrant commenced a foreclosure action. Costa asserted a number of counterclaims against Emigrant and third-party claims against Full Spectrum and Merit Finance. Her theory was that Emigrant acted along with its agents Full Spectrum, Merit Finance, and Professional Abstract (the title company) and engaged in an unfair trade practice aimed at getting Costa to engage in a sham home improvement financing transaction. She claimed violations of the Consumer Fraud Act, the Truth in Lending Act, and the Truth in Consumer Contract Warranty Act.

Emigrant filed a motion for summary judgment. In opposition, Costa argued that, under HOSA and common law principles of agency, Emigrant was liable for the acts of the third-party defendants. Emigrant responded that Costa did not raise HOSA in either her counterclaim or her third-party complaint. The Trial Court agreed with Emigrant, stating that "[a] violation of HOSA was not even raised in these pleadings." The Trial Court further held that the statute of limitations on any HOSA claim had expired.

The Appellate Division reversed. The panel reasoned that although the counterclaim and third-party complaint did not specifically allege that Emigrant was liable for the acts of others under HOSA, "it stated facts that established the elements of such a cause of action." The language of the law -- if a home loan "was . . . arranged . . . by a personal selling . . . home improvements," the borrower may assert claims against the contractor against the creditor -- covered Costa's allegations. Costa clearly alleged that Full Spectrum arranged the loan from Emigrant and that Emigrant was the creditor, providing sufficient notice to Emigrant that HOSA was triggered. Even so, the panel noted that a "prudent attorney" would have specifically identified HOSA in the pleadings. Finally, the panel could not discern from the record why the Trial Court believed the HOSA claim was time-barred, thus requiring further development.

U.S. District Court Dismisses Action Based on Alleged Violation of HAMP

In *Bukowski v. Wells Fargo Bank, N.A.*, defendants moved to dismiss plaintiffs' action seeking to recover damages for defendants' improper service of a residential mortgage loan. Plaintiffs Stephen Bukowski and Virginia Bukowski (together, "Plaintiffs") entered into a mortgage loan with defendant Wells Fargo, which serviced the note and mortgage on behalf of Bank of America that was secured by a lien on Plaintiffs' property.

In April 2015, Plaintiffs applied for a loan modification from Wells Fargo. On September 22, 2015, Wells Fargo provided Plaintiffs with the terms of the trial modification program, which would be followed by a permanent modification if Plaintiffs paid the required three trial payments and returned a certain subordination. Plaintiffs made the three payments and returned the subordination as required by the Home Affordable Modification Program ("HAMP") guidelines and received the permanent modification documents, which included a lump sum payment.

Plaintiffs determined that the lump sum payment was erroneous. Plaintiffs and Defendants had numerous correspondences regarding their disagreement about the lump sum payment. On November 7, 2016, Wells Fargo ultimately issued a Notice of Intention to Foreclosure to Plaintiffs. Plaintiffs then filed a complaint alleging violation of the Real Estate Settlement Procedures Act (RESPA); violation of the Fair Debt Collection Practice Act (FDCPA); violation of the New Jersey Consumer Fraud Act (NJCFA) and breach of contract. Defendants moved to dismiss the complaint.

The District Court for the District of New Jersey dismissed the complaint in its entirety. The Court found that Plaintiffs failed to plead actual or specific damages, which are a necessary element of a RESPA claim. Additionally, the Court found Plaintiffs failed to identify any link between the alleged violations and any alleged damages.

Next, the Court found that Defendants were not “debt collector[s]” under the FDCPA. Plaintiffs agreed to withdraw that claim. The Court then found that the HAMP does not provide a private right of action for borrowers against lenders and servicers. The Court found that Plaintiffs’ alleged violations of the NJCFA were actually impermissible claims under the HAMP.

Finally, the Court dismissed Plaintiffs’ breach of contract claim in which Plaintiffs alleged that Defendants breach their agreement by failing to permanently modify Plaintiffs’ loan in accordance with the trial modification and HAMP guidelines. The Court found that Plaintiffs never signed the permanent modification agreement and, thus, a valid contract did not exist with respect to the permanent modification agreement.

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