

**[New Jersey Supreme Court Upholds Enforcement of Settlement Reached in Residential Mortgage Foreclosure Program](#)**

In *GMAC Mortgage, LLC v. TamiLynn Willoughby*, the Supreme Court of New Jersey held that a settlement reached through the judiciary's Residential Mortgage Foreclosure Program was binding, final, and enforceable.

After a final judgment of foreclosure was entered and a sheriff's sale was scheduled, TamiLynn Willoughby moved to stay the sale and to participate in the Foreclosure Mediation Program -- a statewide program that was implemented following the collapse of the housing market in 2007-2008. The program was designed to provide a neutral forum where homeowners and lenders could attempt to reach mutually agreeable terms to avoid foreclosure. Willoughby met with GMAC's attorney, and the parties reached a settlement agreement. Willoughby was offered a "trial to permanent modification plan contingent on signed modification documents and an initial down payment." Per the terms of the modification, Willoughby was to make a down payment, monthly payments, and a balloon payment, payable on maturity. If Willoughby made "all trial payments," GMAC would make the "modification permanent."

Willoughby made all payments. However, after the trial period concluded, a GMAC servicing agent sent Willoughby a new loan modification agreement. That proposal had a shorter term, higher monthly payments, and a higher balloon payment. Willoughby did not sign the new modification agreement but did make the increased monthly payments. Subsequently, GMAC sent Willoughby two additional modification agreements. Again, Willoughby did not sign the agreements but continued to make the monthly payments. Because of her failure to sign the most recent modification agreement, GMAC advised Willoughby that the loan would be referred for foreclosure -- even though she made \$58,790.69 in payments following her initial participation in the Residential Foreclosure Mediation Program.

Willoughby filed a *pro se* motion to enforce the initial settlement agreement. The Chancery Division, however, referred the matter to

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mediation again, where no agreement was reached. In the interim, GMAC received \$132,682.66 in insurance proceeds for damages caused to Willoughby's home from Hurricane Sandy. Following the unsuccessful mediation, the Chancery Division denied Willoughby's motion to enforce the initial settlement agreement, determining that the settlement was provisional, as evidenced by Willoughby's submission to subsequent mediation.

The Appellate Division affirmed, also concluding that the original settlement was provisional. The Supreme Court reversed and determined that the agreement was intended to be a permanent loan modification. The Court highlighted the agreement's language that if Willoughby made "all trial payments," then the modification would become permanent. The agreement also provided that it was "final, binding and enforceable upon all parties." Writing for the Court, Justice Albin explained that "[n]othing in this Agreement suggested that, after a period of twelve months, GMAC could unilaterally demand that Willoughby agree to a new loan modification on different terms than those that appeared in the Settlement Memorandum." Thus, GMAC could not compel Willoughby to accept a new modification agreement and submit to further mediation.

That Willoughby made higher payments pursuant to GMAC's proposed modification agreement did not shift the analysis. To the Court, Willoughby "struggled, perhaps not deftly, to save her home by continuing with mediations and negotiations because of her failure to secure the relief to which she was entitled by the chancery court." Justice Albin concluded that Willoughby "carried out her part of the bargain" by making all trial payments; accordingly, the Chancery Division should have granted her motion to enforce the agreement. The Court thus remanded to the Chancery Division to fashion an equitable remedy.

Finally, the Court adopted the suggestion of the Seton Hall Law Center for Social Justice, which appeared as *amicus curiae*, that the Foreclosure Mediation Program completion report contain a "check-off category entitled 'Final Settlement (Case Not Dismissed).'" That language would make clear that if the homeowner complies with the contingent terms of the agreement, the foreclosure action would be dismissed.

### [Assignment by Nominee Upheld as Valid by Appellate Division in Foreclosure Action](#)

In *Bank of America, N.A. v. Oh*, the New Jersey Appellate Division affirmed a final judgment of foreclosure despite challenge that the mortgagee was not properly assigned the note. The defendants obtained a mortgage loan from American Partners Bank, secured by residential property located in Jackson Township. The mortgage was given in favor of Mortgage Electronic Registration System, Inc. ("MERS") as nominee for American Partners Bank and its "successors and assigns." Three years later, MERS assigned the mortgage to BAC Home Loans Servicing, LP ("BAC"), which subsequently merged with plaintiff, Bank of America, N.A. After the defendants ceased making payments, plaintiff filed a foreclosure action. The foreclosure action went to trial and judgment was entered in favor of plaintiff.

On appeal, defendants asserted, among other things, that the plaintiff's assignment was "invalid" and that plaintiff did not properly authenticate documents at trial. With regard to the first argument, the Appellate Division found that the loan was properly assigned to the plaintiff by MERS because the indorsement on the promissory note permitted the assignment even if American Partners Bank no longer existed, as evidenced by the plain language "successors and assigns" in the indorsement. Further, testimony at trial confirmed that BAC had been in possession of the note since 2008.

The Appellate Division also rejected defendants' contention that inadmissible hearsay was admitted at trial. First, the Appellate Division noted that defendants did not object to the testimony and documents at trial, thereby waiving

the appeal of the issue absent plain error. Nevertheless, the Appellate Division noted that plaintiff's testimony regarding certain documents was based upon the business records exception of the hearsay rule as the testimony by the witness established he was familiar with the records and an employee of plaintiff.

### **[Trial Court Dismisses Complaint Arising From Lender's Refusal to Modify Loan](#)**

In *Res v. Bank of America, N.A.*, Docket No. BER-L-3346-17 (N.J. Sup. Ct. Aug. 8, 2017), the Superior Court of New Jersey, Law Division, dismissed plaintiffs' complaint arising out of the alleged refusal of defendant Bank of America, N.A. ("BANA") to modify plaintiffs' loan. In August 2007, BANA extended plaintiffs a Home Equity Line of Credit ("HELOC") in the amount of \$500,000. To secure the HELOC, plaintiffs executed a mortgage on property in Old Tappan, New Jersey. In September 2009, BANA loaned plaintiffs \$600,000 in exchange for a note and second mortgage on the property. Plaintiffs then executed a subordination agreement, which subordinated the note and the HELOC. On May 11, 2017, plaintiffs filed a complaint based on BANA's alleged refusal to modify the loans and asserted the following causes of action: (1) breach of the covenant of good faith and fair dealing; (2) lender liability; (3) mistake; (4) misrepresentation; (5) common law fraud; and (6) violation of the New Jersey Consumer Fraud Act ("CFA").

BANA filed a motion to dismiss, which the Court granted. The Court found that plaintiffs' claims for mistake and misrepresentation (counts three and four) were barred by the six-year statute of limitation for negligence. The claims accrued in 2009 and, thus, were barred when the complaint was filed in 2017. In any event, the Court found that plaintiffs failed to state a cause of action for negligence because BANA owed no duty to plaintiffs. The Court then found that plaintiffs failed to state a claim for breach of contract and breach of the covenant of good faith and fair dealing (counts one and two) because they failed to identify which contract BANA allegedly breached. Additionally, the Court noted, there is no claim for lender liability under New Jersey law.

Finally, the Court found that plaintiffs failed to state a claim for fraud or violation of the CFA because they failed to plead fraud with particularity, as required under New Jersey law. Further, plaintiffs failed to provide facts to show that BANA's conduct amounted to an "unconscionable business practices."

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