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BANKING ALERT

July 2017

Chancery Division Denies Request for Custodial Receiver in Residential Foreclosure

In *Wilmington Savings Fund Society, FSB v. Robert Zimmerman*, the Chancery Division denied a motion to appoint a custodial receiver for a single-family residential condominium unit that was the subject of a foreclosure action. The Court also denied the plaintiff financial institution's unopposed motion for reconsideration.

The Court began its analysis by noting that the appointment of a receiver is an extraordinary remedy, used only as a last resort. Turning to the distinctions between different types of receivers, the Court explained that while equity receiverships are imposed for the safeguarding or liquidation of corporations, rent receivers are imposed for the protection of a mortgage lender. Toward that end, the rent receiver ordinarily grows out of a contractual arrangement and its purpose is to have "a disinterested person to collect the rents and pay expenses pending the ultimate disposition of the mortgaged premises." The Court noted that the plaintiff could not point to any case in which either a rent receiver or a custodial receiver was appointed for a single-family residential unit in foreclosure.

The Court further disagreed with the financial institution's suggestion that a multi-factor test favored the imposition of a custodial receiver. With respect to the financial institution's assertion that the property was "underwater," the Court explained that one reason that the property was underwater was that the financial institution waited so long to foreclose. Default occurred in 2008, yet suit was not filed until 2015. To allow that to weigh in the financial institution's favor, the Court said, "would encourage lenders to wait years to file suit, allow the debt balance to accumulate to exceed the fair market value, and then ask the court to appoint a custodial receiver." As for the remaining factors, such as the evidence of waste or deterioration, the Court found the financial institution's contentions unsupported. The Court further determined that it would not be equitable to appoint a custodial receiver. Because the principal owed exceeded the market value at the time the mortgage was assigned, the Court reasoned that the financial institution knew or should have known when it took over the mortgage that the security was inadequate to satisfy the debt.

In This Issue

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

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Moving to the appointment of a rent receiver, the Court stated that the basis for the appointment of a rent receiver is a written contract and that the defendant never agreed to such appointment. The Court determined that "[i]n the context of a foreclosure action of a single-family residential dwelling or condominium unit, . . . [the] defendant homeowner must have agreed to the appointment of a custodial receiver as evidenced by a written statement in the mortgage documents before a custodial receiver can be appointed."

Finally, the Court found that the appointment of a custodial receiver in the single-family home context violates the Fair Foreclosure Act. The Act requires that a number of procedural protections be afforded to homeowners to help them avoid foreclosure. "Nowhere does the Fair Foreclosure Act allow the appointment of a custodial receiver." Indeed, "the appointment of a custodial receiver with the power to rent the property and sell the property would deny the homeowner the ability to cure the default and save their home, which is the stated purpose of the act."

Third Circuit Finds Single Phone Call Sufficient to Trigger Claim Under Telephone Consumer Protection Act

In *Susinno v. Work Out World Inc.*, No. 16-3277 (3d Cir. July 10, 2017), the United States Court of Appeals for the Third Circuit reversed a lower court decision and held that a plaintiff could maintain a claim under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. ("TCPA") based on a single unsolicited pre-recorded voicemail she received on her cell phone.

The plaintiff alleged that she received a phone call from the defendant, Work Out World, Inc. ("WOW"), which she did not answer. WOW left a one-minute pre-recorded promotional offer on the plaintiff's voicemail. The plaintiff was not charged for the call. Based on that voicemail, the plaintiff filed a complaint under the TCPA. WOW moved to dismiss, asserting two arguments: (1) a single voicemail was not the type of conduct that was prohibited by the TCPA; and (2) the plaintiff sustained no injury as a result of the solicitation and voicemail. The District Court agreed and dismissed the Complaint in its entirety.

The Third Circuit vacated the dismissal on appeal. In particular, the Third Circuit rejected WOW's contention that the TCPA did not reach phone calls for which the plaintiff was not charged, stating that Congress did not expressly exclude such phone calls from the statute's reach.

The Third Circuit also agreed with the plaintiff that she sustained sufficient injury for Article III standing purposes. On appeal, WOW argued that, because the plaintiff was not charged for the call, the mere statutory violation was insufficient to provide a cognizable injury for standing purposes in view of the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In rejecting that argument, the Third Circuit analyzed its recent decision in *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017), which held that a plaintiff sustains a cognizable injury where she alleges "the very injury" the act at issue was intended to prevent and that injury maintained a "close relationship to a harm" traditionally recognized in American and English courts. Applying the *Horizon* decision to the facts of this appeal, the Third Circuit held that the TCPA's purpose was clear in that it expressly prohibited pre-recorded phone calls "in the interest of privacy rights" and that the TCPA sought to provide redress to citizens for causes of action that were previously recognized under American common law, in this instance, claims for invasion of privacy and intrusion upon seclusion, despite the fact that a single, unsolicited phone call would likely not trigger liability for such common law claims.

Mortgagee Who is Non-Signatory of a Note is not Required to Receive Notice of Intent to Foreclose

In *Wells Fargo v. Collucci*, No. A-1948-15T3, (N.J. App. Div. July 11, 2017), the New Jersey Appellate Division analyzed whether a non-signatory of a note is required to receive notice of a lender's intent to foreclose. In 2009, defendant Donald Collucci, Jr., executed and delivered a promissory note to plaintiff Wells Fargo; his wife defendant Veronica Collucci did not sign the note. The note was secured by a mortgage on the defendants' marital home and both defendants signed the mortgage. In 2010, the defendants separated and a final judgment of divorce was entered in 2013, and Veronica continued to reside in the marital home. Donald stopped making payments on the note in 2011, and Wells Fargo sent Donald a Note of Intent to Foreclose ("NOI") in March 2011, to the marital residence but did not copy Veronica or send her a separate NOI.

Wells Fargo filed a foreclosure action in May 2013, and Veronica filed an answer in August 2013. Wells Fargo moved for summary judgment, and Veronica cross-moved to dismiss the complaint arguing that she had not been served with any notice of intent to foreclose as required by the Fair Foreclosure Act ("FFA"). The New Jersey Superior Court, Chancery Division, granted Wells Fargo summary judgment, finding that Wells Fargo had satisfied the requirement of the FFA by sending the NOI to Donald. Wells Fargo was not required to send the NOI to Veronica because she did not sign the note. A final judgment of foreclosure was entered and Veronica appealed.

The Appellate Division affirmed, holding that a lender does not have an obligation under the FFA to send a NOI to a mortgagor who did not sign the note. The FFA requires the lender, upon default on the mortgage, to send notice of its intention to foreclose at least thirty days prior to the lender accelerating the mortgage obligation or commencing any foreclosure action. N.J.S.A. 2A:50-56(a). The FFA defines "residential mortgage debtor" or "debtor" as "any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage." The Appellate Division found that because Veronica did not sign the note and, thus, has no obligation to pay the note, Wells Fargo did not have an obligation to send her a NOI.

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