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BANKING ALERT

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New Jersey Appellate Division Splits Deposit From Sheriff's Sale Between Parties After Buyer Alleges Bank Failed to Disclose Prior Mortgage

In *Wells Fargo Bank, N.A. v. Torney*, 2017 WL 2536102 (App. Div. June 9, 2017), prior to a foreclosure sale, Wells Fargo provided a description of the subject property for the Sheriff to advertise the sale. Wells Fargo's description disclosed that the property was subject to a $94,000 first-filed mortgage. The prior mortgage was highlighted in the advertisements of the sale in local newspapers.

The buyer, Edward Shuman, however, learned of the sale through the Sheriff's website, which did not disclose the prior mortgage, and no announcement was made at the sale about the prior mortgage. Moreover, "[o]n the printed condition of sale, the box next to 'subject to a first mortgage' was not checked." Shuman won the auction and tendered a $10,000 deposit. According to Shuman, he learned of the prior mortgage later that day, when he inquired about tax liens on the property.

After Wells Fargo refused Shuman's request to vacate the sale and return his deposit, Shuman filed a motion for the same relief in the Chancery Division. The trial court granted Shuman's motion but determined that Shuman had fallen short of his obligation to conduct a diligent inquiry before the sale. Accordingly, although the trial court vacated the sale, it ordered that only $7,500 of the $10,000 deposit be returned to Shuman; the $2,500 of the deposit that Wells Fargo retained was for the costs of relisting the property and paying interest and taxes until another sale could be held.

Shuman appealed, arguing that the he should have been refunded the full $10,000 deposit. Shuman looked to N.J.S.A. 2A:61-16, which allows a purchaser at a sheriff's sale to be relieved from his bid if a lien or encumbrance on the property was not disclosed in the notices and conditions of sale.

The Appellate Division affirmed, stating that although the statute was "designed to 'shift the burden of unearthing the existence and approximate amount of superior liens from bidders to the selling

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mortgagee,'" Shuman still had an obligation to make an independent inquiry into the property prior to sale. Toward that end, the advertisements disclosed the existence of the prior mortgage and if Shuman had made an independent inquiry, he would have learned of the prior mortgage.

The Appellate Division held that both parties should bear some of the responsibility: Wells Fargo for failing to ensure that the condition of sale contained the disclosure and Shuman for failing to conduct an independent investigation. Thus, because equitable remedies are by their nature flexible, the trial court did not abuse its discretion by apportioning a degree of fault to Shuman and returning only $7,500 of his deposit.

New Jersey Trial Court Finds That Borrower Did Not Execute an Enforceable Loan Modification

In *Ditech Financial, LLC v. Cruz*, Docket No. HUD-F-3869-15 (N.J. Ch. Div. June 14, 2017), the New Jersey Chancery Division analyzed the requirements for what constitutes reasonable steps to provide a defendant with a loan modification in a foreclosure action. In *Cruz*, defendants Tiffany Cruz and Ramon Milian ("Defendants") executed and delivered a promissory note in the amount of $176,000 to Countywide Home Loans, Inc. which was secured by a mortgage on Defendants' property. Defendants defaulted under the loan documents on December 1, 2010 by failing to make payments. Plaintiff, the ultimate assignee of the mortgage, instituted a foreclosure action based on Defendants' failure to make payments when due under the loan documents.

At trial, Defendant Cruz testified that she called Plaintiff in 2013 seeking a loan modification, but had not received the modification package. Ms. Cruz requested that Plaintiff change her address on file, which was her mother's address in Brooklyn, to an address in Jersey City. Plaintiff sent a loan modification package to the address in Jersey City, which was returned undelivered, and the address on file was changed back to Brooklyn. A trial loan modification package was sent to the Brooklyn address indicating that once payments were made under the trial period, a permanent loan modification package would be sent and must be returned to become effective. Plaintiff testified that she never lived at the Brooklyn address, but the evidence indicated that she made three trial payments from that address under the loan documents. After the trial period, a permanent loan modification was sent to the Brooklyn address; yet, Ms. Cruz contended that she never received the permanent loan modification package.

At trial, Plaintiff produced evidence that a permanent modification package was sent to the Brooklyn address. Defendant Cruz argued that she did not receive mail at that address, and had requested an address change. The Court found that the sole issue was whether there was a default under the underlying loan documents based on Defendants' failure to return an executed permanent loan modification. The Court found that there is a presumption that mail properly addressed, stamped and posted was received by a party to whom it was addressed. The Court found that Plaintiff satisfied the requirements and Defendant made trial payments from the Brooklyn address. The Court found that Defendants failed to execute the permanent loan modification agreement and, therefore, were not entitled to a permanent loan modification and defaulted under the loan documents. Accordingly, the Court struck Defendants' contested answer and ordered the matter to Office of Foreclosure as uncontested.

New Jersey Appellate Division Finds FDCPA's Venue Provision Irrelevant in Personal Jurisdiction Dispute

In *Triffin v. Board of County Commissioners Hernando County*, 2017 WL 2458145 (N.J. App. Div. Jun. 7, 2017), the New Jersey Appellate Division declined to utilize the exclusive and mandatory venue provision in the Fair Debt Collection Practices Act ("FDCPA") to obtain personal jurisdiction over a defendant with no minimum contacts in New Jersey.

In this action, the Board of County Commissioners for Hernando County (the "Board"), a public entity in the State of Florida, issued a check to a couple residing in Monmouth County, New Jersey. The couple ultimately cashed the check with a check cashing facility, but the Board's bank refused to pay the check and returned it to the check cashing facility because the item had previously been cashed electronically. The check cashing facility subsequently assigned its rights to Triffin, who filed the action against both the couple and the Board in Monmouth County. While the couple defaulted, the Board did not and asserted as an affirmative defense lack of personal jurisdiction. The Court then granted the Board's motion to dismiss for lack of personal jurisdiction, despite Triffin's contention that he was required to sue both the Board and the couple in Superior Court in Monmouth County pursuant to the FDCPA's provision mandating jurisdiction against a debtor in the county where the debtor lives or signed the contract underlying the debt.

The Appellate Division affirmed the dismissal and agreed with the trial court's determination, noting that the venue provision in the FDCPA did not supplant New Jersey's personal jurisdiction requirements set forth in Rule 4:4-4. While that provision required Triffin to file suit against the couple in Monmouth County, it did not provide a basis to sue the Board in the same action without establishment of minimum contacts with New Jersey. The Appellate Division then recounted the facts of the case, which demonstrated that the Board's only contact with New Jersey was the check it issued to the couple, which was insufficient, according to the Appellate Division, to satisfy the requirements for personal jurisdiction.

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