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BANKING ALERT

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Third Circuit Upholds Dismissal of CFA and RICO Action Against Loan Servicer

In *Lewis v. O'Donnell*, --- Fed. Appx. ----, 2017 WL 35711 (3d Cir. Jan. 6, 2017), the United States Court of Appeals for the Third Circuit addressed the dismissal of a complaint brought by a *pro se* plaintiff challenging the assignment of his mortgage.

The plaintiff defaulted on a mortgage assigned to PennyMac Corporation ("PennyMac"), and PennyMac instituted a foreclosure action. The plaintiff failed to respond, and a default judgment in favor of PennyMac was entered. After final judgment of foreclosure was entered, the plaintiff initiated a civil action against PennyMac in New Jersey state court challenging the assignment of his mortgage. That action was dismissed with prejudice. The plaintiff then filed the same action in the United States District Court in New Jersey, asserting claims under the Fair Debt Collection Practices Act, the New Jersey Consumer Fraud Act and RICO. PennyMac moved to dismiss the Complaint under Rule 12(b)(6) under the *Rooker-Feldman* and entire controversy doctrines, which the plaintiff opposed. The District Court granted the motion to dismiss over the plaintiff's objection.

The plaintiff appealed. The Third Circuit upheld the District Court's dismissal, finding that the plaintiff was provided a fair opportunity to oppose the motion, and that the federal action was an improper attempt to relitigate issues already disposed of in the state action.

Appellate Division Rejects Challenge to Lender's Standing in Foreclosure Action

In *Indymac Venture, LLC v. Hemschot*, 2016 WL 6610351 (App. Div. Nov. 9 2016), defendant Ernest Hemschot obtained a construction loan from Indymac secured by a mortgage. The construction period ran from January 11, 2008 through February 1, 2009. A certificate of occupancy was issued in November 2008. Hemschot moved into the property in February 2009.

Hemschot made the required payments during the initial period; however, he did not complete the loan documents so that his construction loan would "roll into the permanent phase." The lender

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informed Hemschot of his default, stating that he failed to complete the required improvements to the property; had not paid interest, late charges, and costs; and allowed tax and mechanics liens to encumber the property. Hemschot did not cure any of the defaults and the lender filed for foreclosure. Hemschot defended on the grounds that the lender lacked standing because it failed to provide him with written notice of intent to foreclose as require under the Fair Foreclosure Act.

The trial court rejected that argument, and the Appellate Division affirmed. The panel noted that the Fair Foreclosure Act seeks to provide those with residential mortgages every chance to pay their debt and keep their homes, but held the Act was inapplicable for two reasons: (1) Hemschot did not live on the property during the construction period; and (2) the construction loan had matured when plaintiff filed its complaint. And if a mortgage obligation has matured, "so that all sums secured by the mortgage are immediately due and payable, acceleration is not required in order to foreclose"; "[t]he [Act's] own terminology makes the notice of intention inapplicable in this instance." (quoting 30 *New Jersey Practice, Law of Mortgages* § 21.12 at 264 (Myron C. Weinstein) (2d ed. 2000)).

District Court Affirms Ruling That Statute of Limitations in Foreclosure Action Was Not Shortened by Acceleration Notice

In *In re Hartman*, 2016 WL 7189826 (D.N.J. Dec. 12, 2016), the United States District Court in New Jersey upheld the Bankruptcy Court's dismissal of an adversary proceeding brought by James Hartman against Wells Fargo, among others, alleging that the statute of limitations barred Wells Fargo from bringing a foreclosure action in connection with the property-at-issue. Hartman argued that Wells Fargo accelerated the mortgage loan securing the property on October 5, 2008, and, therefore, the six year statute of limitations contained in N.J.S.A. 2A:50-56:1 barred a foreclosure action as of October 5, 2014. The Bankruptcy Court disagreed.

> N.J.S.A. 2:50-56.1 provides in relevant part that:
>
> > An action to foreclose a residential mortgage shall not be commenced following the earliest of:
> >
> > a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond or other obligation secured by the mortgage . . . if the date fixed for making the last payment or the maturity date has been extended by written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument. . .
> >
> > c. Twenty years from the date on which the debtor defaulted, which default has not been cured. . .

The Court of Appeals for the Third Circuit recently ruled in *In re Gordon A. Washington*, 2016 WL 5827430 (3d Cir. Sept. 30, 2016), that subsection (a) of the statute sets forth the possibility that the maturity date may be extended by written instrument, but nothing about it being shortened by demand for full payment. Hartman argued that: (1) *In re Washington* is not binding on the Bankruptcy Court; and (2) that decision ignores that a maturity date can be shortened by demand and acceleration of payment, as well as extended.

The District Court found *In re Washington* to be controlling on the issue. The District Court also rejected Hartman's contention that the relevant promissory note's maturity date of October 1, 2035 was accelerated to October 2008 when Wells Fargo declared default and accelerated the outstanding payments. The District Court found that Wells Fargo's acceleration was not a "written notice" nor did it extend the maturity date, as contemplated by the statute.

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