SHERMAN WELLS SYLVESTER & STAMELMAN LLP

BANKING ALERT

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Appellate Division Dismisses NJLAD Class Action Complaint Against Bank

In *Resua v. BCB Bancorp Inc.*, 2016 WL 3189655 (N.J. App. Div. Jun. 9, 2016), the Appellate Division dismissed a class action complaint asserting age discrimination under New Jersey's Law Against Discrimination ("NJLAD") premised on a bank's offering of personal checking accounts to persons over the age of sixty with more favorable terms than ordinary checking accounts.

In their Complaint, the named plaintiffs identified five different types of "personal checking accounts" that the bank offered to individuals over the age of sixty that the parties agreed contained more favorable terms than the ordinary checking account available to all customers of the bank.

In response, the bank moved to dismiss the Complaint, arguing that NJLAD's provisions concerning discrimination relating to banking services did not preclude a financial institution from considering the age of its customers in offering products and services. The trial court agreed with the bank's interpretation of NJLAD and dismissed the Complaint.

On appeal, the Appellate Division affirmed the trial court's dismissal of the Complaint, noting that N.J.S.A. 10:5-12(i) "conspicuously omit[s] 'age' in describing the members of the protected class in the area of banking activities." Thus, the Appellate Division reasoned, the plaintiffs could not rely on NJLAD's catch-all provision to override the Legislature's decision to omit age as a protected class from subsection (i) concerning banking services. The Appellate Division also noted that the challenged accounts "promote[d] the salutary policy of encouraging the sound management of financial resources to a population of consumers entering what is often a transitional period of life, which often includes retirement."

District Court Finds Thirty-Day Reporting Requirement in Customer Account Agreement to be Reasonable

In *Oguguo v. Wells Fargo Bank, NA, et al.*, No. 14-cv-2383, 2016 WL 3041853 (D.N.J. May 27, 2016), the United States District Court for the District of New Jersey considered a customer's duty to timely report unauthorized transactions on their account. Plaintiffs Constance Oguguo ("Oguguo") and Nkecchi Osuji ("Osuji," together with Oguguo, "Plaintiffs') sought reimbursement of $160,645 withdrawn from Osuji's account at

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defendant Wells Fargo (the "Account") to pay six allegedly forged checks between May and July 2012. The checks were made payable to Metal Building Associates and deposited in defendant Michael Stephen's business account bearing that name at defendant PNC Bank. Osuji contends that she never authorized the checks and had no knowledge until August 14, 2016, when a Wells Fargo representative called to report an overdraft on the Account. Osuji contended that all of the funds deposited in the Account came from Oguguo and Osuji never made any withdrawals. Wells Fargo initiated an investigation based on Osuji's affidavit of check fraud, but denied the claim because it took too long to report the alleged fraud. Osuji's Customer Account Agreement required notice within thirty days from the date that Wells Fargo mailed, or otherwise made available the account statement and also disclaimed liability by the same wrongdoer that could have been prevented by timely notice. Plaintiffs filed suit against Wells Fargo and PNC Bank for, among other things, violation of New Jersey's Uniform Commercial Code (the "UCC").

Wells Fargo and PNC Bank moved for summary judgment. On the claims asserted against Wells Fargo, the District Court found that under the UCC the initial liability falls on a bank for a forged check, but can be shifted to a customer if the bank makes available its statements and the customer fails to timely report the fraud. The District Court found that Wells Fargo made the first two statements available online and then mailed the second two statements. Although Osuji denied receiving the statements, the District Court found that, absent proof to the contrary, Wells Fargo's mailing of the statements satisfied its obligation. The District Court then found that the 30-day requirement in the Customer Account Agreement was not unreasonable given the UCC's recognition that one of the most serious consequences of failure of the customer to comply with notice provisions is the missed opportunity to report losses. The District Court determined that Osuji's failure to timely report the first two checks resulted in future losses that may have been prevented and any subsequent checks by the same wrongdoer were precluded from recovery. However, with respect to the final check on June 25, 2012, even if Osuji had reviewed her June 11, 2012 statement and objected within 30 days that may not have prevented the fraud with respect to the final check, leaving the bank potentially liable for such loss. Thus, the District Court granted summary judgment in favor of Wells Fargo with respect to all but the last check.

On Plaintiffs' claims against PNC Bank for breach of the present warranty, the District Court found that the presentment warranty under the UCC is made to the drawee – *i.e.*, the person ordered in a check to make payment, here, Wells Fargo. Thus, Plaintiffs had no right to assert a presentment warranty. Further, the pleadings made plain that Plaintiffs were really seeking to hold PNC Bank liable for negligently opening the account of Metal Building Associates due to improper documentation. Any negligence claim, however, is barred by the UCC. Therefore, the District Court granted summary judgment in favor of PNC Bank on Plaintiffs' claims.

Appellate Division Affirms Trial Court's Order Denying Third-Party's Motion to Intervene in Mortgage Foreclosure Action

In *Wells Fargo Bank, N.A. v. Rivera*, 2016 WL 3129234 (N.J. App. Div. June 6, 2016), the New Jersey Appellate Division affirmed a trial court order denying a third-party's post-judgment motion to intervene in a mortgage foreclosure action. Appellant Artem Rybakow sought the reversal of the trial court's order so that he could challenge a previously-executed consent order that allowed various affordable housing restrictions on the mortgaged property to remain in place once the mortgage foreclosure was complete.

In 2007, Dawn Rivera purchased a condominium unit in Freehold, New Jersey. The purchase was financed by a purchase money mortgage loan assigned to Wells Fargo. As part of the purchase, Rivera entered into an affordable housing agreement on July 9, 2007 with the municipality and the administrator of its affordable housing program (the "Authority"). The agreement was recorded in Monmouth County with the deed.

The agreement imposed various restrictions on the sale or transfer of the property intended to maintain the property's status as an affordable housing unit and prevent the homeowner, mortgagee, or subsequent purchasers from receiving windfall profits by selling the property at full market value. The terms of the agreement stated that a purchaser at a foreclosure sale conducted by the holder of the first purchase money mortgage would be permanently released from the affordable housing restrictions and covenants imposed by the agreement and that the Authority was required to execute and record evidence that the restrictions were released upon a judgment of foreclosure. Rivera defaulted on her mortgage with Wells Fargo in 2011. She had also fallen behind with condominium association fees. The condominium association obtained a judgment against Rivera for the delinquent fees in October 2012. The following month, Wells Fargo filed a foreclosure complaint and recorded a notice of *lis pendens*.

In 2013, Wells Fargo entered into a settlement agreement with the municipality and the Authority, whereby, the parties agreed that the affordable housing restrictions on the property would not be lifted in the event of a foreclosure sale. A consent order memorializing that settlement was filed on June 10, 2013. Meanwhile, the condominium association executed its judgment and brought the property to a sheriff's sale in February 2014. Appellant was the successful bidder at that sale and received a sheriff's deed to the property, which noted that the property was still subject to Wells Fargo's first mortgage lien.

On July 1, 2014, a final judgment of foreclosure was entered in favor of Wells Fargo in its foreclosure action. Appellant, realizing that the affordable housing restrictions were still in place, moved on an emergent basis on November 14, 2014 to intervene in the mortgage foreclosure action post-judgment, seeking to have the consent order vacated. The trial court denied the motion on the grounds that Appellant lacked standing to contest the consent order since he was not a party to the litigation at the time it was entered. The property subsequently sold at a second sheriff's sale in January 2015 to Wells Fargo. Consequently, Appellant's interest in the property was extinguished.

On appeal, Appellant asserted he had a right to intervene on the grounds that he was unaware of the consent order keeping the affordable housing restrictions on the property in place because it was not recorded in the title search. Appellant claimed that he was under the impression that he could circumvent the various affordable housing restrictions on resale by purchasing the property at the sheriff's sale, and then wait for the restrictions to be lifted after the conclusion of Wells Fargo's foreclosure action. Appellant then planned to redeem the property to avoid losing it, leaving him with what he thought would be a condominium unit free of the affordable housing restrictions.

The Appellate Division agreed with the trial court that Appellant lacked standing to contest the consent order and, therefore, did not have an interest in the matter that would permit him to intervene. The Court explained that Appellant's ownership interest could not be impaired or impeded by Wells Fargo's foreclosure action at the time he acquired it, because as a matter of law he took his ownership interest subject to the terms of the consent order.

Lastly, the Court rejected Appellant's argument that the notice of *lis pendens* should have prevented Wells Fargo and the Authority from entering into a settlement that he contends is contrary to the affordable housing agreement. The Court explained that the notice of *lis pendens* served as a warning to Appellant that any interest he chose to take in the property would be bound by the outcome of the foreclosure action. The warning did not serve to protect the quality of title for his benefit, and did not prevent the parties to the foreclosure action from resolving the affordable housing issue in a manner that Appellant apparently did not expect.

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