

BANKING ALERT

May 2016

[District Court Vacates Entry of Default Against Lender in Action Seeking Rescission of Note](#)

In *Walsh v. Household Finance Corp. III*, 2016 WL 1394435 (D.N.J. Apr. 7, 2016), the United States District Court of New Jersey vacated the entry of default against defendant Household Finance Corp. III (HFC III) in an action by plaintiffs alleging that HFC III and other defendants violated the Truth in Lending Act (“TILA”) and related Regulation Z and seeking rescission of a note and mortgage on their home.

On March 21, 2007, plaintiffs obtained a loan from HFC III to refinance an existing mortgage on their house in Englewood, New Jersey. On December 30, 2014, HFC III assigned the mortgage to defendant US Bank, as Trustee for LSF9. The assignment was recorded on January 14, 2015. On February 20, 2015, plaintiffs mailed a Notice of Rescission to HFC III and U.S. Bank.

On June 17, 2015, plaintiffs filed their complaint, which was later amended on July 1, 2015 to add LSF9 as a defendant. A summons was issued to all defendants and returned executed on October 25, 2015. With respect to HFC III, the process server affirmed that it left a copy of the summons and amended complaint with a person authorized to accept service on behalf of HFC III. On November 2, 2015, following plaintiffs’ request, default was entered against HFC III. On November 30, 2015, HFC III filed a motion to vacate the entry of default against it.

The Court, in exercising its discretion to vacate default, considered the following: (1) whether plaintiffs will be prejudiced, (2) whether HFC III has a meritorious defense and (3) whether the default was the result of HFC III’s culpable conduct. The Court determined that all three factors weighed in favor of vacating default.

First, the Court found that there was no discernable prejudice to plaintiffs from setting aside the default against HFC III, noting that nothing of significance had occurred since the entry of default and there is no indication that evidence has been lost or witnesses have become unavailable. The Court rejected plaintiffs’ argument that certain unrelated litigation pertaining to HSBC, the parent corporation of HFC III, demonstrates that HSBC is an “international crime syndicate” and that therefore, there is a risk of destruction of evidence by HFC III—finding such argument to be speculative in the extreme.

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Second, the Court found that HFC III presents a meritorious defense. HFC III contends that plaintiffs' claims are time-barred under TILA, pursuant to which plaintiffs' right of rescission expired three years after the loan consummation date in March 2007. According to HFC III, plaintiffs did not first seek rescission until nearly five years after the deadline to rescind, on February 20, 2015.

Lastly, the Court found that the default was not the result of HFC III's culpable conduct, but rather, the result of a simple case of inadvertence due the misdirection of the summons and amended complaint to the wrong department at HFC III. The Court administratively terminated the motions to dismiss filed by U.S. Bank and LSF9 to allow all of the defendants to more efficiently assert their arguments and defenses regarding which defendant bears responsibility for which claims.

District Court Dismisses Pro Se Complaint Against Bank Asserting Claims Under RESPA

In *Hernandez v. M&T Bank*, 2016 WL 816746 (D.N.J. Feb. 25, 2016), the United States District Court for the District of New Jersey dismissed the plaintiff's claims arising from the plaintiff's allegations that the bank failed to comply with the Real Estate Settlement Practices Act ("RESPA") in connection with a commercial loan issued by the bank. In particular, the plaintiff alleged that the Bank failed to comply with RESPA's requirements that the bank timely respond to both her qualified written request and request for a loan modification.

In analyzing counts one and two premised on RESPA, the Court found that the nature of the loan given by the bank to the plaintiff was commercial based on the documents submitted by the bank in connection with its motion to dismiss. Having determined that the loan was commercial in nature, the Court turned to RESPA's express provision that it "does not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes." Based on this provision, the Court dismissed the plaintiff's RESPA claims.

Summarily dismissing the RESPA claims on the basis that the plaintiff's loan was a commercial loan not subject to the statutory provisions of RESPA, the Court exercised supplemental jurisdiction over the plaintiff's remaining claims of breach of the implied covenant of good faith and fair dealing and negligent infliction of emotional distress and dismissed them in their entirety. Specifically, the Court found that the bank could not have violated the covenant of good faith and fair dealing in refusing to enter into loan modification negotiations with the plaintiff. With regard to the negligent infliction of emotional distress claim, the Court found as a matter of law that the bank's alleged refusal to renegotiate its loan terms with the plaintiff came "nowhere near the kind [of conduct] that would support" a claim of negligent infliction of emotional distress, which is generally reserved to those instances of extreme conduct.

New Jersey Chancery Division Finds Party Need Only Use A Reasonable Means Of Communication To Inform Parties Of Sheriff's Sale Adjournment

In *Wong v. PNC Bank*, No BER-C-335-15 (Ch. Div. Apr. 26, 2016), the New Jersey Chancery Division discussed what constitutes reasonable notice of an adjournment to a sheriff's sale in New Jersey. In 2014, in a predecessor action, the Court entered Final Judgment in favor of defendant PNC Bank ("PNC"), with respect to real property located in Franklin, New Jersey (the "Property"). 69 North Franklin Turnpike Limited Liability Company ("Debtor") owned a 10% interest in the property and plaintiff Grace Wong owned 90% ("Plaintiff"). Plaintiff and her husband, Steven Wong, were both managing members of Debtor, each owning 50%. PNC requested a Sheriff's sale, which was initially scheduled for May, 2015. PNC sent notice of the sale to Plaintiff via regular and certified mail and the Debtor's counsel via certified mail and email. Plaintiff adjourned the sale twice and in April 2015, Debtor filed a chapter 11 bankruptcy petition. PNC advised Plaintiff and Debtor's counsel via email that the sale was adjourned. The

bankruptcy case was administratively dismissed for failure to file schedules. Steven Wong then filed for chapter 11 bankruptcy and counsel sent notice via email to PNC's counsel demanding the sale be postponed due to the bankruptcy and threatened sanctions if the sale was not adjourned. PNC adjourned the sale and filed a motion in the Bankruptcy Court to determine that the automatic stay did not apply to the sale. The Bankruptcy Court found that the stay was inapplicable to the sale and PNC sent notice via email to Plaintiff and Debtor's counsel that the sale would proceed on June 5, 2015. The Property was sold on June 5, 2015 at the Sheriff's Sale and PNC was the successful bidder.

Plaintiff then filed a complaint that PNC violated the stay when the Property was sold at Sheriff's sale and a *lis pendens* against the Property. PNC filed a motion to dismiss. The case was removed to the District Court for the District of New Jersey, which granted PNC's motion to dismiss. The action was then referred to the Bankruptcy Court, which found that no stay violations existed, dismissed the now-amended complaint and discharged the *lis pendens*. Plaintiff requested that the Chancery Division vacate the District Court's Order dismissing the Complaint.

The Chancery Division found that *res judicata* and issue preclusion bar Plaintiff's complaint, which was identical to the complaint that was dismissed by the Bankruptcy Court. On the one new state law claim, the Chancery Division found that PNC gave sufficient notice of the Sheriff's sale. Rule 4:65-2 requires that a foreclosing plaintiff serve a notice of sheriff's sale at least ten (10) days before the date of the sale by regular and certified mail. However, the Rule is silent as to notice of adjourned sheriff's sales. The Chancery Division found that the only requirement is that there was "some reasonable communication informing the property owner and other interested parties that the sale has been adjourned and the actual date of the sale." The Chancery Division found that PNC served the initial notice via regular and certified mail and, thus, complied with the Rule. The Chancery Division then found that PNC provided Plaintiff with reasonable notice of the adjournments via an email address the Plaintiff had previously used to serve PNC and the parties had successfully used such communication in the action. Further, Plaintiff had notice when she sought an adjournment of the sale due to the automatic stay and cannot claim she was unaware of the sale.

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