SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

April 2016

District Court Dismisses All Claims Against Bank Arising Out of Dispute Over Joint Account

In *Cole v. Wells Fargo Bank, N.A.*, Civil Action No. 12-1932 (D.N.J. Mar. 30, 2016), the district court dismissed claims asserted by plaintiff Francine Cole ("Plaintiff") against defendant Wells Fargo Bank, N.A. ("Wells Fargo") for breach of contract, breach of fiduciary duty, fraud and violation of the Real Estate Settlement Practices Act ("RESPA").

In *Cole*, Plaintiff, who, along with her sister Gwendolyn Cole-Hoover ("Hoover"), served as the co-administrator of her mother's estate, alleged that she and Hoover took out a $125,000 home equity line of credit ("HELOC") secured by a second lien on their deceased mother's home (the "Property") with Wells Fargo. Because they were co-signatories on the HELOC both Plaintiff and Hoover could use funds from the account.

Sometime thereafter, disputes between Plaintiff and Hoover arose, requiring the parties to litigate before the Chancery Division in Morris County regarding management of the Property. In that action, the trial court ordered that the Property be listed for sale and that Plaintiff pay various expenses for the Property out of the home equity line of credit with Wells Fargo. In 2010, Hoover granted her son, Kevin Todd Johnson ("Johnson") a power of attorney that permitted him to, among other things, remove the remaining funds from the HELOC account and place them into another Wells Fargo account that was solely in Hoover's name. Plaintiff subsequently challenged the power of attorney, leading Wells Fargo to return the money to the HELOC account pending investigation. The joint account was reinstated, but sometime thereafter, Hoover again instructed Johnson to remove the funds again from the HELOC account and to transfer the funds to another bank account not maintained at Wells Fargo. As a result, Plaintiff complained to Wells Fargo that she was not notified of the joint account being reinstated, or that her requests for documentation relating to the HELOC had not been provided. Plaintiff subsequently filed suit against Wells Fargo, Hoover and Johnson after receiving some of the documentation she requested from Wells Fargo relating to the HELOC.

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

Follow Sherman Wells on Linkedin Twitter

On summary judgment, the Court dismissed all claims against Wells Fargo. With regard to the breach of contract claim, the Court dismissed the breach of contract claim because the HELOC account was a joint account and Hoover could drawdown the account without Plaintiff's consent. The Court also dismissed the breach of fiduciary duty claim because the record was devoid of any "exceptional facts…which would heighten this creditor debtor relationship…to a fiduciary level." The Court also dismissed Plaintiff's RESPA claim on the grounds that Plaintiff's requests for information, assuming they were qualified written requests, were properly responded to by Wells Fargo and, in any event, Plaintiff could not identify any actual damages arising from Wells Fargo's purported failure to respond.

District Court Declines To Dismiss Claim Under FDCPA Based On Foreclosure Proceeding

In *Humphrey v. PennyMac Holdings, LLC*, No. 15-cv-2622 (D.N.J. Mar. 2, 2016), the United States District Court for the District of New Jersey permitted a claim by a borrower to proceed under the Fair Debt Collections Practices Act ("FDCPA") against the original lender's assignee. Plaintiff Virgil Humphrey ("Plaintiff") brought an action against PennyMac Holdings, LLC ("PennyMac") based on a note secured by a mortgage from Plaintiff, as borrower, to Washington Mutual Bank, as lender. Plaintiff alleges that Washington Mutual "assigned, placed with, or otherwise transferred" the loan to PennyMac for "collection." Plaintiff alleges that PennyMac filed a "debt collection action" and attached a copy of a state court foreclosure complaint. On that basis, Plaintiff brought claims against PennyMac for violation of the FDCPA, Fair Credit Reporting Act ("FCRA") and New Jersey Consumer Fraud Act ("NJCFA").

Plaintiff alleged that PennyMac violated the FDCPA because PennyMac is, in reality, a debt collector and "the state court action is a collection action masquerading as a foreclosure action." The District Court found such allegation barely sufficient to withstand dismissal, but permitted the claim to remain, particularly in light of Plaintiff's *pro se* status. The District Court did caution, however, that PennyMac had raised serious concerns about the viability of the claims, and the Court itself had concerns about jurisdiction under Rooker-Feldmen or abstention under *Colorado River*, based on the pending state foreclosure action. The District Court noted that such concerns could likely be addressed with limited discovery.

Plaintiff claimed that PennyMac, as a credit furnisher, breached a duty to provide accurate information, refrain from providing information after it was informed of a consumer dispute and to correct information under the FCRA. PennyMac contended that there is no private right of action for violation of 15 U.S.C. §1681s-2(a)(1), (2) & (3), which merely lists "responsibilities." The District Court found that the Third Circuit had already held that no private action exists. The District Court did, however, find that a private right of action does arise under 15 U.S.C. §1681s-(2)(b), which provides that a furnisher of credit information has a duty to report a dispute to all credit reporting agencies. The District Court dismissed the FCRA claim without prejudice and instructed that any amendment state the particular manner in which the information furnished to the credit reporting agencies was inaccurate. The District Court then dismissed without prejudice Plaintiff's claim under the NJCFA because the "unlawful practice" alleged in support of the claim was the violation of the FCRA.

New York Court Finds Bank Did Not Act In Bad Faith At Mandatory Residential Foreclosure Settlement Conference

In *Flagstar Bank, FSB v. Walker*, 2016 N.Y. Slip Op. 26058 (N.Y. Sup. Ct. Jan. 29, 2016), the Supreme Court in Kings County, New York rejected a special referee's recommendation that the Court conduct a hearing in a residential foreclosure action to determine whether the plaintiff, Flagstar Bank, negotiated in good faith at a mandatory settlement conference with the defendant borrower. The Court found that Flagstar negotiated in good faith and ordered the foreclosure action to continue.

In April 2011, Flagstar commenced a residential foreclosure action in Kings County, New York. Defendants Pamela Walker and Bevan Walker each filed a contesting answer with counterclaims against Flagstar. Pursuant to NYCPLR 3408, which requires a mandatory settlement conference in "every residential foreclosure action" involving a home loan "in which the defendant is a resident of the property subject to foreclosure," Flagstar and Bevan Walker participated in settlement conferences in October 2011 and January and February 2012 before a special referee. The special referee determined that Flagstar did not negotiate in good faith at the settlement conferences as required under the CPLR and recommended that the Supreme Court in Kings County conduct a bad faith hearing.

In May 2012, the Court conducted a hearing and found that the note encumbering the property that was the subject of the foreclosure action was not eligible for modification under the federal Home Affordable Modification Program ("HAMP"). The Court nonetheless ordered Flagstar to reevaluate Bevan Walker for a loan modification by applying the HAMP guidelines and stayed all foreclosure proceedings pending the outcome of the reevaluation. Flagstar appealed the Supreme Court's decision, and the Appellate Division reversed, finding that the loan was ineligible for modification under HAMP and that the relief granted by the Supreme Court was inappropriate.

Flagstar subsequently filed a motion to, among other things, reject the special referee's directive for a bad faith hearing and allowing Flagstar to continue to prosecute the foreclosure. The Court found that Flagstar did not negotiate in bad faith at the settlement conferences and thus, rejected the special referee's recommendation. The Court noted that Flagstar made several loan modification offers which were flatly rejected by Bevan Walker. The Court explained that although Flagstar may have refused to evaluate the subject loan using HAMP guidelines, its refusal to do so could did not constitute bad faith since Flagstar was under no obligation to consider the loan pursuant to HAMP. The Court further found that Flagstar's loan modification offers were not unreasonable or in bad faith simply because the projected monthly payments were higher than what defendant wanted to pay or higher than what he could comfortably afford. Accordingly, the Court entered an Order finding that Flagstar negotiated in good faith and granting it leave to continue the foreclosure action.

Sherman Wells Named One of the
Best Places to Work in New Jersey

Sherman Wells Sylvester & Stamelman LLP is honored to be named by NJBIZ as one of the Best Places to Work in New Jersey for 2016. Of the 100 companies recognized, Sherman Wells was ranked #25 overall and distinguished as the top ranked law firm within the small/medium company category. We are particularly proud to be one of the youngest companies recognized. Going forward, we will continue to strive to make Sherman Wells a forward-thinking firm dedicated to the professional growth and quality of life of our people.

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

Arjun Shah
Associate
973.302.9698
ashah@shermanwells.com

Anthony C. Valenziano
Associate
973.302.9696
avalenziano@shermanwells.com