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BANKING ALERT

January 2016

District Court Dismisses Borrower's Consumer Fraud and Fair Debt Collection Practices Act Claims

In *Andreotti v. Ocwen*, 2016 WL 236213 (D.N.J. Jan. 19, 2016), the United States District Court for the District of New Jersey dismissed a complaint brought by the plaintiff, a mortgage debtor, against Ocwen, the loan servicer, alleging violations of the New Jersey Consumer Fraud Act (NJCFA) and Fair Debt Collection Practices Act (FDCPA).

Plaintiff executed a mortgage in November 2006 (the "Mortgage") to Mortgage Electronic Registration Systems, Inc. (MERS). On April 20, 2009, the Mortgage was assigned from MERS to Bank of America. Plaintiff alleged that the Mortgage was subsequently assigned to Ocwen. Ocwen, however, denied that claim and noted that the Assignment of Mortgage attached to plaintiff's complaint states that Bank of America assigned the Mortgage to U.S Bank, "c/o Ocwen Loan Servicing, LLC." Elsewhere in the Assignment of Mortgage, Ocwen is referred to as the "Attorney in Fact" for Bank of America. Plaintiff's complaint further alleged that the Mortgage was never fully funded and that he was not in default when state court foreclosure proceedings against him were commenced.

Ocwen moved to dismiss for failure to state a claim. The Court dismissed plaintiff's NJCFA claim for failure to satisfy the heightened pleading standard for claims of fraud. Plaintiff's only allegation against Ocwen in support of his fraud claim was that Ocwen sent Dunning notices to him regarding the Mortgage. The Court noted that, even if true, plaintiff's allegation is insufficient.

Similarly, the Court dismissed plaintiff's claim under the FDCPA on the grounds that the complaint did not allege any discrete act wherein plaintiff's rights were violated. To establish a violation of the FDCPA, plaintiff must prove: (1) the defendant is a "debt collector," and (2) the defendant debt collector engaged in prohibited practices in an attempt to collect a debt. Ultimately, there must be a showing that the debt collection practices were abusive or harassing. Although the Complaint alleged that Ocwen sent Dunning notices to plaintiff, there was no allegation they were abusive or harassing.

In This Issue

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Court Finds Conclusory Allegations of Fraud Relating to Loan Modification Insufficient to Defeat Summary Judgment in Foreclosure Action

In *Deutsche Bank National Trust Company v. Albert Pierro, Jr., et al.*, Docket F-53579-14 (N.J. Ch. Div. Dec. 23, 2015), the New Jersey Chancery Division granted the motion filed by Deutsche Bank National Trust Company ("Plaintiff") for summary judgment and found it had a right to foreclose on property used by defendant Albert Pierro, Jr. ("Defendant") as collateral on a loan. Defendant purchased a home in 2004 with the loan proceeds of a purchase money mortgage. The loan from Washington Mutual Bank provided for negative amortization and, because the monthly payments were insufficient to pay the interest accrued, the deficiency in the interest payments were added to the principal. In 2008, a foreclosure action was initiated against Defendant, who thereafter sought a loan modification. Ultimately, Defendant entered into a loan modification with then servicer, JP Morgan Chase Bank, N.A ("Chase"), in 2011. According to Defendant, he received verbal assurances that the modification would not include a negative amortization. Defendant made payments under the modification agreement and then made a new application and obtained a new loan-modification agreement in 2012.

Defendant testified that sometime after entering into the new loan-modification agreement, he realized the loan was not self-amortizing and there was a balloon payment at the end. Defendant claims he attempted to contact Chase but did not hear back, and he made no payments under the 2012 modification.

Plaintiff filed a foreclosure action against Defendant based on his failure to make payments under the relevant loan documents. Plaintiff moved for summary judgment and the Chancery Division found that the mortgage was assigned by Federal Deposit Insurance Corporation, as receiver of Washington Mutual Bank FKA Washington Mutual Bank, FA to Plaintiff on January 22, 2013.

Defendant argued that Plaintiff's conduct relating to the loan modifications constituted fraud. The Chancery Division initially found that while foreclosure defendants are not entitled to a modification, a lender must act in good faith. The Chancery Division found that Defendant did not meet the heightened pleading standard for fraud because he asserted nothing more than conclusory allegations and did not provide any specifics regarding Chase's alleged promises. Moreover, the Chancery Division found that the fact that a party chooses not to read a document prior to signing does not relieve that party of his or her obligations. Here, the Chancery Division found the modifications were clear and plainly set forth the loan terms. Thus, the Chancery Division granted Plaintiff's motion for summary judgment and referred the matter to the Office of Foreclosure to proceed to judgment.

State Securities Regulators Propose Mandatory Reporting Requirement of Elder Fraud for Financial Advisers

A group of state security regulators recently drafted and proposed a model state law that would require financial advisers and brokers to report suspected elder financial fraud to both state security regulators and adult protective service agencies. The National American Securities Administrators Association ("NASAA") proposed such legislation in response to growing concern of increasing reports of elder financial fraud. In particular, United States Securities and Exchange Commission officials believe that elder abuse will increase "dramatically" in the coming years and the Metropolitan Life Insurance Company estimated that elderly Americans lost almost $3 billion in 2010, up 15% from 2008. The bill drafted by NASAA would provide financial advisers with civil immunity from certain privacy law violations in the event they report suspected fraud and permit the advisers to place temporary holds on suspicious withdrawals from investment accounts. The Securities Industry and Financial Markets Association, a trade group representing financial advisers, has proposed an alternative voluntary reporting system in response to the call by NASAA for mandatory reporting.

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