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BANKING ALERT

August 2015

Anthony Sylvester Again Named Banking and Finance Litigation "Lawyer Of The Year"

Anthony J. Sylvester, founding partner and chair of the firm's Banking and Financial Services Practice, was named by *Best Lawyers in America*® as the Banking and Finance Litigation "Lawyer of the Year" for the Newark Region for the second straight year.

New Jersey Appellate Division Holds That Pennsylvania Bank Did Not Violate New Jersey Banking Act When Closing Loan Transaction In New Jersey

In First Savings Bank of Perkasie v. Asia International Malls, Inc., A-3881-12T4 (N.J. App. Div. Aug. 12, 2015), the New Jersey Appellate Division held that a Pennsylvania bank did not violate the New Jersey Banking Act when it closed a loan in New Jersey that had been approved in the bank's Pennsylvania offices.

The defendants, Asia International Malls, Inc. ("AIM") and its principals Phong N. Tran and Charlotte Lucy Tran (collectively, "Defendants"), entered into a real estate transaction to purchase commercial property located in Voorhees Township, New Jersey. To secure financing, Defendants retained the services of a mortgage broker located in Philadelphia, Pennsylvania. The broker put Defendants in contact with the plaintiff, First Savings Bank of Perkasie (the "Bank"), a savings bank located and registered to do business in Pennsylvania. The Bank was not registered to do business in New Jersey, nor did the Bank maintain any offices, employees or operations in New Jersey.

The Bank agreed to lend AIM approximately $12.8 million to complete the real estate transaction and fund construction of the project in Voorhees secured by personal guarantees of Mr. and Mrs. Tran. While much of the services attendant to the loan transaction were conducted through the Bank's offices in Pennsylvania, (i.e., the appraisals, loan approvals, property searches and credit searches), the actual closing took place at the offices of a New Jersey title insurance company.

The Bank extended a second loan to Defendants in connection with the project a year later; again, the loan documents were executed by Defendants in New Jersey. Defendants ultimately defaulted in April 2010. In May 2010, the Bank filed a foreclosure complaint, as well as a complaint

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in the law division against Mr. and Mrs. Tran under the guarantees. Defendants moved to dismiss the foreclosure complaint on the grounds that the Bank was not licensed to transact business in New Jersey and, as a result, violated the New Jersey Banking Act, N.J.S.A. 17:9A-1 et seq., when the Bank closed the loan in New Jersey. The trial court denied the motion to dismiss and summary judgment was granted in favor of the Bank on December 7, 2012.

The Appellate Division affirmed the trial court's determination that the Bank did not violate the New Jersey Banking Act and that the Bank could proceed with a foreclosure action. Specifically, the Appellate Division reviewed the statutory language of the New Jersey Banking Act, which expressly provides that a "foreign bank" may seek to enforce obligations in New Jersey that were validly acquired "by it in the transaction of business outside" of New Jersey. Turning to whether the loan transaction itself was conducted in New Jersey, the Appellate Division rejected Defendants' contention that the situs of the closing and realty were dispositive, finding that the Bank did not maintain offices or employees in New Jersey and did not actively solicit transactions from New Jersey residents. Moreover, the Appellate Division noted that the Bank approved the loan in its Pennsylvania offices. As for the closing, the Appellate Division held that the closing, in and of itself, did not change the interstate nature of the transaction into one done exclusively in New Jersey.

The decision provides some guidance as to the type of activities a "foreign bank" may conduct in New Jersey without running afoul of the New Jersey Banking Act.

New York Comptroller Reports That Number Of Foreclosure Cases Remains High

In an August 2015 report on the state of foreclosure filings in New York, State Comptroller Thomas P. DiNapoli stated that while New York has seen a leveling off of new foreclosure filings since 2013, "they remain significantly higher than prerecession levels." The Comptroller did note, however, that activities typically associated with the initiation of a foreclosure action (i.e., lis pendens filings) have slowed, while notices of sales and public auctions, which signal the end of the foreclosure process, have increased. The Comptroller identified this development as a sign of small improvement, but cautioned that a significant number of foreclosure actions remain pending.

The Comptroller also highlighted efforts by major banks and mortgage servicing companies to engage in "best practices" with regard to the management of vacant and abandoned properties owned by mortgagors in default. The Comptroller noted that such efforts have been helpful in stemming the "spread of foreclosure-induced blight."

New Jersey Federal Court Dismisses Complaint Seeking To Block Foreclosure Action

In Espaillat v. Deutsche Bank Nat. Trust Co., Case No. 2:15-cv-00314, 2015 WL 2412153 (D.N.J. May 21, 2015), the United States District Court for the District of New Jersey dismissed with prejudice a panoply of claims for declaratory and injunctive relief and for damages made by a self-represented defaulting mortgagor seeking to prevent foreclosure.

On November 28, 2006, plaintiff mortgagor executed a note in favor of IndyMac Bank, FSB, which was secured by a mortgage made to defendant Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for IndyMac and its successors. Defendant Deutsche Bank was the trustee for the trust that owned plaintiff's note and mortgage at the time of plaintiff's complaint.

On January 16, 2015, plaintiff filed his complaint against several defendants, including Deutsche Bank and MERS (together, "Defendants") seeking, among other things, declaratory and injunctive relief preventing Defendants from

foreclosing and asserting claims for negligence, accounting, breach of the implied covenant of good faith, breach of fiduciary duty, violation of the Real Estate Settlement Procedures Act ("RESPA"), violation of the Home Ownership Equity Protection Act ("HOEPA"), fraud, intentional infliction of emotional distress and slander of title. Plaintiff's complaint essentially argued that Defendants do not have a right or interest in the note or mortgage because: (1) his loan was improperly securitized; and (2) there are defects in the chain of title. Defendants filed a motion to dismiss plaintiff's complaint. Notably, no foreclosure action had been instituted against plaintiff as of the date of the Court's decision on Defendants' motion to dismiss.

The Court dismissed plaintiff's complaint with prejudice. With regard to plaintiff's claims for declaratory and injunctive relief, which alleged that Defendants failed to comply with the terms of the Pooling and Servicing Agreement ("PSA") under which the loan was securitized, the Court found that plaintiff lacked standing to assert a violation of the PSA since he was neither a party to nor an intended third-party beneficiary of the PSA. Moreover, because there was no pending foreclosure action, the Court held that even if Defendants had engaged in the alleged violations, plaintiff would not be entitled to declaratory relief on the grounds that there was no "live controversy of sufficient immediacy between the parties." Similarly, injunctive relief was denied since there was no foreclosure action for the Court to enjoin.

Plaintiff's claims for negligence, violation of RESPA and HOEPA and fraud were dismissed on the grounds that they are all time-barred under the governing statutes of limitations. The Court noted that all of plaintiff's allegations relate back to the origination and securitization of the loan, which occurred in November 2006. In New Jersey, a six-year statute of limitations governs negligence and fraud claims. RESPA claims are governed by a one-year statute of limitations and claims under HOEPA are governed by a three-year statute of limitations. Because plaintiff filed his complaint on January 16, 2015, over eight years after the loan was originated, the negligence, fraud, RESPA and HOEPA claims were untimely. The Court dismissed plaintiff's claims for accounting and breach of the implied covenant of good faith and fair dealing for failure to allege sufficient facts entitling him to such relief.

Lastly, plaintiff's tort claims for breach of fiduciary duty, intentional infliction of emotional distress and slander of title were found barred under the "economic loss" doctrine, which prohibits plaintiffs from recovering in tort economic losses which flow from a contract. The Court noted that plaintiff's tort-based claims are rooted in a contractual relationship between the parties based upon the note and mortgage. Thus, the Court determined that plaintiff is prohibited from seeking recovery through tort actions.

The Court's swift dismissal with prejudice of such boilerplate claims and foreclosure defenses is positive news for lenders and mortgage servicers who often find themselves immersed in protracted and tortured litigation against defaulting mortgagors who assert such claims to prevent or delay foreclosure.

If you have any questions about this Alert:

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