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BANKING ALERT

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New Jersey State Court Holds That Bank Is Not Required To Report Suspected Elder Abuse

As a matter of first impression, a New Jersey trial court held that a victim of elder abuse may not maintain a private cause of action against a bank for failure to report the abuse under N.J.S.A. 17:16T-1, et seq. In Lucca v. Wells Fargo Bank, N.A., --- A.3d ----, 2015 WL 3883893 (N.J. Law Div. Jan. 28, 2015), the plaintiff, an elderly customer of Wells Fargo Bank ("Wells Fargo"), made over twenty-five wire transfers from her account at Wells Fargo to an individual who claimed to be a lawyer. After paying over $330,000 to this individual and discovering that she was a victim of an elaborate scam, the plaintiff filed suit against Wells Fargo and one of its employees. In addition to counts for negligence and breach of contract, the plaintiff also asserted a claim against the defendants under N.J.S.A. 17:16T-1, which the plaintiff claimed imposed a statutory duty upon Wells Fargo and its employees to report the suspected scam to the police or adult protective services.

Following a bench trial, the Court dismissed the claim under N.J.S.A. 17:16T-1. The Court found that the statute provides, and the legislative history confirms, that this provision ensures that financial institutions may release account information of customers to local authorities without fear of liability under any law or regulation concerning financial privacy of bank customers. Based on the express language of the statute and its legislative history, the Court held that "[w]hile the statute encourages disclosure, it does not require disclosure. Rather, the statute gives the institution a safe harbor—it immunizes the institution—if it chooses to release, or not to release, the customer's information." The Court further buttressed its interpretation of the statute with reference to New Jersey's Adult Protective Services Act, which identifies those individuals and agencies, i.e., police, firefighters and paramedics, who must report suspected elder abuse. The Court noted that financial institutions were absent from this list.

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The decision in Lucca provides financial institutions guidance when faced with potential instances of alleged elder abuse involving its customers, resolving any doubt that a financial institution is not required by New Jersey law to file a report or disclose such information.

District Court Dismisses Wrongful Foreclosure Action And Confirms That Mortgagor May Not Challenge Assignment of Mortgage

In a matter we handled for The Provident Bank, Reyes v. Gov't Nat'l Mortgage Assoc., et al., No. 15-cv-00064 (D.N.J. May 21, 2015), pro se plaintiff Elvis Reyes ("Plaintiff"), a residential homeowner and co-mortgagor, brought an action defendants The Provident Bank (the "Bank"), Governmental National Mortgage Association of the United States and Mortgage Electronic Registration Systems, Inc. (collectively, "Defendants") for declaratory and injunctive relief, quiet title, negligence, accounting, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, wrongful foreclosure, violations of the Real Estate Settlement Procedures Act ("RESPA") and the Home Ownership Equity Protection Act ("HOEPA"), fraud in the concealment, intentional infliction of emotional distress and slander of title. According to Plaintiff, on August 26, 2003, he executed and delivered a note to Jersey Mortgage Company. The note was secured by a mortgage on Plaintiff's property. The subject mortgage was allegedly sold to investors on October 30, 2003, and the securitization of the loan was governed by a Pooling Service Agreement ("PSA"). Plaintiff, in bringing his federal court action, argued that the mortgage assigned to the Bank was void and any foreclosure on the property was improper.

The District Court dismissed the action with prejudice. The District Court found that Plaintiff's federal claims under HOEPA and RESPA were time-barred because the action was filed nearly 12 years after the mortgage loan was made in 2003. In addition, the District Court dismissed the state law claims.

Plaintiff's claims for declaratory and injunctive relief on the grounds that Defendants allegedly failed to comply with the terms of the PSA and to prevent a foreclosure and Sheriff's Sale of the property were dismissed as premature. The District Court found that Plaintiff failed to provide any facts that there was a foreclosure pending on the Property and, indeed, the Bank argued that there was no foreclosure action pending. The District Court further held that Plaintiff did not have standing to assert a violation of the PSA or the assignment of mortgage because he was neither a party nor a third-party beneficiary of the agreements. The District Court also dismissed Plaintiff's quiet title claim, holding that Plaintiff's conclusory allegations regarding the invalidity of the loan documents were insufficient to state a quiet title claim because he failed to set forth facts showing the invalidity of the note, mortgage, or assignments, or that he paid the note in full.

Additionally, the claims for negligence and fraud in the concealment were dismissed as time-barred because they related back to the loan's origination in August 2003. The claim for an accounting was dismissed because an accounting is a remedy not a separate cause of action. The breach of the covenant of good faith and fair dealing was dismissed because Plaintiff failed to assert any facts supporting the cause of action. The claims for breach of fiduciary duty, intentional infliction of emotional distress and slander of title were also dismissed. (Plaintiff's motion for reconsideration was denied.)

Appellate Division Finds Inordinate Delay In Arranging Sheriff's Sale Could Subject Foreclosing Bank To Liability For Unpaid Condominium Fees

In Mill Creek Island Berkeley Condominium Association, Inc. v. Nitto, Docket No. A-4544-13T1, 2015 WL 4067422 (N.J. App. Div. July 6, 2015), the New Jersey Appellate Division reversed a trial court order dismissing a condominium association's claim against a homeowner for unpaid condominium fees and remanded the matter for the trial court judge to determine whether Wells Fargo, the foreclosing bank, should be held liable for the fees in light of its apparent delay in arranging a sheriff's sale.

The facts in Mill Creek showed that defendant moved out of her condominium unit and subsequently stopped paying the condominium fees after she determined it was impossible for her to continue living there due to apparent harassment from her neighbor and the Association's purported refusal to address the dispute. Defendant thereafter filed a Chapter 7 bankruptcy petition, identifying the unpaid condominium fees as a debt. The Bankruptcy Court granted her a discharge in September 2012. On February 6, 2013, the Association filed suit seeking to enforce its contractual right to collect the unpaid fees. At trial, defendant asserted, among other things, that her mortgage lender, Wells Fargo, had changed the locks and winterized the unit in March of 2012. Wells Fargo subsequently filed a foreclosure action against defendant, but refused to take a deed-in-lieu of foreclosure. At trial, the Association's witness and attorney both said that they did not know anything about the foreclosure, but were aware of the notices on the door indicating that the unit had been winterized. The trial judge concluded that, because of the foreclosure, Wells Fargo was in control of the property and questioned whether the Association should have sought to recover unpaid fees from the bank instead of defendant. The judge concluded that the Association could not collect the outstanding condominium fees from defendant because she no longer had possession of the unit. The judge noted that neither party disputed that defendant had in fact vacated the property and no longer had access to the condominium unit.

On appeal, the Association successfully argued that the trial judge erroneously relied on case law that has been superseded by subsequent amendments to the United States Bankruptcy Code. The relevant provision of the Code, 11 U.S.C. §523(a), was amended in 2005 to expand the rights of a condominium association to collect fees from a unit owner who has filed for bankruptcy. 11 U.S.C. §523(a) provides that post bankruptcy petition condominium fees are not excluded from discharge when the debtor physically occupies or receives rental income from the unit or "*as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest*" in the property.

The Appellate Division reversed and remanded the matter, finding that the trial judge based his decision on an outdated version of the Bankruptcy Code. The Appellate Division found that while it appears that defendant no longer has a possessory interest in the property, the trial court must determine whether, in light of the foreclosure and Wells Fargo's apparently inordinate delay in accepting a deed or arranging a sheriff's sale, defendant still has a legal or equitable interest in the unit. The Appellate Division also instructed the trial judge to determine whether Wells Fargo should be compelled either to take title to the unit or schedule a prompt sheriff's sale, and whether "it acted so inequitably by refusing to do so that it should be compelled to pay the condominium fees" instead of defendant "as a matter of equity." Foreclosing banks should remain diligent when managing and disposing of the collateral securing their mortgages. The Appellate Division's decision leaves banks who inordinately delay in accepting a deed or arranging a sheriff's sale vulnerable to unforeseen liabilities.

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