SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

May 2015

Mortgagors Cannot Collaterally Challenge Validity Of An Assignment Of Mortgage Outside Of Foreclosure Proceeding

A United States District Court held that mortgagors lack standing to challenge the validity of an assignment of mortgage and attack a foreclosure on their home outside of a foreclosure proceeding. Pillitteri v. First Horizon Home Loans, et al., No. 14-03076, 2015 WL 790633 (D.N.J. Feb. 24, 2015). In Pillitteri, plaintiffs John and Gail Pillitteri ("Plaintiffs") brought an action against defendants First Horizon Home Loans ("First Horizon"), First Tennessee Bank National Association ("First Tennessee Bank"), Mortgage Electronic Services, Inc. ("MERS") and the Bank of New York Mellon Corp. ("BNY Mellon") (collectively, "Defendants"), seeking to quite title on real property located in New Jersey (the "Property").

In 2006, Plaintiffs purchased the Property and obtained a mortgage loan from First Horizon. Plaintiffs later obtained a home equity line of credit from First Horizon, which was also secured by the Property. In 2009, after Plaintiffs stopped making payments on both loans, First Tennessee Bank commenced a foreclosure action against Plaintiffs and allegedly subsequently filed an assignment of mortgage. In 2010, BNY Mellon commenced a foreclosure action against Plaintiffs and allegedly subsequently filed an assignment of mortgage. Thereafter, Plaintiffs filed a Complaint against Defendants, alleging that Defendants "engaged in deceptive practices and [Plaintiffs] have been prevented from selling their home or recovering any of their money, and should be compensated for mental anguish, pain and suffering, and monetary loss caused by Defendants."

Specifically, Plaintiffs alleged that First Horizon engaged in a "reckless underwriting policy" that significantly contributed to the decline in value of the Property. Plaintiffs further alleged that First Horizon assigned the first loan and mortgage on the Property as an asset-backed security with BNY Mellon serving as the trustee. Plaintiffs alleged that the second loan and mortgage on the Property were assigned to First Tennessee Bank. Based on the foregoing, Plaintiffs asserted two counts against Defendants: (1) a challenge to the interest held by BNY Mellon and (2) to quite title to the Property.

In This Issue

Office Locations

New Jersey
210 Park Avenue
2nd Floor
Florham Park NJ
07932
973.302.9700

New York
805 Third Avenue
10th Floor
New York NY
10022
212.763.6464

Essentially, Plaintiffs challenged the assignments of mortgage and ownership of the loans by First Tennessee and BNY Mellon. Defendants moved to dismiss the claims arguing that Plaintiffs lack standing to challenge the validity of the assignments because Plaintiffs are not parties and, alternatively, Plaintiffs failed to state a claim to quiet title.

The District Court, noting that the Third Circuit has not yet addressed whether a plaintiff has standing to challenge the assignment of their mortgage, and that there were conflicting decisions within the District and among other Circuits, the District Court found that Plaintiffs failed to establish that they are an intended third-party beneficiary to the assignments. The District Court, recognizing that New Jersey is a judicial foreclosure state and Plaintiffs could challenge the validity of the assignments, held that "there is no prudential reason for [ ] Plaintiffs to have standing to collaterally attack their foreclosure in a separate judicial proceeding." Finding that Plaintiffs did not have standing, the Court granted Defendants' motion to dismiss Plaintiffs' Complaint.

The District Court additionally found that, even assuming Plaintiffs had standing, Plaintiffs failed to state a claim against Defendants. Although unclear, Plaintiffs' first claim appeared to challenge BNY Mellon's standing to foreclose. Despite their *pro se* status, the District Court found that even under a less stringent pleading standard, Plaintiffs did not plead a recognized cause of action and, in any event, a challenge to the foreclosure is improper outside of the foreclosure proceeding. With respect to the claim to quiet title, the District Court found that Plaintiffs failed to allege how the purported invalid assignments of mortgage could cloud Plaintiffs' title to the Property. Additionally, Plaintiffs did not adequately allege the strength of their own title, which was subject to a foreclosure proceeding. Thus, the District Court found that Plaintiffs failed to state a claim to quiet title.

New Jersey Appellate Division Finds Foreclosing Bank Not Liable In Premises Liability Action For Personal Injury

On April 21, 2015, against the backdrop of one of the highest foreclosure rates in the country, the New Jersey Appellate Division held that a bank did not have a duty to manage and maintain a foreclosed four-unit apartment building in a lawsuit brought by a man who alleged that he injured himself after he slipped and fell on snow and ice that had accumulated on an abutting sidewalk.

In McRoy v. Eskander, No. A-3558-13T3, 2015 WL 1781521 (N.J. Super. Ct. App. Div. Apr. 21, 2015), the foreclosed apartment building was at one time occupied by defendant Eskander, who was one of the mortgagors under a note and mortgage executed to Bank of America ("BOA"). The mortgagors defaulted and, in November 2009, a final judgment of foreclosure was entered in favor of BOA. The mortgagors vacated the property soon thereafter and, when plaintiff fell in February 2011, a Sheriff's Sale had not yet taken place.

The record indicated that during the fourteen months between the foreclosure judgment and plaintiff's alleged injury, the building was unoccupied and BOA did not maintain the premises or the sidewalk except for performing yard work on one occasion in April 2010. BOA did, however, periodically inspect the premises to ensure it was vacant and kept current on all property taxes and water bills.

The trial court entered judgment against Eskander for $70,000 and granted BOA's motion for summary judgment. On appeal, plaintiff argued that BOA was a "mortgagee in possession" and the foreclosed property was commercial in nature and, therefore, BOA had a duty to warn him of or eliminate all hazardous conditions from the sidewalk. New Jersey courts have held that commercial landowners have a duty to maintain public sidewalks that abut their property in reasonably good condition and are liable to pedestrians injured as a result of their negligent failure to do so. In order to be deemed a mortgagee in possession, the mortgagee must take over the management and control

of the mortgaged property from the mortgagor. The duty of a mortgagee in possession is that of a provident owner, which includes managing and preserving the property. The acts of a mortgagee under the circumstances determine whether it is in possession.

The Appellate Division, without determining whether the property was commercial in nature, affirmed summary judgment in favor of BOA, holding that BOA was not a mortgagee in possession. In support of its holding, the appellate court noted that BOA "never supplanted or supplemented Eskander's control or management of the property" and "[b]ut for once instance when BOA's agent did some yard work, BOA never expended any effort to preserve or improve the premises . . . in any respect." The Court further held that although BOA paid the property taxes and water bill and occasionally drove by the property to determine its vacancy, such actions were undertaken to protect its collateral and not to exert any control or management of the property. Therefore, BOA was not a mortgagee in possession and, accordingly, is not liable for plaintiff's injuries.

The Appellate Division's decision in McRoy is in contrast to an earlier opinion this year by the United States District Court of New Jersey in Charlton v. Wells Fargo Bank, No. 11-6572, 2015 WL 686827 (D.N.J. Feb. 18, 2015). There, the District Court held that Wells Fargo had a duty of care to a plaintiff injured inside a foreclosed residential property. The facts in Charlton, unlike those in McRoy, indicated that Wells Fargo's marketing of the property made plaintiff a prospective invitee who had a reasonable expectation that the property was safe for viewing.

Plaxico Burress Indicted Under Recently Amended Bad Check Criminal Statute For Failed Electronic Funds Transfer

Former professional football player Plaxico Burress was indicted last month in New Jersey for failing to pay his state income taxes for the 2013 tax year. Burress, who has been out of the National Football League since 2012, allegedly failed to pay approximately $50,000 in state income taxes owed for the 2013 tax year. Prosecutors allege that Burress attempted to pay the outstanding balance to the Division of Taxation by way of electronic funds transfer ("EFT"), only for that EFT to fail due to insufficient funds. After a series of failed attempts to collect the outstanding balance, prosecutors indicted Burress on two counts: (1) willful failure to pay state tax; and (2) issuing a bad EFT. Both charges are third-degree charges, carrying a maximum sentence of five years in state prison.

Burress' prosecution is the result of a recent change to New Jersey law, N.J.S. 2C:21-5, which was amended by the New Jersey state legislature on September 10, 2014. The law, which made it illegal for a person to issue or pass a check or money order knowing that it would be refused, *i.e.*, attempting to pass a bad check, was amended to include EFTs. Confusion as to whether the law applied to a failed EFT precipitated the change. Burress is believed to be the first person to be prosecuted under the new law for a failed EFT.

As consumers turn away from paper checks and money orders towards electronic payments and EFTs, the amendment to N.J.S. 2C:21-5 may come into play more frequently as a failed EFT, whether it be for insufficient funds or a non-existent account, could potentially trigger prosecution under N.J.S. 2C:21-5.

If you have any questions about this Alert:

Attorney Contact Information

Anthony J. Sylvester
Partner
973.302.9713
asylvester@shermanwells.com

Charles R. Berman
Partner
973.302.9692
cberman@shermanwells.com

Timothy A. Kalas
Partner
973.302.9693
tkalas@shermanwells.com

Craig L. Steinfeld
Counsel
973.302.9697
csteinfeld@shermanwells.com

Caitlin T. Shadek
Associate
973.302.9672
cshadek@shermanwells.com

Anthony C. Valenziano
Associate
973.302.9696
avalenziano@shermanwells.com

Arjun Shah
Associate
973.302.9698
ashah@shermanwells.com