SHERMAN WELLS SYLVESTER & STAMELMAN LLP

BANKING ALERT

Borrower Can Maintain Breach Of Contract Claim Against Mortgage Servicer Based On Alleged Oral Representations Made During Loan Workout Negotiations

In Angers v. Pennymac Loan Services, LLC, Civ. No. 14-4701, 2014 WL 6668001 (D.N.J. Nov. 24, 2014), a financially distressed homeowner sued a mortgage servicer company over an alleged oral loan modification. In September 2007, the homeowner plaintiff executed an interest only, adjustable rate mortgage in the principal amount of $560,000 with Wells Fargo. In September 2011, plaintiff fell upon financial hardship due to her mother's illness and sought to modify her mortgage with defendant, the mortgage servicer company. At the time, plaintiff believed defendant was the mortgage servicer of her mortgage and had the authority to modify the mortgage. Defendant, through its representative, offered plaintiff an oral modification whereby the principal balance of the loan would be reduced to $460,000 and the loan would be restructured from an interest only mortgage to a five-year, adjustable rate mortgage. Plaintiff said she accepted this offer. Sometime thereafter, however, defendant sent plaintiff a written modification offer that contained terms less than favorable to plaintiff and refused to honor the terms of the oral modification. Plaintiff nonetheless accepted this written modification offer, and nearly three years later in July 2014, filed a complaint against defendant seeking declaratory and injunctive relief, as well as damages stemming from defendant's actions with regard to the modification of plaintiff's mortgage. Plaintiff's complaint asserted claims against defendant for, among other things, violation of the federal Home Affordable Modification Program ("HAMP"), violation of the Fair Debt Collection Practices Act ("FDCPA"), violation of the New Jersey Consumer Fraud Act ("NJCFA"), fraud, and a wide-variety of contract-based claims. Defendant moved to dismiss. The Court granted the motion except as to plaintiff's contract claim.

Home Affordable Modification Program (HAMP)

Plaintiff alleged that defendant violated the federal guidelines and regulations under the HAMP. The HAMP is a foreclosure mitigation program handled jointly by the Department of the Treasury and the Department of Housing and Urban Development. The Court dismissed the HAMP claim because HAMP "does not provide a private right of action" and thus, plaintiff lacked standing to assert such a claim.

In This Issue

Borrower Can Maintain Breach Of Contract Claim Against Mortgage Servicer Based on Alleged Oral Representations Made During Loan Workout Negotiations
Pg 1

United States Supreme Court Holds Right of Rescission Under TILA Properly Exercised by Written Notice to Lender
Pg 3

New Jersey Supreme Court Prohibits Trial Court From Having Ex Parte Post-Trial Conversations With Jury
Pg 4

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Fair Debt Collection Practices Act (FDCPA)

Plaintiff alleged that defendant violated the FDCPA by telling plaintiff in September 2011 that it had the authority to make a modification to her loan when it did not have such authority. The Court found the claim to be time-barred under the one-year statute of limitations for FDCPA claims. The Court rejected plaintiff's argument contending that since defendant has an opportunity to correct its noncompliance with the FDCPA each month before plaintiff makes a mortgage payment, the statute of limitations for any FDCPA claim is restarted every month. The Court noted that the Third Circuit has held that the FDCPA claims begin to accrue when the mortgage modification is signed and the debt collector's statement becomes "objectively false." Plaintiff's FDCPA claim, the Court found, arose in September 2011 when defendant represented that it had the authority to make a loan modification. Plaintiff did not file her Complaint until July 2014, well outside the one-year limitations period.

Fraud and New Jersey Consumer Fraud Act (NJCFA)

Mortgage servicers and banks are among those governed by the NJCFA. A debtor seeking to sustain a cause of action under the NJCFA against must allege the following elements: (1) an unlawful practice by defendant; (2) an "ascertainable loss" by the debtor; and (3) a causal nexus between the two.

In federal court, to maintain a NJCFA and/or fraud claim, a plaintiff must meet the stringent pleading standard under the federal rules, which requires the plaintiff to specify the "date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." The Court dismissed both the NJCFA and common law fraud claims, finding that plaintiff failed to allege the circumstances surrounding fraud with the requisite particularity.

Contract-Based Claims

Plaintiff made a wide-variety of contract-based claims against defendant, the simplest of which was breach of contract. Plaintiff based her breach of contract claim on the theory that defendant's representative orally offered her the modification contract, that she agreed to those terms, that a contract was thus formed, and that defendant subsequently breached that contract when it sent her paperwork containing less than favorable terms and refused to honor the oral modification offer.

Defendant sought to dismiss the breach of contract claim on the mistaken grounds that New Jersey's Statute of Frauds, N.J.S.A. 25:-1-13, requires mortgage modifications be in writing. The Statute of Frauds states, in pertinent part:

> An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless: . . . (b) a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

Accordingly, plaintiff can prove there was an oral modification to her mortgage if she is able to do so with "clear and convincing evidence." The Court found that whether plaintiff is able to satisfy this burden is not a matter to be determined on a motion to dismiss.

The Court found that plaintiff alleged the bare minimum of facts needed to establish a breach of contract claim: plaintiff asserts (i) that defendant's representative orally offered her a mortgage modification that was specific enough to constitute a valid contract; (ii) that she accepted this modification; (iii) that defendant breached this agreement by refusing to honor the terms of the modification; and (iv) that she was injured because the oral

modification included terms more favorable to her than either the original terms of her loan or the written modification thereto.

The Court found that plaintiff also stated a claim for breach of the implied covenant of good faith and fair dealing, which every contract in New Jersey contains, but dismissed plaintiff's claims for promissory estoppel, breach of implied contract and quantum merit, finding such claims infeasible.

Banks, mortgage servicers and their employees must remain prudent when orally negotiating loan workouts with borrowers as the Court's decision in Angers enables defaulting borrowers to maintain breach of contract claims based on alleged oral loan modifications that are inconsistent with the terms of the parties' written modification.

United States Supreme Court Holds Right of Rescission Under TILA Properly Exercised by Written Notice to Lender

The United States Supreme Court recently ruled that a borrower exercising the right to rescind a home loan under the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., need only provide written notice to the lender within the three year period, not file suit within that period. See Jesinoski v. Countrywide Home Loans, Inc., et al, 2015 WL 144681 (Jan. 13, 2015).

In Jesinoski, exactly three years after refinancing the mortgage on their home, the borrowers notified the lenders, by way of letter, that the borrowers sought to rescind the loan. The lenders refused to acknowledge the validity of the rescission. The borrowers then filed suit in United States District Court seeking a declaration of rescission and damages. Ruling on the lenders' motion for a judgment on the pleadings, the District Court found that a borrower must file suit within three years of the loan's consummation to trigger the availability of a rescission remedy under TILA and that providing notice, in and of itself, was insufficient. Thus, the District Court ruled that despite the Jesinoski's notification to the lender within the three-year period, rescission was not available because the suit was filed four years and one day after the loan was made. The Eighth Circuit affirmed, citing its own decision in Keiran v. Home Capital, Inc., 720 F.3d 721, 727–728 (8th Cir. 2013), in which it held that "a party seeking to rescind a loan transaction must file suit within three years of consummating the loan."

The Supreme Court unanimously disagreed and reversed the decision. The Supreme Court determined that the plain language of TILA specifies that a borrower need only notify the creditor of his/her intent to rescind the loan and does not require the borrower to file a lawsuit. Accordingly, Section 1635(a) of TILA explains in unequivocal terms how the right to rescind is to be exercised: TILA provides that a borrower "shall have the right to rescind . . . by notifying the creditor . . . of his intention to do so." The Supreme Court found that this language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind and as long as the borrower notifies the lender within three years after the transaction is consummated, the rescission is timely. The Supreme Court further held that TILA does not also require the borrower to file suit within three years and rejected the lenders' argument that when the rescission is disputed written notice is insufficient and the borrower must file suit.

In defending claims brought under TILA, lenders must be aware that the three-year period required by TILA is satisfied when the borrower notifies the lender of his intent to rescind the loan within that period, even if a lawsuit has not yet been filed, regardless of whether the rescission is disputed.

New Jersey Supreme Court Prohibits Trial Court From Having Ex Parte Post-Trial Conversations With Jury

In Davis v. Husain, the New Jersey Supreme Court unanimously held that a post-verdict conversation between a trial judge and a jury outside the presence of counsel was improper and remanded the matter for a determination as to whether a new trial was warranted.

The underlying trial in Davis concerned claims brought by the plaintiff of sexual harassment against her former employer under New Jersey's Law Against Discrimination. At trial, both the former employee and employer, as well as other employees, testified at length regarding the truth of the allegations. Critical for the purposes of the Court's analysis, while raising his right hand to swear the oath, the defendant did not place his left hand directly on the Bible.

The jury returned a verdict in favor of the plaintiff. After a verdict, the trial judge met with the jurors outside the presence of the parties. One of the jurors remarked that she was surprised that the defendant did not place his hand directly on the Bible prior to his testimony, the judge shared this comment with trial counsel. The defendant raised this issue during post-trial motions, only for the trial judge to deny the defendant's request for a mistrial. By a 2-1 majority, the Appellate Division affirmed the trial court's decision not to grant a mistrial, finding that the observation made by the single juror regarding the defendant's failure to place his hand on the Bible did not unequivocally demonstrate bigotry and, nonetheless, the verdict was consistent with the evidence put on at trial. The dissent disagreed, stating that the trial judge's decision to hold *ex parte* conversations with jurors after the verdict was a violation of the Code of Judicial Conduct and, as a result, a presumption of harm against the defendant should apply.

As a result of the dissent, the New Jersey Supreme Court undertook review of the Appellate Division's decision. Initially, the Court stressed the important public interest served by shielding the deliberations of the jury from the public. Concerned that the "[f]reedom of debate might be stifled…if jurors were made to feel that their arguments and ballots were to be freely published to the world," the Court has limited the circumstances where jurors may be questioned by the attorneys or the court based on a "strong showing that a litigant may have been harmed by juror misconduct." Thus, absent an application by one of the parties under R. 1:16-1, neither the attorneys nor the trial judge may converse with jurors post-verdict, irrespective of the trial judge's motives in speaking with the jury after the trial is complete. "Our holding is simply stated. Post-verdict ex parte communication between the trial court and jurors cannot be countenanced. The informality of such encounters, however benign their intended purpose, creates the possibility for the innocent remark or question to spark an attempt to plumb jurors' decision-making processes."

However, the Supreme Court stopped short of ordering a new trial, and remanded the matter to a new trial judge to determine whether a new trial was warranted.

The ruling in Davis stresses that any discussion between the court and jurors, regardless of topic, is wholly improper and not permissible. Notwithstanding the Court's hesitance to apply a presumption of harm to a situation where such conversations occur, parties should be mindful of the ruling in Davis and circumstances that may arise after trial that require applying for relief under R. 1:16-1.

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