

## BANKING ALERT

October 2019

### [New Jersey Appellate Division Affirms Priority of Bank's Mortgage Lien Over Marital Possessory Interest](#)

In *US Nat'l Bank Ass'n v. Ahmed, et al.*, 15-2-2708 (N.J. App. Div. Oct. 3, 2019), the Appellate Division affirmed a trial court decision that a Bank's mortgage lien had priority over a marital possessory interest.

In 2004, defendant Asad Ahmed purchased property solely in his name. Thereafter, he and his then-wife, Muzamil Sheikh, moved into the property as their marital residence. In 2007, Ahmed was able to refinance his mortgage; however, by inadvertence or mistake, Sheikh did not sign the refinance mortgage paperwork. Shortly thereafter, Ahmed conveyed ownership of the property to himself and Sheikh as husband and wife. Ahmed and Sheikh ultimately divorced in 2013.

Sheikh argued that she acquired a "colorable" possessory interest in the property when she first moved into the property and that this "colorable" possessory interest was separate and independent of the marital and fee interest that she obtained. Sheikh further argued that her "colorable" possessory interest was not extinguished by her divorce and was superior to US Bank's mortgage.

The Appellate Division disagreed with Sheikh on several grounds. First, the court found that Sheikh had constructive notice of the preexisting mortgage when she acquired a fee interest in the property and, thus, her fee interest was subject to US Bank's mortgage (a point Sheikh did not contest). Second, while Sheikh did enjoy a marital possessory interest in the property as Ahmed's spouse, such marital interest was subject to US Bank's mortgage since the recordation of the mortgage was prior to Sheikh's acquisition of her marital possessory interest. Third, the court held that Sheikh's fee interest extinguished her marital possessory interest; since a marital possessory interest is a lesser estate to a fee ownership, Sheikh's marital possessory interest was merged into the greater estate of her fee interest. Finally, the court held that, even if her marital possessory interest somehow survived her acquisition of a fee interest, Sheikh's marital possessory interest would have ultimately been extinguished by her divorce. See N.J.S.A. 3b:28-3(c).

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The Appellate Division also found that equitable reasons supported the lender's position. Among other things, although Sheikh did not sign the refinance mortgage, she still received benefits from the refinance, including the discharge of the previous mortgage. The Appellate Division held Sheikh would be unjustly enriched if she were to enjoy these benefits while still maintaining a first priority lien interest on the property.

**[New Jersey Appellate Division Reverses Grant of Summary Judgment and Final Judgment of Foreclosure Due to Competing Notes Submitted to Court](#)**

In *U.S. Bank Nat'l Ass'n v. Dwyer*, defendants Kenneth Dwyer and Catherine Dwyer (together, "Defendants") executed a note and mortgage in favor of Ameriquest Mortgage Company. Subsequently, the mortgage was assigned on five different occasions; the fifth assignment was to plaintiff U.S. Bank. Defendants defaulted on the loan, and U.S. Bank commenced foreclosure proceedings.

U.S. Bank filed a motion for summary judgment, which Defendants opposed by arguing that U.S. Bank lacked standing to bring the foreclosure action, that they were not in default under the terms of the mortgage loan, and that U.S. Bank improperly accelerated the mortgage loan. The trial court granted U.S. Bank's motion for summary judgment, reasoning that U.S. Bank produced the original note and established "a chain of unbroken assignments which were recorded." Further, the trial court explained that, based on a certification that U.S. Bank submitted in connection with its motion for summary judgment, Defendants did not make the payments due on the mortgage. U.S. Bank then filed an unopposed motion for final judgment, which was granted. However, the note submitted in connection with the motion for final judgment was not the same note submitted with U.S. Bank's motion for summary judgment. Defendants moved to vacate, arguing that there were inconsistencies between the two notes. The trial court denied the motion.

Defendants appealed, and the Appellate Division affirmed in part and reversed in part. The Appellate Division explained that possession of the note or an assignment of the mortgage predating the original complaint confers standing to foreclose. Because of "the competing notes submitted by [U.S. Bank] in support of its applications for summary judgment and final judgment," however, the Appellate Division was unable to determine if U.S. Bank properly possessed the note prior to the filing of the foreclosure complaint. Thus, the Appellate Division required U.S. Bank, on remand, to address the inconsistency between the note submitted in support of summary judgment and the note filed with its application for final judgment so that the trial court could make appropriate factual findings in the first instance. Finally, the Appellate Division affirmed the determination that Defendants were in default in making their required payments under the mortgage loan.

## [New Jersey Appellate Division Rejects Challenge to Foreclosure Action Based on Unclean Hands Doctrine](#)

In *The Bank of New York Mellon v. Andrew J. Micali, Jr.*, Docket No. A-0040-18T2 (N.J. App. Div. Oct. 23, 2019), the Appellate Division affirmed a final judgment of foreclosure granted over the borrower's objection that, among other things, the lender lacked standing and could not foreclose due to the doctrine of unclean hands.

In March 2006, defendant-borrower Andrew J. Micali, Jr. ("Borrower"), executed a promissory note and mortgage for the benefit of America's Wholesale Lender ("AWL"), which was secured by property located in Ventnor, New Jersey. Mortgage Electronic Registration Systems ("MERS"), as nominee, for AWL, was named in the mortgage as the mortgagee. Three years later, Borrower defaulted on the loan. In January 2010, MERS assigned the mortgage to the plaintiff, the Bank of New York Mellon, as trustee for the Certificate Holders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-2007 ("Plaintiff"). In May 2014, Plaintiff's loan servicer, Specialized Loan Servicing, LLC ("SLS"), sent a notice of default and intent to foreclose to Borrower. Because of a difference in the originally recorded name of Plaintiff in the assignment recorded in March 2010, Plaintiff recorded a corrected assignment in March 2015. A foreclosure complaint was subsequently filed in June 2015. Borrower answered, admitting that he executed a note to AWL, but challenged Plaintiff's contention that it was the proper party in interest and that Plaintiff's foreclosure action was barred by the unclean hands doctrine.

On a motion for summary judgment, the trial court rejected those arguments, finding that Borrower failed to identify a linkage between the allegedly improper conduct by Plaintiff and the underlying mortgage transaction. The trial court further found that Plaintiff was in possession of the note and, thus, had standing to foreclose. In so doing, the trial court ruled that the certification submitted by Plaintiff's loan servicer, SLS, properly established that Plaintiff was the true party in interest.

On appeal, Borrower pressed those same arguments, which were rejected by the Appellate Division. In particular, the Appellate Division found that Borrower's invocation of the unclean hands doctrine as an affirmative defense lacked the factual specificity required by the Court Rules. Borrower's general, unsubstantiated allegations of improper conduct on the part of attorneys and notaries who prepared and notarized assignment documents, were not sufficient, when those allegations were not tethered to the specific mortgage transaction at issue. The Appellate Division also rejected the arguments challenging Plaintiff's standing to foreclose, namely that the certification offered by SLS was deficient because SLS lacked "personal knowledge," finding that the SLS representative specifically based his certification on his review of business records maintained by SLS. The Appellate Division noted that a certification premised on a review of business records is sufficient to establish that Plaintiff had standing to proceed with a foreclosure action.

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