

BANKING ALERT

January 2020

[New Jersey Appellate Division Affirms Summary Judgment Order Dismissing Dishonored Check Action and Order Awarding Attorneys' Fees](#)

In *Robert J. Triffin v. Nancy R. Mazin, PC*, Docket No. A-1484-18T2 (App. Div. Jan. 23, 2020), the Appellate Division affirmed the dismissal of a complaint on summary judgment seeking reimbursement of a dishonored check. The Appellate Division also upheld frivolous litigation sanctions imposed upon the plaintiff.

Between September 20 and 25, 2017, William G. Milligan, a former employee of an entity called "Vinyl Railing Factory, LLC," presented a check payable to "Vinyl Factory," a non-existent company, for payment to Casino Hotel Employees Check Cashing Services ("CHECCS"). The check, drawn on an account maintained by Nancy R. Mazin, PC ("Mazin"), was subsequently dishonored by the bank because it was fraudulently cashed. Nancy Mazin, on behalf of her firm and the account holder, executed an affidavit of forgery, stating that the check was stolen and not endorsed. Robert Triffin, who the Appellate Division noted is "engaged in the business of buying and pursuing collection on dishonored negotiable instruments," purchased the check from CHECCS and filed suit against Mazin, Milligan, and Vinyl Railing Factory, LLC. Milligan and Vinyl Railing Factory, LLC were ultimately dismissed for lack of service.

After being served, Mazin filed on short notice a motion for summary judgment, which Triffin opposed. In support of the motion, Mazin focused on the fact that Triffin was not a holder in due course because CHECCS paid Milligan on the check without complying with NJSA 17:15A-47, which provides that, where the payee on a check is not a person, the licensee (here CHECCS), cannot pay such a check without having on file "a corporate resolution or other appropriate documentation indicating that the corporation, partnership or other entity has authorized the presentment of a check on its behalf and the federal taxpayer identification number of the corporation." The Court granted the motion and found that, because "Vinyl Factory" was not a real entity, CHECCS did not have appropriate documentation on file and, as such, Triffin was not a holder in due course.

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Three weeks after granting the motion, the Court also granted Mazin's motion for frivolous litigation and attorneys' fees, finding that Triffin failed to investigate the basis of his claims, including whether CHECCS had complied with N.J.S.A. 17:15A-47. Given Triffin's extensive experience in buying negotiable instruments and his legal training, the Court found it appropriate to award attorneys' fees. The Appellate Division affirmed both Orders, finding that the Court's "thoughtful, well-reasoned memoranda of decisions" amply supported each finding.

[District Court Dismisses Claims Relating to Alleged Fraud in Wells Fargo Foreclosure Methods](#)

In *Harrell v. Wells Fargo Bank, N.A.*, No. CV 19-01417 (JMV) (D.N.J. Dec. 27, 2019), the United States District Court for the District of New Jersey dismissed the claims of five *pro se* litigants who alleged fraud in Wells Fargo Bank, N.A.'s ("Wells Fargo") foreclosure methods. In a joint complaint, five plaintiffs alleged fraud and denial of civil rights in connection with five unrelated foreclosure proceedings that were brought by Wells Fargo in New Jersey. The Complaint provided a separate section for each plaintiff's individual "case information." The Complaint further alleged six counts against Wells Fargo: (1) "Violations Stemming from 42 U.S.C. § 1983," (2) "Violations Stemming from RICO – 18 U.S.C. §§ 1961-68," (3) "Violations Stemming from – civil rights violation," (4) "Violations Stemming from Forensic Audit and Contract Law," (5) "Violations Stemming from HUD Requirements," and (6) "Violations Stemming from – Fair Debt Collection Practices Act." Wells Fargo subsequently moved to dismiss the Complaint, and the Court granted Wells Fargo's motion on December 27, 2019.

In granting Wells Fargo's motion to dismiss, the Court held that plaintiff Norma Harrell lacked standing to bring an action. Harrell's father was the property owner and party to a foreclosure action commenced by Wells Fargo. Harrell argued that her father granted her a power of attorney to act on his behalf. The Court ruled that a power of attorney does not transfer an ownership interest in a claim but, rather, confers the authority for an agent to act on behalf of the principal. Accordingly, Harrell is unable to bring a suit in her own name based on the power of attorney granted by her father.

The Court also found that the claims of the remaining four defendants, which were based on separate foreclosures, were improperly joined in the action because they did not arise out of the "same transaction, occurrence, or series of transactions or occurrences." Thus, the Court severed the action into four separate actions on behalf of the remaining plaintiffs, and granted each plaintiff the opportunity to file his or her own amended complaint.

The Court's opinion provided further guidance as to the deficiencies in the claims asserted in the Complaint. Notably, the Court held that, to bring an action under Section 1983, a plaintiff must allege that the violation of a right secured by the Constitution or laws of the United States and must show that the deprivation was committed by an individual acting "under the color of state law." Since plaintiffs failed to allege that Wells Fargo was acting under the color of state law, the Court dismissed counts 1 and 3 of the Complaint. The Court similarly dismissed the remaining four counts of the Complaint as a result of plaintiffs' failure to state a claim under F.R.C.P. 12(b)(6).

Finally, the Court addressed Wells Fargo's argument that plaintiff's Complaint was precluded by the entire controversy doctrine. The Court noted that the doctrine extinguishes a federal-court claim that could have been joined, but was not raised in a prior state court action. In the context of foreclosure matters, the entire controversy doctrine is limited to "germane" claims—claims that arise out of the underlying mortgage transaction. The Court noted that a claim based on the conduct of the mortgage prior to the institution of a foreclosure - - like plaintiffs'

fraud claims here - - are considered to be germane. Thus, the Court cautioned that, although plaintiffs have the opportunity to amend their individual complaints, their claims are likely barred by the entire controversy doctrine.

[New Jersey Appellate Division Affirms Decision Vacating Final Judgment in Tax Foreclosure Action Against Mortgagee Based on Notice of Lis Pendens](#)

In *Ebury Re LLC v. De La Cruz*, Docket No. A-0734-18T2 (App. Div. December 27, 2019), borrowers, Glenis A. De La Cruz and Hector A. De La Cruz, executed a note for a loan in the amount of \$304,000 with Eastern American Mortgage Co. (“Eastern American”). They also executed a mortgage granting Eastern American a security interest in property located in the City of Paterson. Eastern American assigned the mortgage to Deutsche Bank National Trust Company (“Deutsche Bank”); however, the assignment was not recorded because Deutsche Bank either lost or misplaced the document. The borrowers defaulted, and, in 2013, Deutsche Bank filed a foreclosure complaint, stating that it owned the note and the mortgage pursuant to an assignment but that it had misplaced the assignment. Deutsche Bank also filed a notice of *lis pendens*.

Years after it filed the foreclosure complaint, in 2017, Deutsche Bank obtained a new assignment from Eastern American. Meanwhile, and unbeknownst to Deutsche Bank, U.S. Bank purchased Tax Sale Certificate No. 2012-000297 from the City of Paterson in the amount of \$183.20, which was issued because the borrowers failed to pay taxes on the mortgaged property. In 2016, U.S. Bank filed a tax sale foreclosure complaint but did not name Deutsche Bank as a defendant. Following the filing of the tax sale foreclosure complaint, U.S. Bank assigned the certificate to plaintiff Ebury Re LLC (“Ebury Re”). Because the tax sale foreclosure complaint was uncontested, on February 23, 2017, the trial court entered a final judgment by default for Ebury Re.

Deutsche Bank subsequently learned of Ebury Re’s final judgment by default and, on December 14, 2017, filed a motion to vacate the judgment. Ebury Re opposed the motion, claiming Deutsche Bank had no recorded interest in the property during pendency of the tax sale foreclosure action. The trial court granted the motion, allowing Deutsche Bank to file a contesting answer. The trial court reasoned that denying Deutsche Bank the chance to protect its interest would only serve to unjustly enrich Ebury Re.

Ebury Re appealed, and the Appellate Division affirmed. On appeal, Ebury Re argued that the trial court’s decision ran afoul of N.J.S.A. 54:5-89.1, which mandates that a party with an unrecorded interest at the time of the tax sale foreclosure action is bound by the proceedings and any judgment entered. The Appellate Division disagreed, finding that “[v]acating the final default judgment in this matter [was] consistent with the intent and purpose of the Tax Sale Law.” As the panel explained, the Tax Sale Law was intended to give the property owner the chance to redeem the certificate and reclaim his property. The panel determined that the 2013 *lis pendens* gave Ebury Re notice that Deutsche Bank had an interest in the property based on its foreclosure action and that Ebury Re knew of Deutsche Bank’s *lis pendens* through a title search conducted prior to the filing of the tax sale foreclosure action. There was thus sufficient information to identify Deutsche Bank’s interest in the property. Accordingly, the panel concluded that “[u]nder these unique circumstances, it would have been unfair, inequitable, and resulted in a grave injustice if the final default judgment had not been vacated, especially in light of the significant monetary difference between the cost to redeem the certificate and the value of Deutsche Bank’s interest in the Property.”

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