

BANKING ALERT

February 2020

[New Jersey Chancery Division Holds That Recent Change in New Jersey Law Precludes Lender From Requesting Unlimited Number of Adjournments of Sheriff's Sale](#)

In *Goshen Mortgage LLC v. Nancy Herman*, Docket No. F-7201-19 (Ch. Div. Jan. 23, 2020), the trial court denied a lender's motion for an order allowing for an unlimited number of adjournments of a sheriff's sale in a residential foreclosure action.

The foreclosure action was commenced on April 15, 2019, and plaintiff Goshen Mortgage, LLC ("Goshen") obtained final judgment of foreclosure on August 26, 2019. A sheriff's sale was initially scheduled for October 18, 2019. However, the defendant borrower submitted a complete loss mitigation package more than a month prior to the October 18th sale date, which obligated Goshen to review the submission. In the process, Goshen utilized the two adjournments of the sale permitted under the law. After completing its review of the loss mitigation package and approving the defendant borrower's request to conduct a short sale, Goshen sought an order from the trial court permitting Goshen unlimited adjournments to complete the process.

The trial court denied the motion, finding that a change to N.J.S.A. 2A:17-36, which became effective July 28, 2019, limited the number of adjournments of sheriff's sales in residential foreclosure actions to five -- two by the lender, two by the borrower, and one by both the lender and debtor upon agreement, not to exceed thirty days for each adjournment. The revised statute further provides that a court, "for cause," may order further adjournments. In explaining the change to the statute, the trial court noted that the revision was to ensure the orderly and expeditious completion of residential mortgage foreclosure proceedings. Accordingly, the trial court denied the motion, finding that unlimited adjournments would frustrate that stated legislative purpose and, in any event, Goshen had not made a proper showing of "cause." Instead, the trial court granted a single five-week stay.

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[New Jersey Appellate Division Rules That Judgment Lien has Priority Over Prior Improperly Recorded Mortgage](#)

In *Ditech Financial, LLC v. Migliaccio, et al.*, A-0478-18T4 (N.J. App. Div. Feb. 11, 2020), the Appellate Division affirmed the trial court's ruling that a 2006 judgment lien had priority over a 2004 mortgage that was improperly recorded.

In 2001, Carol Migliaccio borrowed \$252,700 from IndyMac Bank, F.S.B. ("IndyMac") to finance the purchase of a residential property in Somerset Township. The loan was secured by a mortgage that was recorded with first-priority position with the Somerset County Clerk's office. In March 2004, Migliaccio again utilized IndyMac to refinance the 2001 mortgage. As part of the refinancing, on April 20, 2004, the 2001 mortgage was discharged, and the discharge was properly recorded in Somerset County. However, on May 4, 2004, IndyMac's title agent erroneously recorded the refinancing mortgage with the Mercer County Clerk's Office. The refinancing mortgage was not properly recorded with the Somerset County Clerk's Office until September 20, 2011.

In April 2006, Thompson Realty Company of Princeton ("Thompson") obtained a judgment against Migliaccio which was properly recorded in Somerset County on April 21, 2006.

Through a series of assignments, plaintiff Ditech Financial, LLC ("Ditech") became the holder of the 2004 refinancing mortgage. In 2016, Ditech filed an action to foreclose upon the refinancing mortgage and named Thompson as a defendant in the foreclosure action. Thompson and Ditech filed cross motions for summary judgment, each seeking priority over the other party's lien. The Court granted Thompson partial summary judgment and found that Thompson's judgment lien was superior to Ditech's mortgage. Ditech appealed the trial court's ruling and argued that the Court failed to apply the equitable doctrines of subrogation, replacement or modification in Ditech's favor.

The Appellate Division rejected Ditech's arguments on appeal and affirmed the priority of Thompson's lien over Ditech's mortgage. Ditech first argued on appeal that the doctrine of equitable subrogation allows a third-party lender to inherit the original lien position of a mortgage it paid off when an intervening lien arises without the third-party lender's knowledge. The Court held that Thompson's lien was not an "intervening lien" as it was docketed two years *after* the 2001 mortgage was discharged and the 2004 refinancing mortgage was disbursed. Moreover, the doctrine of equitable subrogation does not apply when the same lender (here, Ditech) is seeking to succeed to the priority of one of its own loans.

Ditech next argued that, under the principles of replacement and modification, when a mortgage is refinanced by the same lender, the refinancing mortgage may be given the priority of the original mortgage. The Appellate Division ruled, however, that replacement and modification does not apply when a junior lienor (here, Thompson) is protected by the recording act when it acquired an interest in property at the time that the senior mortgage is not of record. Because the 2004 refinancing mortgage was not properly recorded until 2011, there was no valid notice of the refinancing mortgage lien in the Somerset County land records when Thompson recorded its judgment in 2006. Thus, the recording statute prevents Ditech from seeking priority over Thompson's lien.

[New Jersey Chancery Division Grants Bank's Motion To Strike Lease as a "Sham"](#)

In *JPMorgan Chase Bank, N.A. v. Araxie Boyadjian*, Docket No. F-002239-16 (Ch. Div. Feb. 3, 2020), the trial court granted a lender's motion for an order declaring a lease agreement a "sham lease" and permitting an eviction which had been scheduled to take place.

On September 30, 2004, defendants Araxie Boyadjian and Helen Boyadjian (together, "Defendants") executed a promissory note in favor of Washington Mutual Bank, N.A. in the amount of \$2,500,000. As part of that transaction, Defendants executed a mortgage which encumbered real property located in Saddle River, New Jersey. Ultimately, Defendants failed to make their required mortgage payments and a foreclosure action was filed in January 2016. Final judgment of foreclosure was entered on October 31, 2017 and a sheriff's sale took place on March 22, 2019, at which plaintiff JPMorgan Chase Bank, N.A. ("Chase"), as successor by merger to Washington Mutual Bank, N.A., purchased the property.

After taking ownership, Chase discovered that an entity named Boyajian Asset Trust (the "Trust"), as landlord, had entered into a lease with Jack, Linda and David Boyajians (collectively, the "Boyajians") on December 30, 2014. Also unbeknownst to Chase until after the sheriff's sale was the fact that Defendants had transferred their interest in the property to the Trust four weeks after taking title to the property by way of unrecorded deed in the amount of \$4,250,000. The unusual terms of the lease included a six-year term, required no security deposit, imposed no late payment penalties, and required a single payment obligation of \$108,000 over the course of the entire six-year lease term, which came out to a monthly rent of \$1,500. The record developed through motion practice, however, revealed that the \$1,500 monthly rent was well below market as established by a licensed real estate broker and, in fact, there was no indication that the Boyajians had actually paid any rent.

Based on that record, the trial court granted Chase's motion to declare the lease a sham and permit Chase to proceed with an eviction of the Boyajians. In so doing, the trial court found that the lease met all three indicia used by the courts to determine whether a lease was a sham exempt from New Jersey's Anti-Eviction Act. In particular, the lease was (1) between parents and children; (2) for well below market rent; and (3) contained an unusually long term.

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