

BANKING ALERT

December 2022

Appellate Division Refuses to Bar Claims on Letter of Credit Under Entire Controversy Doctrine

In *Amboy Bank v. M.V.N. Homes Inc. v. Khan*, Docket NO. A-0625-21 (App. Div. Dec. 7, 2022), the New Jersey Appellate Division refused to apply the entire controversy doctrine to a claim brought by plaintiff Amboy Bank (the “Bank”) arising from an outstanding amount due and owing on a letter of credit issued on behalf of the defendants.

In 2004, the Bank issued an irrevocable standby letter of credit (the “LOC”) for the benefit of the Township of Plumstead (“Plumstead”) in connection with a loan given to defendant M.V.N. Homes Inc. (“MVN”), and guaranteed by the other defendant, MVN’s principal Murtaza Ali Khan. In connection with the LOC, the defendants agreed to reimburse the Bank, on demand, the amount of any draft drawn on the LOC. Originally secured by a CD in the possession of the Bank, the LOC was subsequently secured by a second mortgage on real property located in Plumstead (the “Property”). In August 2019, the Bank requested that the LOC be released, and advised that the LOC, which was set to expire in March 2020, would not be renewed. On September 2, 2020, Plumstead passed a resolution that confirmed upon its receipt of its \$12,500 from the LOC, it would release Amboy from its obligations under the LOC. Thereafter, on October 6, 2020, Plumstead issued a draw request in the amount of \$12,500 which complied with the terms and conditions of the LOC, and the Bank paid Plumstead \$12,500. Amboy subsequently demanded that the defendants reimburse the Bank the amount of the draw request, which the defendants refused to do.

As a result, the Bank initiated a matter in the Special Civil Part against the defendants in November 2020. The Bank filed a motion for summary judgment in February 2021. In response, the defendants cross-moved for summary judgment, arguing that the matter should be dismissed under the entire controversy doctrine in view of a prior foreclosure action that was initiated by the Bank against MVN (the “Foreclosure Action”), and another action in the Law Division filed against the defendants (the “Law Division Action”). Final judgment in the Foreclosure Action was entered in October 2016, and a judgment was entered in favor of Amboy in February 2017. In March 2021, the trial court denied both motions and commenced a trial the next day. After the one-day bench trial, the trial court dismissed the Complaint with prejudice on the grounds that the entire controversy doctrine barred the Bank’s claims. The Bank timely filed a motion for reconsideration, which was granted

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Office Locations

New Jersey

210 Park Avenue
2nd Floor
Florham Park NJ 07932
973.302.9700

New York

1185 Avenue of the Americas
3rd Floor
New York NY 10036
212.763.6464

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by a different judge. A new trial was held in July 2021, and the evidence and testimony concerning the LOC and the validity of the related documents went unchallenged. Later that month, the trial court entered a judgment in favor of the Bank in the full amount requested, finding, among other things, that the entire controversy doctrine was inapplicable because money judgment claims on a note are non-germane and cannot, without leave of court for good cause shown, be joined in a mortgage foreclosure action. In reviewing the underlying actions, the trial court held that the LOC was not germane to either the Foreclosure Action or the Law Division Action, notwithstanding the fact that the Property, which was security for the LOC, was the subject of the Foreclosure Action. After entry of judgment in favor of the Bank, the defendants moved for reconsideration, which was denied.

On appeal, the Appellate Division affirmed for substantially the reasons set forth in the trial court's decision, noting that its review of the findings and conclusions of a trial court after a bench trial are "limited." And while the Appellate Division's review of the legal conclusions of the trial court are subject to de novo review, the Appellate Division affirmed the trial court's determination that the entire controversy doctrine did not preclude the filing of the action relating to the LOC, noting that, at the time of the filings of the Foreclosure Action and the Law Division Action, there was no outstanding draw amount on the LOC, which was not drawn upon until 2020. Thus, the Appellate Division held, there was no claim that was ripe for adjudication during the pendency of either action. The Appellate Division also agreed that, under R. 4:64-5, the Bank was not obligated to join non-germane claims in the Foreclosure Action.

Appellate Division Affirms Final Judgment of Foreclosure and Dismissal of CFA Counterclaim

In *CitiMortgage, Inc. v. Cianfrone*, Docket No. A-0487-21 (App. Div. Dec. 16, 2022), the New Jersey Appellate Division denied an appeal seeking to overturn a final judgment of foreclosure and reinstate the borrower's consumer fraud counterclaims.

Defendant Debra Cianfrone ("Defendant") inherited residential property located in Teaneck, New Jersey (the "Property") from her late mother in 1998. After inheriting the Property, Defendant married defendant Ian P. Mitchell ("Mitchell") and made him co-owner of the Property. After becoming co-owner, Mitchell executed a promissory note in the amount of \$250,000 in favor of Real Estate Mortgage Network, Inc. ("REM"), and both Defendant and Mitchell delivered a mortgage to MERS, as nominee for REM, to secure REM's loan. The mortgage was duly recorded in the Bergen County Clerk's office. Years later, Defendant and Mitchell divorced and, as part of that process, executed a property settlement agreement which provided, among other things, that Defendant was to retain the Property and be fully responsible for all mortgage, tax, and insurance payments. The Property was subsequently deeded back to Defendant. In 2012, Defendant and Mitchell defaulted on the loan by failing to make monthly payments. REM assigned the mortgage to the plaintiff, CitiMortgage, Inc. ("Plaintiff"), which filed an action to foreclose the mortgage on the Property. After Defendant and Mitchell defaulted, a final judgment of foreclosure was entered in favor of Plaintiff. Defendant moved to vacate the default and dismiss the action due to lack of standing, but that motion was denied by the trial court.

Thereafter, Plaintiff moved to vacate the final judgment of foreclosure and amend the Complaint to add a previously unnamed junior lienholder. That motion was granted, and an Amended Complaint was filed. In response, Defendant filed a contesting answer and counterclaim asserting claims under New Jersey's Consumer Fraud Act ("CFA"). On a motion for summary judgment filed by Plaintiff, the Court struck Defendant's affirmative defenses and dismissed her CFA counterclaims, and again entered a final judgment of foreclosure in favor of Plaintiff.

On appeal, Defendant raised two arguments. First, Defendant claimed that the trial court erred in dismissing the CFA counterclaims and, second, that Plaintiff did not have possession of the note and mortgage. Addressing the CFA claims, the Appellate Division stated that Plaintiff's vague allegations of fraud in connection with the loan modification process, *i.e.*, that she was repeatedly "baited" into submitting loan

applications and required to provide additional documentation and paperwork, were insufficient to meet the heightened pleading standard applicable to fraud claims under R. 4:5-8(a). Additionally, the Appellate Division noted that there was no evidence provided to the trial court demonstrating that a CFA violation had occurred in connection with any loan modifications submitted by Defendant. The Appellate Division further noted that the CFA “affirmative defenses,” like the other affirmative defenses, were asserted in “boilerplate fashion” and did not contain specific supporting facts in the record that constituted a valid affirmative defense to the foreclosure.

As for standing, the Appellate Division rejected Defendant’s contention that the certification submitted by Plaintiff’s loan servicer was not based on sufficient personal knowledge. In particular, the Appellate Division held that the certification laid proper foundation to authenticate the loan documents and that, tellingly, Defendant did not dispute that she executed the loan documents.

Attorney Contact Information

Anthony J. Sylvester
Partner
973.302.9713
asylvester@shermanatlas.com

Craig L. Steinfeld
Partner
973.302.9697
csteinfeld@shermanatlas.com

Anthony C. Valenziano
Counsel
973.302.9696
avalenziano@shermanatlas.com