

BANKING ALERT

April 2023

New Jersey Appellate Division Denies Appeal Seeking to Contest Foreclosure Action As Moot

In *M&T Bank v. H. Scott Gurvey*, Docket No. A-0749-21 (N.J. App. Div. Apr. 20, 2023), the Appellate Division denied as moot an appeal of the underlying decisions made by the trial court in a foreclosure action that was resolved by way of a private sale of the mortgaged property.

In 2002, defendants H. Scott Gurvey and Amy Gurvey (together, “Defendants”) borrowed \$561,600 from Hudson City Savings Bank (“HCSB”), which was secured by a mortgage on Defendants’ Montclair home (the “Property”). In 2015, HCSB was acquired by plaintiff M&T Bank (the “Bank”). Subsequent to the loan, Defendants and the Township of Montclair (the “Township”) were involved in a protracted tax court dispute over the property taxes for the Property. While those proceedings were pending, the Bank notified Defendants in late 2016 that they were in default of their loan obligations as a result of their failure to pay the delinquent property taxes. In response, Defendants argued that no property taxes were due to the Township in view of the ongoing tax court dispute. In January 2017, the Bank advised Defendants that the Bank had paid the outstanding tax liability and had created an escrow for payment of future property taxes, resulting in an upward adjustment of Defendants’ monthly payment going forward. Defendants objected, and refused to make the adjusted payments and, instead, only paid the principal and interest due and owing on the loan. Accordingly, the Bank declared Defendants in default in May 2017, and sent a notice of intention to foreclose in July 2017.

In response, Defendants filed an order to show cause and complaint against the Bank seeking to restrain the Bank from foreclosing and asserting that the Bank was in breach of its contractual obligations to Defendants. While that action was pending, the Bank commenced a foreclosure action in July 2018. After Defendants removed the foreclosure action and the action was remanded, the Bank sought entry of default in September 2020 as Defendants failed to file a contesting answer in the action. The trial court refused to vacate the default on Defendants’ motion. Defendants sought interlocutory appeal of that order, which was granted, and the Appellate Division reversed the trial court’s order. After additional

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motion practice, the trial court entered final judgment of foreclosure in December 2021. After a stay of the sheriff's sale was granted, Defendants sold the Property to a private buyer for an amount that well exceeded the amount due and owing to the Bank under the loan. On the Bank's motion, and over Defendants' objection, the foreclosure action was dismissed with prejudice and the final judgment of foreclosure was vacated. Defendants nonetheless appealed, arguing, among other things, that the trial court had erred in (1) finding the matter was uncontested and (2) refusing to hear Defendants' arguments in opposition to the foreclosure action.

On appeal, the Appellate Division rejected the appeal, finding that the appeal was mooted by the subsequent (and voluntary) sale of the Property that satisfied the loan balance in full. The Appellate Division accepted the Bank's argument that reversal of the entry of final judgment would have no practical effect as, among other things, the Property sold for well over the balance due and owing, approximately \$500,000 more, "negating any claim that the sale was forced."

New Jersey Trial Court Rejects Borrower's Unclean Hands Defense to Foreclosure Action

In *East-West Funding, LLC v. 339 River Road Holdings, LLC., et al.* the Superior Court of New Jersey, Chancery Division granted plaintiff's motion for summary judgment after defendant's default of its loan obligations that were secured by a mortgage.

In August 2018, defendant 339 River Road Holdings, LLC ("Defendant") borrowed \$25,000,000 from plaintiff East-West Funding, LLC ("Plaintiff") as evidenced by a term loan note executed by Defendant (the "Note"). The loan obligation was secured by a mortgage on property owned by Defendant. The first disbursement in the amount of \$10,000,000 was made on August 10, 2019, and a second disbursement in the amount of \$15,000,000 was made on November 1, 2018. The Note provided Defendant the option to request additional funds of up to \$10,000,000.

In August 2019, Defendant exercised the option to request additional funding and received \$5,000,000, with two equal disbursements of \$2,500,000 occurring on August 30, 2019, and September 18, 2019.

Defendant defaulted on its loan obligations after failing to pay real estate taxes due for the second, third, and fourth quarters of 2021. Plaintiff made a protective advance to pay delinquent real estate taxes in the amount of \$800,628.35.

A Loan Term Modification was agreed to by the parties in June 2020 and a subsequent Amended Loan Term Modification was agreed to in January 2021. A Notice of Default and Demand for payment was subsequently sent to Defendant on September 7, 2021.

After Plaintiff initiated suit, Plaintiff moved for summary judgment. In opposition, Defendant claimed that it had entered into an agreement to sell the property which would have allowed Defendant to pay off the loan in full. Defendants alleged that the attorneys representing the buyer met with the Mayor of Edgewater (where the property was situated) and informed him that the property was to be sold for retail space. Defendant claimed that Plaintiff's principal subsequently exerted control over the Mayor and council to consider an amendment to rezone the portion of the Borough of Edgewater where the property was located into a low-density residential area, resulting in the property being divided into multiple lots, and a diminution in its value. As a result, Defendant claimed that the buyer terminated the agreement on November 29, 2022.

Separately, on March 13, 2023, the Court was notified that a third-party had assumed ownership control over Defendant. The third-party advised in its letter to the Court that the acquisition permitted it to assume the position in the action held by Defendant.

The third-party, made a defendant in the action, alleged that the potential diminution in value due to Plaintiff's interference should reduce or offset entirely, the amount due.

The Court rejected these allegations as an attempt to join non-germane claims to the foreclosure action. Defendant never requested leave to file a counterclaim in any papers, but only cited the doctrine of unclean hands as a basis on which the instant motion should be denied, which the court found to be improper.

The Court explained that Defendant's claim of unclean hands would only be germane if it directly related to the original transaction that created the mortgage being foreclosed. The Court found that the doctrine of unclean hands did not serve as a defense to the foreclosure because it did not deal with the initial loan agreement. If Defendant has a viable claim against Plaintiff's principal for any misconduct it should be brought in a separate action in the Law Division.

Further, the Court highlighted that the third-party that assumed control over Defendant and took its place in this action was prohibited from doing so without the consent of Plaintiff as indicated in the loan agreement.

Finally, there was a question as to whether the construction lien on the property held by another defendant required the motion for summary judgment to be denied because the holder of the construction lien claimed it took priority over Plaintiff's lien. Specifically, the holder of the construction lien argued that Plaintiff's mortgage was an advancement of funds for an equity investment rather than a mortgage loan and therefore did not take priority over the construction loan. The court rejected this argument as there was no representation that Plaintiff's loan was anything outside of a standard commercial loan constituting a mortgage on the property and a note reflecting the indebtedness.

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