

BANKING ALERT

July 2023

New Jersey Appellate Division Enforces Online Arbitration Agreement

In *Racioppi v. Airbnb, Inc.*, Docket No. A-0455-22 (N.J. App. Div. Jul. 17, 2023), the New Jersey Appellate Division ruled that an arbitration provision embedded in the defendant's internet terms of service was enforceable.

The plaintiff, Nicholas Racioppi, Jr. ("Plaintiff"), booked a short-term rental in Manhattan through a website maintained by the defendant, Airbnb, Inc. ("Airbnb") in April 2022. Several days later, Plaintiff's booking was cancelled by Airbnb, and Plaintiff received a full refund of his deposit. Thereafter, Plaintiff communicated with Airbnb concerning a replacement property but, Plaintiff allegedly determined that the proposed alternatives were not suitable. As a result, Plaintiff allegedly "expend[ed] thousands of dollars more than the agreed-upon price" to book another rental property.

Plaintiff filed suit in May 2022 against, among others, Airbnb, alleging breach of contract, fraud, and violation of the New Jersey Consumer Fraud Act. In response, Airbnb filed a motion to compel arbitration pursuant to the arbitration agreement contained in Airbnb's terms of service ("TOS"), and Airbnb provided the trial court with screenshots of the various pages that Plaintiff clicked through to complete his booking, including a screen that contained hyperlinks to the TOS, as well as the following disclaimer: "By signing up, I agree to Airbnb's [TOS], Privacy Policy, Guest Refund Policy, and Host Guarantee Terms." Plaintiff claimed he never consented to the TOS, was unaware of the TOS prior to the filing of the suit, and that Airbnb had "concealed" the arbitration provision. The trial court sided with Airbnb, noting that the United States Court of Appeals for the D.C. Circuit had previously upheld the enforceability of Airbnb's TOS and arbitration provisions, and that Plaintiff had reasonable notice of the arbitration provision.

The Appellate Division affirmed the trial court, noting that Plaintiff was provided reasonable notice of the TOS on the first sign-up screen, which stated that "[b]y signing up, [he] agree[ed] to Airbnb's [TOS]..." The Appellate Division also held that the arbitration provisions were "unambiguous and satisfactorily distinguished from the other terms of...[the] TOS."

In This Issue

New Jersey Appellate Division Enforces Online Arbitration Agreement
Pg 1

New Jersey Appellate Division Upholds Final Judgment of Foreclosure Against Borrower's Challenge to Standing
Pg 2

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New Jersey Appellate Division Upholds Final Judgment of Foreclosure Against Borrower's Challenge to Standing

In *The Bank of New York Mellon v. Johnson*, Docket No. A-2915-21 (N.J. App. Div. Jul. 19, 2023), the New Jersey Appellate Division rejected a borrower's challenge to the plaintiff's standing to prosecute a foreclosure action.

The defendant, Shawn Johnson ("Defendant"), executed a promissory note in favor of K. Hovanian American Mortgage, LLC in the amount of \$417,000 in 2005. The loan was secured by a mortgage on Defendant's residence. In 2016, the loan was assigned to the plaintiff, The Bank of New York Mellon ("BNY"). Thereafter, in 2018, Defendant defaulted on the loan by failing to make certain monthly payments. In March 2019, BNY initiated a foreclosure action. After Defendant failed to file an answer, BNY obtained a final judgment of foreclosure in July 2019. In November 2019, Defendant filed a motion to stay the sheriff's sale, which was granted. The sale was adjourned to January 8, 2020. In February 2020, the parties agreed to vacate the January 8th sale and reschedule to sale. Two years later, in April 2022, Defendant moved to vacate the final judgment of foreclosure on the grounds that BNY lacked standing to foreclose because it did not provide proof that it owned both the note and mortgage prior to the foreclosure action. The trial court denied the motion, finding that BNY's certified copy of the mortgage's assignment, dated prior to the foreclosure action, was sufficient to establish standing.

On appeal, Defendant argued that his challenge to standing constituted a meritorious defense to the foreclosure action. The Appellate Division rejected this contention, holding that BNY "clearly had standing through its mortgage assignment," and that the assignment was sufficient in and of itself to establish standing.

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