Sherman Atlas Sylvester & Stamelman

BANKING ALERT

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New York Appellate Division Finds Insufficient Proof of Mailing Precludes Entry of Summary Judgment in Favor of Lender in Foreclosure Action

In *Federal National Mortgage Association v. Adago*, Case No. 2022-05040 (N.Y. App. Div. 1st Dept Sept. 26, 2023), the First Department reversed a trial court's order granting summary judgment on the grounds that the lender failed to provide sufficient proof of mailing of a notice of default to the borrower.

The plaintiff, Federal National Mortgage Association ("Plaintiff"), instituted a mortgage foreclosure action against the defendant-borrower, Joseph Adago ("Adago"), in New York Supreme Court. In support of Plaintiff's motion for summary judgment, Plaintiff, by way of two affidavits from Plaintiff's mortgage servicer, asserted that it sent Adago notice of the mortgage default by way of regular mail. Based on these submissions, the trial court granted the motion, and found that Plaintiff had mailed to Adago the contractually required notice of mortgage default.

On appeal, the First Department reversed the trial court's granting of summary judgment, finding that the two affidavits from Plaintiff's mortgage servicer did not establish that Plaintiff had complied with its notice obligations under the mortgage. Specifically, the First Department found that neither affidavit demonstrated that the mailing had actually been sent as neither affiant had personal knowledge that the notice of default was mailed. The business records appended to the affidavits also failed to substantiate Plaintiff's contention that it had provided proper notice. In particular, the First Department found that Plaintiff's submission of the notice itself was insufficient to establish proof of mailing.

The First Department also held that the RPAPL pre-foreclosure notice was insufficient because it failed to inform Adago that if the default was not cured by the date set forth in the notice, Plaintiff could require immediate payment of the loan in full.

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New Jersey Appellate Division Enforces Arbitration Clause Against Consumer

In *Gunton Corporation v. Anita Diorio*, Docket No. A-3273-21 (N.J. App. Div. Oct. 23, 2023), the New Jersey Appellate Division affirmed a trial court's order compelling arbitration of a dispute between a consumer and a company that installed door products at her house.

In September 2020, defendant Anita Diorio ("Diorio") purchased Pella door products from plaintiff Gunton Corporation ("Gunton") for installation in her home. The contract price for the door products, inclusive of installation, was $36,989. Diorio made a $10,000 down payment, with the remaining $26,489 balance to be repaid over 144 monthly payments and financed by another company, third-party defendant Service Finance Company ("SFC").

Diorio signed two contracts for the transactions, one for the sale and installation and another for the financing agreement. Thereafter, Gunton delivered and installed door products to Diorio. Diorio was dissatisfied with Gunton, claiming that the installation was incomplete. As a result, Diorio stopped her monthly payments due under the financing agreement.

Gunton filed a collections action against Diorio to recover the balance due. In response, Diorio filed numerous counterclaims against Gunton, including, among other claims, breach of contract, negligence, fraud, and violations of the Consumer Fraud Act and the Fair Debt Collections Practices Act. Gunton moved to dismiss on the grounds that the claims must be arbitrated pursuant to the arbitration provision contained in the parties' agreement. In opposition, Diorio claimed that Gunton waived its right to arbitrate as it brought a collection action against Diorio in court.

The trial court granted Gunton's motion to dismiss and compelled arbitration. In addition, the court dismissed the complaint and counterclaim without prejudice, enabling all issues to be litigated in arbitration.

On appeal, the Appellate Division found that the trial court correctly determined that the complaint and counterclaims should be decided at the same time by the same tribunal as the complaint and counterclaims overlap significantly.

The Appellate Division further explained that "an arbitration agreement must be the result of the parties' mutual assent, according to customary principles of state contract law" and "by its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court."

The arbitration agreement here specified that the parties "'AGREE[D] TO ARBITRATE DISPUTES ARISING OUT OF OR RELATING TO YOUR PELLA PRODUCTS (INCLUDES PELLA GOODS AND PELLA SERVICES) AND WAIVE[D] THE RIGHT TO HAVE A COURT OR JURY DECIDE DISPUTES.'" Thus, the Appellate Division determined that the language was sufficiently clear to require an arbitration of the issues presented in the complaint and the counterclaims.

The Appellate Division rejected Diorio's contention that the arbitration provision was contained in the services agreement, and not the financing agreement, noting that the financing and services contracts were not inconsistent.

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