SHERMAN WELLS
SYLVESTER & STAMELMAN LLP

BANKING ALERT

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[Anthony J. Sylvester Named "Lawyer of the Year" in Banking and Finance Law]

Sherman Wells is pleased to announce that Anthony J. Sylvester has been recognized by Best Lawyers™ as the 2021 "Lawyer of the Year" in in the area of Banking and Finance Law for the Newark region.

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[New Jersey Federal Court Refuses to Dismiss Breach of Implied Covenant and Good Faith and Fair Dealing Claim Brought by Borrower Against Lender]

In *Estate of Joyce v. Federal National Mortgage Association*, Civil Action No. 19-12963, 2020 WL 6797069 (D.N.J. Nov. 19, 2020), William and Beverly Joyce purchased real property located in Jersey City using a $504,000 mortgage loan. Federal National Mortgage Association

("Fannie Mae") has been the owner of the Loan since December 2009, and Nationstar Mortgage LLC is the current servicer. Seterus was the prior servicer until its merger with Nationstar in 2019.

As a result of prior litigation regarding the loan, the Joyces, on the one hand, and Fannie Mae and Seterus, on the other, entered into a

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settlement agreement. The settlement provided the terms to be included in a future modification of the loan, including: (i) a modified principal Loan balance of $468,256.83, (ii) a modified interest rate of 4.25%, and (iii) a modified term of forty years, with the first payment due on November 1, 2018 and a balloon payment of $42,500 due on maturity. Following the execution of the settlement agreement, the Joyces signed a loan modification agreement, which generally reflected the terms in the settlement agreement. However, the "Interest Bearing Principal Balance" was listed as $425,756.83 instead of $468,256.83. Fannie Mae and Nationstar claim that the error resulted from erroneously subtracting the $42,500 balloon payment from $468,256.83. According to Fannie Mae and Nationstar, the principal amount in the modification was thus understated and the modification agreement differed from the settlement agreement.

When presented with a modified agreement, the Joyces refused to sign and subsequently brought suit against Fannie Mae and Nationstar for, among other things, breach of contract. Fannie Mae and Nationstar then asserted counterclaims for breach of the settlement agreement and breach of the implied covenant of good faith and fair dealing. The Joyces filed a motion to dismiss the counterclaims.

The district court dismissed Fannie Mae's and Nationstar's breach of contract claim. The breach of contract claim was grounded in a purported breach of the settlement agreement by the Joyces refusing to sign the corrected modification. Because the only damages alleged were the costs incurred in defending the lawsuit initiated by the Joyces, the district court held that Fannie Mae and Nationstar could not allege damages beyond non-recoverable attorneys' fees. However, the covenant of good faith and fair dealing claim was allowed to proceed. The Joyces asserted that such claim was duplicative of and could not co-exist with the claim for breach of contract. But because the district court determined that Fannie Mae and Nationstar could not maintain their breach of contract counterclaim, and because the Joyces failed to assert an alternative basis for dismissal, the district court denied the motion to dismiss with respect to that claim.

New Jersey Appellate Division Affirms Reinstatement of Foreclosure Action After Proof of Service of NOI Provided to Trial Court

In *Wells Fargo Bank, N.A. v. Herzinger, et al.*, Docket No. A-1599-19T1 (N.J. App. Div. December 4, 2020), the New Jersey Appellate Division affirmed the trial court's reinstatement of a foreclosure complaint that the Appellate Division previously ordered to be dismissed for the lender's failure to provide a Notice of Intent to Foreclose (NOI).

In its prior opinion, *Wells Fargo Bank, N.A. v. Herzinger, et al.*, Docket No. A-5141-17 (N.J. App. Div. July 19, 2019), the Appellate Division accepted the trial court's findings that defendants defaulted on their mortgage loan and that Wells Fargo had standing to enforce the mortgage note. However, the Appellate Division also determined that Wells Fargo had not presented sufficient proof that it served an NOI as required by the Fair Foreclosure Act (FFA). On that basis, the Appellate Division reversed the trial court's grant of summary judgment and remanded with instructions to dismiss the foreclosure complaint with prejudice. The trial court subsequently dismissed Wells Fargo's foreclosure action.

After the Appellate Division's July 2019 ruling, defendants filed a motion to compel Wells Fargo to compensate them for the full value of the property which had been sold in a sheriff's sale pending the initial appeal. Wells Fargo filed a cross-motion seeking to reinstate the foreclosure action. For the first time, Wells Fargo presented proof that the NOIs had in fact been served on defendants via certified mail, return receipt requested. Among other things, Wells

Fargo presented certified mail receipts that bore defendant Raymond Herzinger's signature. Faced with this new evidence, at a subsequent hearing, the trial court questioned defendants about their previous representations alleging a lack of notice. The trial court ultimately granted Wells Fargo additional time to submit a certification authenticating the NOIs and signed return receipt cards.

On November 8, 2019, the trial court accepted the proof of service proffered by Wells Fargo. In a seven-page opinion, the trial court granted Wells Fargo's cross-motion to reinstate the complaint and denied defendants' motion to compel compensation. The Court found, among other things, that Wells Fargo presented "unassailable proof" that defendants were served the NOIs and that Mr. Herzinger was "demonstrably mistaken" when he denied receiving the NOI before the trial and appellate courts. The Court then exercised its equitable power and reinstated the foreclosure action.

Defendants appealed the trial court's decision and contended that the trial court erred by (i) not following the Appellate Division's July 19, 2019 ruling, (ii) denying their motion for compensation and (iii) accepting the certified mail return receipts as new evidence. The Appellate Division rejected all of defendants' contentions. The Appellate Division found that the trial court "scrupulously followed" the Appellate Division's July 2019 ruling by dismissing the foreclosure complaint "on the same day" the court issued its prior ruling. The Appellate Division further found that the trial court "acted well within his discretion" in admitting the certification from a Wells Fargo officer who attested to the authenticity of the return receipt cards signed by Mr. Herzinger. The Appellate Division noted that the NOIs and certified mail return receipt cards proved the defendants received proper notice of the foreclosure action in accordance with the FFA.

Finally, the Appellate Division reiterated that its July 2019 decision to dismiss the foreclosure action was without prejudice. The appellate panel noted, however, that the better practice would have been for Wells Fargo to file a motion to reconsider the July 2019 ruling and to expand the record. Nevertheless, the Appellate Division ruled that the trial court did not abuse its discretion in reinstating the foreclosure complaint and concluding that defendants are not entitled to compensation for the full market value of the property.

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