Sherman Atlas Sylvester & Stamelman

BANKING ALERT

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New Jersey Federal Court Denies Motion Seeking to Dismiss FDCPA Claims Arising From Filing of Foreclosure Action

In *Salerno v. Selene Finance LP*, Civil Action No. 2:20-cv-15071 (D.N.J. Mar. 16, 2021), the court denied a motion to dismiss filed by defendants Selene Finance LP ("Selene") and Knuckles, Komosinski & Manfro, LLP ("Knuckles") seeking to dismiss claims brought by plaintiff Nicole Salerno ("Plaintiff") arising under the Fair Debt Collection Practices Act ("FDCPA").

By way of factual background, Plaintiff's husband, Stephen Salerno ("Stephen"), and mother, Mary Salerno ("Mary"), along with Plaintiff, shared a home in Edison, New Jersey (the "Property"). The title of the Property identified Stephen and Mary as owners, not Plaintiff herself. In 2005, Stephen refinanced the mortgage on the Property and although he identified himself as married on his refinance application, the lender did not require Plaintiff to execute any of the loan documents. In 2011, Stephen defaulted on the loan and, as a result, the lender initiated a foreclosure action. Mistakenly believing that Mary was Stephen's spouse, the lender applied for, and was granted, an Order reforming the mortgage to include Mary. Ultimately, the foreclosure action resulted in Stephen entering into a loan modification agreement with Selene, who was the loan servicer for the lender.

After Stephen again defaulted on the loan, the lender filed a second foreclosure, naming Stephen, Mary, and "Mrs. Stephen C. Salerno, spouse of Stephen C. Salerno" as defendants. Knuckles, as counsel to the lender, filed the second foreclosure action. Again believing Mary to be Stephen's spouse, the lender voluntarily dismissed "Mrs. Stephen C. Salerno" as a defendant from the foreclosure action. As a result of this error, Plaintiff was never served with a notice of default, the notice of her rights to cure any default, the application for final judgment, or the notice of the sheriff sale. Plaintiff claimed that she first learned that her home had been sold at a sheriff sale when the sheriff came in January 2020 to evict her. Plaintiff subsequently filed an Order to Show Cause to vacate the final judgment and set aside the sheriff sale, which was granted. The lender filed an amended foreclosure complaint in December 2020 correctly naming Plaintiff as a defendant. Prior to the filing of

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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

the amended complaint, however, Plaintiff filed an action in the United States District Court for the District of New Jersey, alleging that Selene's and Knuckles' actions in foreclosing on Plaintiff's home without properly naming her violated the FDCPA. Both defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that New Jersey's entire controversy doctrine precluded Plaintiff from asserting the FDCPA claims in federal court because such claims must be raised as part of the ongoing foreclosure proceeding. In denying the motion, the court held that the entire controversy doctrine did not apply to the FDCPA claims because the foreclosure proceeding was ongoing and had not been reduced to a final judgment on the merits. In so doing, the court joined several other courts in the District that declined to apply the entire controversy doctrine under such circumstances.

New Jersey Appellate Division Affirms Trial Court's Grant of Summary Judgment in Residential Foreclosure Action

In *Wells Fargo Bank, N.A. v. Cannarozzo*, Docket No. A-4697-18 (N.J. App. Div. Apr. 8, 2021), defendant John Cannarozzo ("Defendant") executed a note and mortgage on his residential property in 2009. The original note was payable to Stearns Lending, Inc. Defendant defaulted on the note and mortgage in March 2006. The mortgage was subsequently assigned three times, ultimately being assigned to plaintiff Wells Fargo Bank, N.A. ("Wells Fargo"). On June 12, 2018, Wells Fargo filed a foreclosure action against Defendant and filed for summary judgment. Defendant opposed and filed a cross-motion for summary judgment, arguing that Wells Fargo had no standing to bring a foreclosure action because it lost the mortgage note, the Notice of Intent to Foreclose (NOI) was deficient and Wells Fargo's affidavits were hearsay.

In connection with its summary judgment motion, Wells Fargo submitted an affidavit, which attested to three mortgage assignments, the last from Nationstar Mortgage LLC to Wells Fargo, recorded on December 27, 2017. Wells Fargo also submitted a Lost Note Affidavit, which certified the note was lost and that Wells Fargo agreed to indemnify Defendant against any loss resulting from a third-party presenting the note and validly enforcing same. Additionally, a NOI was served on Defendant via certified mail. The trial court granted summary judgment for Wells Fargo and denied Defendant's cross-motion. Defendant appealed.

On appeal, Defendant argued that Wells Fargo lacked standing due to the lost note. The Appellate Division found that the Lost Note Affidavit was sufficient. The Appellate Division also found Wells Fargo adequately demonstrated, by way of an affidavit, an assignment of the mortgage prior to filing the foreclosure complaint. Additionally, the Appellate Division found neither of the affidavits to be hearsay as they were both made by vice-presidents of Wells Fargo who attested to the basis of their respective knowledge and familiarity with Wells Fargo's business records. Finally, the Appellate Division found that the NOI was properly served via certified mail. The Appellate Division affirmed the trial court's decision.

New York Appellate Division Refuses to Enjoin Article 9 Foreclosure Sale of Equity Interests of Borrower

In *Shelbourne BRF LLC v. SR 677 Bway LLC*, 192 A.D.3d 444 (1st Dep't 2021), New York's Appellate Division created a significant barrier for borrowers seeking to enjoin a foreclosure sale of equity interests under Article 9 of the UCC. In *Shelbourne*, the trial court enjoined the sale and required that the borrowers post a bond. In a short opinion, the Appellate Division discussed the propriety of the injunction, finding "that plaintiffs failed to demonstrate the requisite irreparable harm." To the Court, "[n]otwithstanding the existence of the COVID-19 pandemic, the feared loss of an investment can be compensated in money damages." The

Court looked to its prior decision in *Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC*, 80 A.D.3d 483, 484 (1st Dep't 2011), in which it held that because the borrower's interest in real estate is commercial, any loss of its investment can be compensated by money damages.

The Court in *Shelbourne* thus refused to lessen the burden that borrowers face seeking to enjoin a mezzanine loan foreclosure sale because of the COVID-19 pandemic.

Attorney Contact Information

Anthony J. Sylvester
Partner
973.302.9713
asylvester@shermanatlas.com

Craig L. Steinfeld
Partner
973.302.9697
csteinfeld@shermanatlas.com

Caitlin T. Shadek
Counsel
973.302.9672
cshadek@shermanatlas.com

Anthony C. Valenziano
Counsel
973.302.9696
avalenziano@shermanatlas.com

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