

BANKING ALERT

March 2018

[New Jersey Appellate Division Upholds Priority of Mortgage and Loan Modifications Over Discharged Lis Pendens](#)

In *Investors Bank v. Visions Development Group, LLC*, A-3588-15T1 (N.J. App. Div. Mar. 9, 2018), the New Jersey Appellate Division affirmed a trial court's determination that the plaintiff's prior recorded mortgage and loan modifications had priority over an alleged equitable lien maintained by a broker who had an agreement in place with the property owner.

The case arose from a mortgage loan given by the plaintiff, Investors Bank ("Investors"), to Visions Development Group, LLC ("Visions"), secured by commercial property located in Manalapan, New Jersey (the "Property"). The mortgage and an assignment of rents were promptly recorded on November 3, 2006. Shortly before the mortgage and assignment of rents were recorded, Visions retained a broker, defendant Eric W. Weiss, to secure a commercial tenant for the Property. In return, the agreement between Weiss and Visions provided that Weiss would be paid a commission. The agreement, however, was never recorded. Investors and Visions subsequently entered into a series of loan modifications, two of which were recorded on April 4 and July 11, 2008, respectively. Weiss filed a notice of *lis pendens* against the Property in connection with an action filed by Visions against Weiss. The *lis pendens*, although recorded on October 21, 2008, was discharged by the trial court in December 2008.

Investors entered into another loan modification with Visions that was recorded on August 26, 2009. On April 16, 2010, Weiss filed a second notice of *lis pendens*, which was filed and recorded in connection with Weiss's claim for a commission under the agreement. In that regard, Weiss obtained two judgment liens against the Property on January 7, 2011. These judgment liens were docketed on March 1 and April 13, 2011.

After Visions defaulted on its obligations to Investors, Investors filed a foreclosure action against Visions on March 30, 2011. The foreclosure suit subsequently added Weiss. Weiss ultimately sought to prevent a foreclosure sale of the Property by way of Order to Show Cause. His application was denied, permitting Investors to proceed with the sale of the Property, subject to Investors depositing \$100,000 in escrow as

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security in the event that Weiss prevailed on his equitable lien claim. After some limited discovery, Investors filed and prevailed on a motion for summary judgment, finding that Weiss did not have any priority over Investors' mortgage and subsequent loan modifications.

On appeal, the Appellate Division rejected Weiss's contention that the 2006 agreement between Weiss and Visions created an equitable lien that trumped Investors' mortgage, noting that the agreement did not pledge the property as security for an obligation, nor did it require that Visions pay the commissions directly out of the rental income received by Visions. Moreover, the 2006 agreement was never recorded as a lien on the Property. The Appellate Division also rejected Weiss's argument that his notices of *lis pendens* gave him priority over Investors' mortgage and loan modifications. With respect to the first notice of *lis pendens*, the Appellate Division noted that it was discharged, and provided no basis to claim priority over Investors because there was no indication that Investors had any notice of that *lis pendens* filing. As to the second *lis pendens*, the Appellate Division held that because it was recorded after the third loan modification (recorded July 29, 2009), Investors still maintained priority over Weiss as to the Property.

New Jersey Appellate Division Affirms Grant of Summary Judgment and Award of Fees of "Frivolous" Consumer Fraud Act Claim

In *Williams v. Hudson City Savings Bank*, No. A-2276-15 (N.J. App. Div. Jan. 2, 2018), plaintiff William Williams ("Plaintiff") executed a note and mortgage in favor of defendant Hudson City Savings Bank ("Hudson City") to purchase property in New Jersey. Plaintiff met with a representative of defendant Weichert Financial Services who completed a residential loan application in Plaintiff's presence, which stated that the information provided was "true and correct" and any "intentional or negligent misrepresentation" may result in civil or criminal liability." Based on representations made in the application, Hudson City approved Plaintiff's loan and later granted a loan modification. In October 2011, Plaintiff defaulted on the loan. In June 2012, Hudson City initiated a foreclosure proceeding and Plaintiff's answer and counterclaim were ultimately stricken and the foreclosure proceeded to final judgment. The parties ultimately negotiated a Consent Final Judgment. On September 11, 2013, Plaintiff filed a complaint in the Superior Court of New Jersey, Law Division alleging Hudson City engaged in predatory lending in violation of New Jersey's Consumer Fraud Act ("CFA"), and common law fraud. On December 10, 2014, Hudson City served Plaintiff's counsel with a frivolous pleadings notice pursuant to Rule 1:4-8; however, Plaintiff and his counsel continued to pursue the action.

Hudson City filed a motion for summary judgment, which the trial court granted on October 9, 2015. The motion court found that Plaintiff failed to provide evidence to support his claim of predatory lending under the CFA. The Court found that Plaintiff signed the loan documents, thereby attesting to the accuracy of the information that led Hudson City to issue the loan and that the terms of the note and mortgage were not commercially unreasonable (the original interest rate was 6.125 percent and later was reduced to 5.375 percent). Additionally, the motion court found that Plaintiff's common law fraud claims were unsupported by the record because Plaintiff failed to establish Hudson City had a duty to verify Plaintiff's income and Hudson City engaged in an extensive underwriting process before approving Plaintiff's loan.

Hudson City then filed a motion for sanctions under Rule 1:4-8. The motion court granted Hudson City's application, awarding \$27,306.58 in attorneys' fees. The motion court found that Plaintiff's complaint was frivolous and lacked

any factual or legal basis, and that the unpublished cases cited by counsel were clearly distinguishable and inapplicable.

Plaintiff appealed and the Appellate Division affirmed. The Appellate Division remanded solely on the issue of determining the responsibility of payment between Plaintiff and his counsel. The Appellate Division held that “to the extent the court determines that the fee sanction should apply to [P]laintiff, and not just [P]laintiff’s counsel, the court must specifically allocate the fee sanction between [P]laintiff and his counsel.”

Federal District Court Dismisses Complaint Seeking to Prevent Sheriff’s Sale

In *Kajla v. U.S. Bank, N.A.* (D.N.J. Mar. 1, 2008), plaintiff Ajay Kajla filed a complaint in the United States District Court for the District of New Jersey and a motion for a temporary restraining order preventing the sheriff’s sale of his home. Plaintiff’s complaint in federal court followed a final judgment of foreclosure entered in the Superior Court of New Jersey -- a judgment that the Appellate Division affirmed on direct appeal. The complaint alleged that defendants U.S. Bank, Wells Fargo, and Phelan Hallinan Diamond & Jones PC engaged in a fraudulent scheme to deprive him of his home by unlawfully assigning his mortgage and foreclosing without standing. The Court denied Plaintiff’s request for emergent relief. Defendants then filed a motion to dismiss, arguing that Plaintiff’s claims were barred by the *Rooker-Feldman* doctrine, New Jersey’s entire controversy doctrine, and *res judicata* or collateral estoppel and, alternatively, failed to state a claim upon which relief could be granted.

Starting with the *Rooker-Feldman* doctrine, the Court explained that, under that doctrine, federal courts lack jurisdiction to conduct appellate-type review of state court proceeding. *Rooker-Feldman* stands as a bar to a “plaintiff’s federal claims seeking redress of a state court foreclosure judgment” and thus any attempt to overturn or negate a state-court judgment of foreclosure in federal court must fail. Because Plaintiff’s complaint complained of injury caused by the state-court judgment and essentially asked a federal court to review and reject the state-court judgment, the doctrine applied.

However, the Court held that the *Rooker-Feldman* doctrine did not bar all of Plaintiff’s claims. One count of Plaintiff’s complaint alleged fraud resulting from the Defendants’ failure to respond to certain of Plaintiff’s inquiries under the Real Estate Settlement Procedures Act (“RESPA”). That claim alleged harm after the state-court judgment and did not implicate the validity of the mortgage, defendants’ standing to foreclose, or the state-court judgment. Thus, the Court held that, to the extent that this count of the complaint “alleges injuries sustained exclusively from Defendants’ conduct separate and apart from the state court’s judgment in the foreclosure action,” the Court retained jurisdiction.

Nonetheless, the Court dismissed the RESPA claim. Although RESPA requires a mortgage loan servicer who receives certain communications to conduct a reasonable investigation to satisfy the inquiry and respond to the request in a certain timeframe, “a prerequisite for RESPA to apply is an existing mortgage.” Because under New Jersey law, a loan is extinguished on entry of a final judgment of foreclosure, and because the communications that Plaintiff claimed required a response were sent after the final judgment, there was no valid mortgage at the time of the communications and the complaint did not state a claim upon which relief could be granted. The Court, accordingly, granted Defendant’s motion to dismiss in full.

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