

[New Jersey Appellate Division Overturns Grant of Summary Judgment in Foreclosure Action](#)

In *Onewest Bank, F.S.B. v. Musallam*, 2016 WL 5795819 (N.J. App. Div. Oct. 5, 2016), the New Jersey Appellate Division reversed an order of summary judgment in favor of the lender in a foreclosure action, finding that the borrower's counterclaim under the New Jersey Consumer Fraud Act ("CFA") could not be dismissed at the summary judgment stage.

The plaintiff-lender, Onewest Bank, F.S.B. ("Onewest"), filed suit to foreclose on a purchase money mortgage securing a note executed by the borrowers, Abdelnasser Musallam and Islam Musallam. In response, the Musallams asserted counterclaims against Onewest, including a claim under the CFA based on allegations that Onewest engaged in predatory lending practices. In particular, the Musallams alleged that Onewest misrepresented their yearly income without their knowledge. On Onewest's motion for summary judgment, the trial court dismissed the CFA counterclaim and entered judgment in favor of Onewest.

The Appellate Division reversed the decision, finding that the evidentiary support for the Musallams' counterclaim raised an issue of fact regarding whether Onewest falsified the Musallams' loan application without their knowledge. Such conduct by the lender, the Appellate Division found, would be within the broad proscription of "unconscionable business practices" made unlawful by the CFA.

[Federal Court Denies Bank's Motion to Dismiss Claims Based on TPP With Plaintiff](#)

In another decision outlining both the wide reach of the CFA, and the implications of the Home Affordable Modification Program, a federal judge in *Hawkins v. Seterus, Inc.*, 2016 WL 5477995 (D.N.J. Sept. 27, 2016), denied a lender's motion to dismiss a borrower's counterclaims asserting claims for breach of contract and violation of the CFA.

In *Hawkins*, the plaintiff-borrower, Gregory Hawkins, alleged that he obtained a fixed-rate \$334,500 loan secured by a mortgage on his home. Ultimately, Mr. Hawkins defaulted in his obligations under the note and mortgage and a foreclosure action was initiated, and a final judgment by default was entered in December 2012. Thereafter, in September 2014,

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Mr. Hawkins applied to his loan servicer, Ocwen, for a modification of his mortgage loan under the Home Affordable Modification Program (“HAMP”). As required by HAMP, Ocwen advised Mr. Hawkins that he would need to participate in a Trial Period Plan (“TPP”), requiring him to make three timely monthly payments through January 2015. After this correspondence, Ocwen again contacted Mr. Hawkins to advise him that liens against him had appeared on a judgment search, which Mr. Hawkins claimed were not against him. Mr. Hawkins subsequently provided Ocwen an Affidavit of Title to this effect. Ocwen advised Mr. Hawkins to continue making TPP payments until the final modification was approved. Despite the Affidavit of Title, however, Ocwen again raised the lien issue, requiring Mr. Hawkins to provide more documentation demonstrating that the liens were satisfied. As alleged, Mr. Hawkins provided all documentation and information requested of him, only for Ocwen to advise him in writing that the modification had been denied. Ocwen then wrote Mr. Hawkins again, stating that the HAMP request was actually still under review and that the loan was being transferred from Ocwen to Seterus, Inc. Once Seterus took over the loan, Seterus offered Mr. Hawkins a TPP with less favorable terms and subsequently sent him a notice of intent to foreclose.

First, the Court found that Mr. Hawkins’ allegations asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing and violation of the CFA were sufficient at the pleading stage to survive a motion to dismiss. In particular, the Court found that New Jersey law supports Mr. Hawkins’ position that a TPP letter can give rise to a binding agreement. Thus, the allegations raised by Mr. Hawkins required resolution of whether the TPP letter was a binding offer.

Secondly, the Court found that a borrower can maintain a cognizable CFA claim against a lender for “drawing” a borrower into a TPP while improperly withholding approval of a final loan modification.

Third Circuit Finds Twenty-Year Statute of Limitation Applies to Foreclosure Action

In *In re: Gordon Allen Washington*, --- Fed. Appx. ----, 2016 WL 5827439 (3d Cir. Sept. 30, 2016), the Third Circuit determined that the provision of the New Jersey statute providing for a twenty-year statute of limitations for foreclosure actions applied to a foreclosure suit asserted after the lender accelerated the maturity date on the loan after the borrower’s default.

The debtor, Gordon Allen Washington, entered into a loan agreement with the Bank of New York Mellon (the “Bank”) secured by a mortgage on his home with a maturity date on the note of March 1, 2037. Shortly after executing the loan documents, Mr. Washington defaulted, and the Bank filed a foreclosure complaint in December 2007 claiming the full amount of the indebtedness was due and owing, something Mr. Washington claimed was evidence that the Bank had accelerated the entire amount due and owing under the loan. After the foreclosure action was dismissed for failure to prosecute, Mr. Washington filed for bankruptcy and sought to have the Bank’s foreclosure claim extinguished because it had run out of time to foreclose. The Bankruptcy Court agreed with Mr. Washington that the six-year statute of limitations applied, only for the District Court to find on approval that the twenty-year statute of limitations applied.

In affirming the District Court, the Third Circuit found that subsection (a) of N.J.S.A. 2A:50-56.1, providing for a six-year statute of limitation for bringing a foreclosure action after the maturity date, did not apply in the case because such a reading of the statute would necessarily render subsection (c), which provides for a twenty-year statute of limitations after an event of default, surplusage. Specifically, the Third Circuit found that the act of a filing foreclosure

action and declaring the full amount due and owing under the loan documents did not pull “subsection ‘c’ off the table” because every action under that statute involves foreclosures.

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