

## BANKING ALERT

June 2019

### [New Jersey Federal Court Dismisses UCC and Common Law Claims Against Depository Bank](#)

In *Viola Moore v. JPMorgan Chase Bank, N.A.*, Civil Action No. 18-13727 (D.N.J. May 29, 2019), a federal district court dismissed a complaint filed against a bank alleged to have wrongfully cashed two checks containing forged endorsements.

The plaintiff, Viola Moore (“Plaintiff”), owned a rental property in Bayonne (the “Property”). In July 2015, the Property was partially destroyed in a fire. Plaintiff submitted an insurance claim to her insurer and received \$295,000 in insurance proceeds for the damage. Those proceeds were subsequently deposited with the mortgagee for the Property, Bank of America, N.A. (“BOA”), which held the proceeds in an escrow account at BOA as required by the loan documents. To rebuild the Property, Plaintiff retained Universal Sales Consultants, Inc. (“Universal Sales”). Plaintiff retained Universal Sales to, among other things, obtain architectural plans and secure building permits. Several months later, Plaintiff learned that Universal Sales had made no progress on either front, despite having obtained two checks from BOA in the total amount of \$177,000. Plaintiff alleged that she did not authorize the withdrawals of those funds from the escrow account and was only made aware of the withdrawals after she terminated her arrangement with Universal Sales. The two checks were ultimately deposited into an account maintained at JPMorgan Chase Bank, N.A. (“Chase”). After Plaintiff filed a fraud claim with BOA, BOA in turn contacted Chase, which refunded BOA the full amount of the checks.

Plaintiff nevertheless filed suit against both BOA and Chase, asserting claims under the UCC for conversion, breach of presentment warranty, and improper payment. Plaintiff also asserted claims of fraud, negligence, and negligent misrepresentation. Both banks filed motions to dismiss the Complaint. In granting Chase’s motion to dismiss in full, the District Court found that Chase’s return of the proceeds to BOA extinguished any claim for conversion under the UCC. The District Court further found that Plaintiff, as a payee, had no standing to assert a claim against Chase for a breach of presentment warranty. The District Court also dismissed all common law claims against Chase on the grounds that New Jersey law

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precludes a plaintiff from asserting common law claims against a bank where the allegations arise from the negotiation and deposit of checks, which is governed by the UCC.

### **[New Jersey Appellate Division Refuses to Dismiss Foreclosure Complaint That Did Not Contain Allegations Concerning Assignments of Mortgage](#)**

In *U.S. Bank Trust, N.A. v. Mitsel*, No. A-2975-17T3, 2019 WL 2522208 (App. Div. June 19, 2019), Jennifer Mitsel defaulted under a mortgage loan. The original lender, Quicken Loans, Inc., filed a foreclosure action. The mortgage was subsequently assigned to the United States Department of Housing and Urban Development and then to U.S. Bank. Pursuant to Rule 4:34-3, U.S. Bank was substituted as the plaintiff in the foreclosure action. Mitsel did not answer the foreclosure complaint, and the trial court entered default against her. Mitsel later moved to vacate the default, to dismiss the complaint, and for summary judgment, arguing that U.S. Bank lacked standing to foreclose, that she was not served with a copy of the motion to substitute, and that the foreclosure complaint did not properly recite the assignments of the mortgage and the chain of title. The trial court granted Mitsel's motion to vacate but denied her motion to dismiss and for summary judgment, explaining that U.S. Bank had standing to foreclose as it held the note and that U.S. Bank was permitted to continue prosecuting the action as a substituted plaintiff. The trial court then granted U.S. Bank's motion for summary judgment.

Mitsel appealed, raising the same jurisdictional arguments. The Appellate Division affirmed for substantially the same reasons at the trial court. Recognizing that possession of the note or an assignment of the mortgage predating the original complaint conferred standing, the Appellate Division explained that U.S. Bank had the right to foreclose the mortgage. The Court also rejected Mitsel's argument that U.S. Bank's failure to amend the complaint to recite assignments in accordance with Rule 4:64-10(b) provides a valid defense to the foreclosure. Foreclosure, the Court explained, was a discretionary remedy. U.S. Bank was authorized to prosecute the complaint under Rule 4:34-3 and Mitsel possessed all the information regarding the assignments that she maintains U.S. Bank fatally omitted from the complaint; thus, there was no prejudice to Mitsel as a result of U.S. Bank's failure to strictly comply with Rule 4:64-1(b)(10).

### **[New Jersey Appellate Division Declines to Set Aside Sheriff's Sale and Permit Redemption of Foreclosed Property](#)**

In *Bank of America, N.A. v. Smith*, Docket No. A0912-18T1 (N.J. App. Div. June 19, 2019), the New Jersey Appellate Division affirmed the trial court's order denying the motion filed by defendant Wadell Smith ("Defendant") to set aside a sheriff's sale and allow redemption on a foreclosed property.

In December 2008, Defendant executed a note to Allied Mortgage Group ("Allied") for \$403,987 and, on the same day, executed a mortgage to Mortgage Electronic Registration Systems, Inc., as nominee for Allied. Plaintiff Bank of America ("Plaintiff") was the successor assignee to the mortgage. Defendant defaulted in August 2010 and Plaintiff filed a foreclosure complaint in March 2016. Plaintiff's motion for summary judgment was granted in December 2016 and an application for final judgment was entered in January 2018. In April 2018, Defendant filed a motion to vacate final judgment, which was denied. In June 2018, Defendant filed a motion to dismiss, which was also denied. A sheriff's sale was held in June 2018 and Plaintiff purchased the Property. In July 2018, Defendant filed a motion to set aside the sheriff's sale, which was denied. Defendant appealed.

Defendant argued on appeal that Plaintiff failed to comply with amended foreclosure Rules 4:64-1 and 4:46-2 by filing certifications rather than affidavits as sufficient proof of the amount due and outstanding on the note. The Appellate Division found no circumstances to justify an order under Rule 4:50-1 vacating the judgment of foreclosure. The Appellate Division noted that the amendments to the rules governing foreclosures require a foreclosure plaintiff to execute a Certification of Diligent Inquiry confirming that the attorney has communicated with an employee of the plaintiff or its loan servicer and confirmed the accuracy of the note and other foreclosure documents. Thus, despite Defendant's arguments that an affidavit is necessary, the rule permits proof of amount due to be submitted by certification. Accordingly, the Appellate Division affirmed the trial court's order.

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