

## BANKING ALERT

July 2019

### [New Jersey Appellate Division Rejects Homeowner's Arguments That Assignee Did Not Have Standing to Foreclose](#)

In *Ditech Financial, LLC v. Elena Evglevskaya*, Docket No. A-2633-17T4 (N.J. App. Div. Jul. 16, 2019), the New Jersey Appellate Division affirmed a judgment of foreclosure over the objection of a homeowner who claimed the assignee of a mortgage did not have standing to prosecute a foreclosure action.

In December 2004, the defendant executed a mortgage in favor of Coastal Capital Corp d/b/a the Mortgage Shop ("Coastal Capital") on his home in the amount of \$330,000. Eight years later, Coastal Capital assigned the mortgage to Bank of America, N.A. ("BOA"), which subsequently assigned the mortgage in June 2013 to Green Tree Servicing ("Green Tree"). In January 2015, Green Tree instituted a foreclosure action due to a payment default on the loan. Upon the completion of discovery, Green Tree filed a motion for summary judgment. The defendant cross-moved for summary judgment and moved to dismiss the Complaint. In February 2017, the Court agreed with Green Tree, struck the answer of the defendant, and entered judgment in Green Tree's favor. On November 22, 2017, a notice of motion for entry of judgment of foreclosure was filed and entered on January 30, 2018. During the pendency of the foreclosure action, the defendant filed a separate action against BOA and Fannie Mae, which was dismissed in June 2016.

On appeal, the defendant contended that Green Tree lacked standing to foreclose and that the mortgage was illegally assigned. On appeal, the Appellate Division noted that while the record indicated that, prior to the 2004 mortgage the defendant was the victim of a scheme that resulted in the defendant being named on a fraudulently obtained mortgage, that mortgage was discharged in 2005, years prior to the mortgage foreclosure action and had nothing to do with the 2004 mortgage that served as the basis for the mortgage foreclosure action. The Appellate Division also held that Green Tree had adequately proven standing by way of unchallenged certifications that demonstrated that it possessed standing to foreclose through properly executed assignments.

### [In This Issue](#)

New Jersey Appellate Division Rejects Homeowner's Arguments That Assignee Did Not Have Standing to Foreclose

**Pg 1**

New Jersey Appellate Division Finds Subsequent Mortgagee That Recorded First is Not Entitled to Priority in Foreclosure Action

**Pg 2**

New Jersey Appellate Division Affirms Summary Judgment in Favor of Bank in Residential Foreclosure Action

**Pg 2**

### [Office Locations](#)

#### [New Jersey](#)

210 Park Avenue  
2nd Floor  
Florham Park NJ 07932  
973.302.9700

#### [New York](#)

1185 Avenue of the Americas  
3<sup>rd</sup> Floor  
New York NY 10036  
212.763.6464

Follow Sherman Wells on

LinkedIn  Twitter 

### **New Jersey Appellate Division Finds Subsequent Mortgage That Recorded Mortgage First is Not Entitled to Priority in Foreclosure Action**

In *Wilmington Sav. Fund Soc. v. 61 Holdings, LLC*, the borrower executed a note and mortgage in favor of World Savings Bank in April 2004 in the amount of \$220,000.00. The mortgage was secured by real property in Ridgefield Park. World Savings recorded its mortgage on January 7, 2005, which was later assigned to Wells Fargo. In July 2004, the borrower executed a line of credit and mortgage in favor of Fleet National Bank (“Fleet”) in the amount of \$25,000.00. Fleet’s mortgage was also secured by the Ridgefield Park property, and the mortgage was later assigned to Wilmington Savings and recorded in August 2004.

In 2009, Wells Fargo instituted foreclosure proceedings. Neither Wilmington Savings nor Fleet was named in the foreclosure complaint. After purchasing the property at the foreclosure sale for \$100.00, Wells Fargo sold the property to 61 Holdings, LLC for \$175,000.00. Wilmington Savings then instituted the instant foreclosure action against 61 Holdings.

The trial court considered the priority issue. Although the line of credit note was recorded first, it was granted second in time to Wells Fargo’s mortgage, and Wells Fargo and its predecessor had no constructive or actual knowledge of the line of credit note. In contrast, the trial court found that Wilmington Savings knew of Well Fargo’s mortgage, drawing an adverse inference based on Wilmington Savings’ failure to produce its loan file. Thus, the trial court denied Wilmington Savings’ motion for summary judgment and granted 61 Holding’s cross-motion for summary judgment, explaining that (1) Wells Fargo was entitled to equitable subrogation of Wilmington Savings’ interest; (2) 61 Holdings was entitled to step into the shoes of Wells Fargo; and (3) 61 Holdings was permitted to foreclose Wilmington Savings’ interest in a strict foreclosure action.

Wilmington Savings appealed. The Appellate Division determined that the trial court did not abuse its discretion in determining that Wilmington Savings had notice of the prior loan. The Appellate Division also agreed with the trial court’s determination that “[u]njust enrichment would thus result if the interest held by [Wilmington Savings] were to be vaulted past the interest held by [61 Holdings] solely by virtue of it being first to record. Such a result would contradict the very purpose behind the doctrine of equitable subrogation.” Finally, the Appellate Division determined that as an innocent purchaser, 61 Holdings, had the same rights as its predecessor in interest, Wells Fargo, which included the right to bring a strict foreclosure action.

### **New Jersey Appellate Division Affirms Summary Judgment in Favor of Bank in Residential Foreclosure Action**

In *Santander Bank, N.A., v. Smulyan*, Docket No. A3373-17T4 (N.J. App. Div. Jul. 8, 2019), the defendant (“Defendant”) and his wife executed a thirty-year promissory note to Sovereign Bank in the amount of \$270,000 in December 2003. As security for the note, Defendant executed a non-purchase money mortgage to Sovereign Bank, encumbering residential property located in Union, New Jersey. Defendant defaulted on the mortgage loan by failing to make the payments due on August 1, 2011 or thereafter. In October 2013, Sovereign Bank was renamed Santander Bank (“Plaintiff”). On May 13, 2014, Plaintiff mailed by certified and regular mail to Defendant at the property in Union a Notice of Intent to Foreclose (“NOI”) in accordance with the Fair Foreclosure Act (“FFA”). Defendant failed to cure the default and Plaintiff filed a foreclosure complaint on October 21, 2014.

After initial motion practice and discovery, Plaintiff moved for summary judgment; in support of the motion, Plaintiff filed a copy of the original note, mortgage, payment history, NOI and certification from Plaintiff's employee. On December 18, 2015, the Court granted Plaintiff's motion, but ordered Plaintiff to provide proof within thirty days that Sovereign Bank was, in fact, renamed Santander Bank, and directed Plaintiff to produce "a merger document or a certification of the merger and the date of the merger" to establish that Sovereign Bank and Plaintiff were one in the same. After Plaintiff provided documentation, the Court confirmed summary judgment in Plaintiff's favor. Defendant filed numerous motions for reconsideration and to stay the foreclosure proceedings. Ultimately, a final judgment of foreclosure was entered in favor of Plaintiff and Defendant appealed only the trial court's entry of summary judgment.

Specifically, Defendant argued, as he did below, that Plaintiff did not have standing to foreclose because Plaintiff "did not retain ownership or possession of the original note" when the foreclosure complaint was filed, Plaintiff did not have an assignment of the mortgage from another lender who Defendant claims owned the loan, and Plaintiff mailed a deficient NOI.

The Appellate Division affirmed the grant of summary judgment find that "[t]he only material issues . . . are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgaged premises" and when "the execution, recording, and non-payment of the mortgage [are established], a prima facie right to foreclosure [is] made out." The Appellate Division found that certification submitted by Plaintiff and additional evidence was sufficient to establish possession of the note and there was no need for an assignment. Accordingly, the Appellate Division affirmed the trial court's grant of summary judgment.

### **If you have any questions about this Alert:**

#### **Attorney Contact Information**

##### **Anthony J. Sylvester**

Partner

973.302.9713

asylvester@shermanwells.com

##### **Craig L. Steinfeld**

Partner

973.302.9697

csteinfeld@shermanwells.com

##### **Caitlin T. Shadek**

Counsel

973.302.9672

cshadek@shermanwells.com

##### **Anthony C. Valenziano**

Counsel

973.302.9696

avalenziano@shermanwells.com

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon with regard to any particular facts or circumstances without first consulting an attorney.

© 2019 Sherman Wells Sylvester & Stamelman LLP. All Rights Reserved.