

BANKING ALERT

August 2019

[New Jersey Appellate Division Finds Service of NOI Deficient in Foreclosure Action](#)

In *Wells Fargo Bank, N.A. v. Herzinger*, the defendants, Raymond Herzinger and Kathleen Herzinger, appealed an order entering summary judgment against them in a residential foreclosure action. There was no dispute that the borrowers defaulted on the subject mortgage loan. However, they argued that the plaintiff, Wells Fargo Bank, N.A. (“Wells Fargo”), lacked standing to foreclose, and that it failed to serve the Notice of Intent to foreclose (NOI) by registered or certified mail with return receipt requested as required by the Fair Foreclosure Act (“FFA”).

The Appellate Division started from the baseline that the “[t]he FFA promulgates strict foreclosure guidelines that lenders must comply with as they attempt to resolve non-performing loans.” The Appellate Division reasoned that the NOI is an important part of the FFA, providing borrowers with clear notice that quick action is necessary to prevent foreclosure, and the FFA is clear: a residential mortgage lender must serve a NOI to file foreclosure proceedings “by registered or certified mail, return receipt requested.” That requirement differs from a general presumption of receipt from mailing if sent to the correct address. The Appellate Division explained that “[w]hen the Legislature chooses to impose a requirement to use the return-receipt-request option for certified mail, as it did in the FFA, we must assume that the requirement is significant and cannot be disregarded.” Thus, the FFA’s requirement of registered or certified mail with return receipt requested must be strictly enforced, and the remedy for a lender’s non-compliance is dismissal without prejudice.

In the case before it, the Appellate Division determined that the trial court’s finding that NOIs “mailed by certified mail, return receipt requested, and regular mail were forwarded to RAYMOND C. HERZINGER and KATHLEEN D. HERZINGER,” although taken from Wells Fargo’s statement of undisputed facts, was not supported by any document or certification that was provided in the course of discovery. The Appellate Division therefore concluded that the record failed to establish that plaintiff complied with FFA and also failed to establish that defendants actually received the NOI. Accordingly, the Appellate Division reversed

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the grant of summary judgment in favor of Wells Fargo and remanded with instructions to dismiss the foreclosure complaint, without prejudice.

[New Jersey Appellate Division Affirms Final Judgment of Foreclosure](#)

In *Santander Bank, N.A., v. Dzincielewski*, Docket No. A-2178-17T3 (N.J. App. Div. July 4, 2019), the New Jersey Appellate Division affirmed the trial court's Order granting the bank's motion for summary judgment in a residential foreclosure action.

Aubrey Dzincielewski owned a residential property in Toms River until her death in July 2014. In 2009, Aubrey and her son, Stephen, executed a note and mortgage to secure a \$130,000 Home Equity Line of Credit ("HELOC") from Sovereign Bank, later renamed as plaintiff, Santander Bank, N.A. ("Santander"). After Aubrey died, the loan went into default and Santander issued a notice of default addressed to Aubrey's estate on August 31, 2016. On April 4, 2017, Santander filed a foreclosure action.

In the foreclosure complaint, Santander named defendant Frank Dzincielewski as an heir and executor of Aubrey's estate ("Defendant"). Defendant filed a "contesting" answer asserting, among other things, that Santander's claims were barred by New Jersey's Home Ownership Security Act (HOSA) because Santander charged late fees of more than five percent of the principal and interest. Santander filed for summary judgment and Defendant did not oppose. The Court granted Santander's motion for summary judgment and Santander moved for final judgment. Defendant responding by filing a motion to fix the amount due supported by his own certification. Defendant asserted that Santander charged late fees after Audrey's death in excess of those permitted by HOSA. The Court granted Santander's motion and denied Defendant's motion finding that Defendant did not provide any proof of his calculation of late fees allegedly charged by Santander.

Defendant appealed, arguing that Santander did not provide sufficient evidence of Santander's name change and that the note had been assigned. Additionally, Defendant argued that an offset should have been applied to the amount due because Santander's calculation of late fees violated HOSA. The Appellate Division affirmed, finding that Defendant could not appear on behalf of Aubrey's estate without counsel as he holds no interest in the subject property. The Appellate Division then found that regarding Defendant's lack of standing, the trial court's factual findings were fully supported by the record and that Santander had adequately demonstrated standing to foreclose.

[New Jersey Appellate Division Finds that Borrower Lacks Standing to Challenge Transfer of Mortgage in Foreclosure Action](#)

In *U.S. Bank National Association v. Victor Costa*, Docket Nos. A-4718-17T1 and A-0404-18T1 (N.J. App. Div. Aug. 13, 2019), the New Jersey Appellate Division refused to set aside a sheriff sale and final judgment of foreclosure premised on an argument that the plaintiff lacked standing.

In July 2007, the defendant borrowed \$410,000 from Bank of America, N.A. ("BOA"), secured by a mortgage on property located in Newark. Beginning in 2009, the defendant failed to make required payments on the loan. In November 2012, BOA assigned the mortgage to Nationstar Mortgage, LLC ("Nationstar"). That assignment was duly recorded in December 2012. Nationstar filed a foreclosure complaint two years later in December 2014. Subsequently, Nationstar assigned the mortgage to U.S. Bank National Association ("US Bank"). In February 2017,

the trial court granted US Bank's motion for substitution as plaintiff in the foreclosure action. The court also entered final judgment by default and a writ of execution in July 2017. It was not until six months later that the defendant made her first appearance in the action seeking to vacate the final judgment. That motion was denied by the court. Ultimately, a sheriff sale went forward in July 2018, with US Bank purchasing the property for \$1.00. The defendant's motion to set aside the sale was denied in September 2018.

On appeal, the Appellate Division rejected the defendant's contention that US Bank lacked standing to foreclose, finding that the defendant failed to oppose US Bank's motion to substitute in as plaintiff. Further, the Appellate Division stated that the defendant's contention that the record fails to state how US Bank received the mortgage assignment was irrelevant because, as a matter of law, the defendant cannot challenge the transfer of the mortgage.

Finally, the defendant's argument as to a lack of proof that the sheriff's sale occurred was unsubstantiated by any evidence in the record. To the contrary, the Appellate Division noted that the record contained a Report of Sale and a copy of the Sheriff's Deed to US Bank, which were sufficient proof to demonstrate the sale occurred.

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