

**[New Jersey Appellate Division Affirms Denial of Motion Seeking to Vacate Final Judgment of Foreclosure](#)**

In *Wells Fargo, N.A. v. Duarte*, Docket No. A-0548-18T2 (N.J. App. Div. Dec. 13, 2019), the Appellate Division rejected a borrower's attempt to set aside both a final judgment of foreclosure and subsequent sheriff's sale.

As alleged in the Complaint, in January 2010, the defendant, Armando S. Duarte, as attorney-in-fact for his father, executed a home equity conversion note to the plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), in the amount of \$787,500. By its terms, the note evidencing the loan was payable in full upon one of two conditions: (1) the death of Mr. Duarte's father; or (2) when the father ceased using the property securing the loan as his primary residence. The loan was secured by a mortgage on the father's residence, which was duly recorded.

Four months after executing the loan documents, Mr. Duarte's father passed away and, in turn, Wells Fargo elected to accelerate the debt and demand payment of the unpaid principal and interest. Mr. Duarte failed to repay the loan and Wells Fargo filed a foreclosure complaint in August 2013. No answer was filed and default was entered against Mr. Duarte and his father's estate in November 2015. A final judgment of foreclosure was entered in May 2016. A sheriff's sale was subsequently held after several delays. After the sheriff's sale was held, Mr. Duarte filed a motion to vacate the final judgment of foreclosure and set aside the sheriff's sale. The trial court denied the motion, finding that Mr. Duarte had been properly served, there were no meritorious defenses to the complaint, and that Mr. Duarte had no evidence to demonstrate that he and Wells Fargo had an enforceable oral agreement to permit him to purchase the property at 95% of its fair market value.

On appeal, the Appellate Division wholly adopted the arguments set forth in the trial court's decision, finding that Mr. Duarte's arguments lacked any merit.

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### **New Jersey Appellate Division Rejects Borrower's Attempt to Avoid Foreclosure Based on Bankruptcy Order of Discharge**

In *U.S. Bank Trust, N.A. v. Flamer*, defendant Lulu Flamer borrowed \$64,139.84 from Household Finance Corporation III ("Household Finance"). To evidence the loan, Flamer executed a promissory note in 1997, and also granted Household Finance a mortgage on her home. Flamer ultimately failed to make the March 28, 2014 installment payment and all required monthly payments thereafter. The promissory note and mortgage were subsequently assigned to plaintiff, U.S. Bank Trust, N.A. ("U.S. Bank"), in January 2015, and, in August 2015, U.S. Bank filed a foreclosure complaint against Flamer. That October, Flamer filed a Chapter 7 bankruptcy petition.

Flamer was issued an Order of Discharge by the bankruptcy court, which provided that "a creditor with a lien may enforce a claim against the debtor's property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage . . ." After the Order of Discharge was issued, U.S. Bank file a motion for summary judgment in the foreclosure action, which was granted, and thereafter moved for entry of final judgment. The trial court rejected Flamer's objection to the amount due and entered an order for final judgment of foreclosure. Flamer then moved to vacate the final judgment and cancel the mortgage pursuant to N.J.S.A. 2A:16-49.1, arguing that the mortgage loan was discharged under her bankruptcy order prior to the issuance of the final judgment of foreclosure and that the lien was cancelled. The trial court denied the motion, along with Flamer's subsequent motion for reconsideration.

Flamer appealed, and the Appellate Division affirmed. The Appellate Division noted that N.J.S.A. 2A:16-49.1 -- the statute on which Flamer relied -- works as "a housekeeping measure to assure that judgments discharged in bankruptcy do not remain of record, cloud title, or require payment in the future." Because the judgment against Flamer was entered in September 2017, the Appellate Division explained that it could not have been discharged in the 2016 bankruptcy order. Moreover, according to the Appellate Division, the trial court properly determined that the foreclosure action was in rem, and U.S. Bank had the right to enforce its lien and foreclose on the mortgage notwithstanding Flamer's bankruptcy discharge. Flamer discharged the note but the mortgage was not cancelled in the bankruptcy proceeding.

### **New Jersey Appellate Division Affirms Foreclosure Judgment Entered Seven Years After Rejecting Borrower's Loan Modification Argument**

In *Wilmington Savings Fund Society, FSB v. Morgan*, Docket No. A-0493-17T2 (N.J. App. Div. Dec. 12, 2019), the Appellate Division affirmed a final foreclosure judgment entered against defendant-homeowner Lauri Morgan ("Defendant") and rejected Defendant's argument that the trial court failed to enforce a prior loan modification.

In February 2007, Defendant entered into a refinance agreement with Premier Bank and executed a note in the principal amount of \$375,000, which was secured by Defendant's residence. Plaintiff Wilmington Savings Fund Society, FSB ("Plaintiff") subsequently acquired the note and mortgage through assignments and merger. In May 2014, Plaintiff filed a foreclosure complaint, which alleged that Defendant defaulted when she failed to make a monthly installment payment that was due March 1, 2010, and every payment thereafter. Defendant answered the complaint and asserted several defenses. Plaintiff subsequently moved for summary judgment in January 2015. In her opposition to summary judgment, Defendant denied that a default occurred and argued that her loan was modified by virtue of her application to a Home Affordable Modification Program ("HAMP") Trial Period Plan that was in effect from February 2010 through April 2010. The trial court rejected Defendant's argument and found that, even if Plaintiff did enter into a HAMP plan, she still defaulted by failing to make timely payments.

Defendant moved for reconsideration of the trial court's ruling, arguing there were errors in the record and that she did, in fact, make timely payments under the HAMP plan. In response, Plaintiff submitted a letter previously sent to Defendant which denied Defendant's application for modification of the loan under HAMP. The trial court denied Defendant's motion for reconsideration. The trial court also held that, even if defendant was not in default as a result of a modification based on her HAMP application in 2010, she had still not made a single payment since that time and, thus, was currently in default.

The trial court entered a final foreclosure judgment on August 18, 2017. Defendant appealed the foreclosure judgment and argued that the trial court erred by refusing to enforce the modification agreement under HAMP. The Appellate Division rejected Defendant's argument. Among other things, Defendant was unable to refute Plaintiff's letter which explained why she did not qualify for HAMP. Moreover, the Appellate Division noted that Defendant received Plaintiff's HAMP letter in 2010. Since then, Defendant made no attempt to escrow funds, pay down her mortgage, or do anything else to qualify for a modification. Accordingly, the Appellate Division ruled that Defendant's argument that she should have received a HAMP loan modification was without merit. Plaintiff's final foreclosure judgment was affirmed.

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

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