

## BANKING ALERT

October 2020

### [New Jersey Appellate Division Affirms Final Judgment of Foreclosure and Striking of Borrower's Counterclaims](#)

In *Bank of China v. 769 Associates, LLC*, Docket No. A-2100-18T4 (N.J. App. Div. Oct. 8, 2020), the New Jersey Appellate Division affirmed a trial court order entering final judgment of foreclosure in favor of the plaintiff, Bank of China (the "Bank"), and striking the counterclaims of the borrower, 769 Associates, LLC (the "Borrower").

In 2007, the Bank made three multi-million-dollar, interest-only loans to three related companies controlled by the same owner, one of which included the Borrower and was secured by a mortgage on a commercial office building located in West Orange, New Jersey. Sometime thereafter, the loan documents were amended to provide that the mortgages on two other properties securing the other two loans would also serve as security for the loan to the Borrower. All three loans matured on July 1, 2017, however, Borrower failed to repay the loan and the Bank commenced foreclosure. In its answer, Borrower asserted counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing, claiming that the Bank undertook efforts to preclude the other two borrowers from pre-paying their loans and securing discharges of those mortgages. The Bank sought dismissal of those counterclaims. The trial court granted the Bank's motion to dismiss the counterclaims, holding that while the allegations may have supported claims brought by the other two borrowers, they were not a defense to the maturity-date default by the Borrower. The trial court further held that the counterclaims were not germane and, thus, were not properly brought as part of the foreclosure suit.

On appeal, the Appellate Division held that the Bank's alleged inequitable conduct as it related to the other two borrowers did not "affect [the Bank's] right to foreclose against [the Borrower]." There were no allegations that the Bank's conduct precluded the Borrower from paying all outstanding principal and interest by the maturity date, only that the Bank engaged in activity that potentially hindered the other two borrowers in connection with their loan obligations, not the obligations of the Borrower.

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### **New Jersey Federal Court Dismisses Complaint Alleging Fraud Against Mortgage Servicer**

In *Scalercio-Isenberg v. Select Portfolio Servicing, Inc.*, Civ No. 20-cv-4501 (D.N.J. Sept. 20, 2020), plaintiffs Sherry Scalercio-Isenberg and Marcus K. Insenberg (together, “Plaintiffs”), *pro se*, filed a complaint alleging fraudulent conduct against their mortgage servicer, defendant Select Portfolio Servicing, Inc. (“Defendant”). Plaintiffs alleged that they paid their monthly mortgage payments on time, but Defendant did not immediately credit the payments and reported false late payment status to all credit reporting agencies and then denied Plaintiffs mortgage re-financing options. Plaintiffs also alleged that Defendant opened an authorized escrow account in Plaintiffs’ name and improperly charged “escrow taxes and insurance.” Plaintiffs’ complaint alleged the following claims: (1) violation of the Fair Credit Reporting Act (“FCRA”); (2) mortgage fraud under the New Jersey Consumer Fraud Act (“NJCFA”); (3) violation of the Fair Debt Collection Practice Act (“FDCA”), (4) extortion and (5) money laundering.

Defendant moved to dismiss the complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant first argued Plaintiffs’ claims were barred by a confidential settlement and release agreement; however, the District Court for the District of New Jersey declined to consider the settlement agreement because it was not integral to or specifically relied on in the complaint and was not a matter of public record or subject to judicial notice and, thus, not properly included in a 12(b)(6) motion.

The District Court found there was no private right of action under 18 U.S.C. §1681s-2(a) of the FCRA and, instead, a plaintiff may only bring a claim against a furnisher of credit information, based on a failure to furnish correct information to a consumer reporting agency, where (1) the plaintiff sent a “notice of disputed information to a consumer reporting agency,” (2) the consumer reporting agency then notified the furnisher of the dispute, and (3) the “furnisher failed to investigate and modify the inaccurate information.” The District Court found the complaint failed to allege that the credit reporting agency notified Defendant of the dispute and, thus, Defendant’s duty to investigate was not triggered.

The District Court then found that Plaintiffs failed to state a claim under the NJCFA regarding the allegedly improper escrow account because the alleged unlawful conduct did not arise in the context of either the formation or modification of the mortgage loan, and the NJCFA only covers unlawful conduct in “connection with the sale or advertisement of any merchandise or real estate.” Additionally, the District Court found Plaintiffs failed to plead Defendant was a debt collector under the FDCPA and New Jersey did not recognize civil actions for extortion or money laundering.

The District Court dismissed the complaint in its entirety, but granted Plaintiffs leave to file an amended complaint to cure any deficiencies.

### **New Jersey Appellate Division Rejects Challenge to Bank’s Standing to Foreclose**

In *The Bank of New York Mellon v. Rinker*, Docket No. A-5406-18T3 (N.J. App. Div. Oct. 14, 2020), the Appellate Division refused to vacate a final judgment of foreclosure based on the borrower’s challenge to the lender’s standing to foreclose.

In 2007, the defendant, Dennis Rinker (“Borrower”) obtained a \$146,000 loan from Countrywide Bank, FSB (“Countrywide”) secured by residential property. In 2012, the loan was assigned to The Bank of New York Mellon (“BNY”) as trustee for the plaintiff, Certificate Holders of the CWALT, Inc. Alternative Loan Trust 2007-HY7C Mortgage

Pass-Through Certificates, Series 2007-HY7C (“Plaintiff”), which was documented by an assignment by Mortgage Electronic Registration Systems (“MERS”), as nominee for Countrywide. In 2015, MERS, again as nominee for Countrywide, assigned the mortgage to BNY as trustee for Plaintiff. A third assignment was recorded in 2017 as a “gap” assignment to “complete the chain” between the assignment recorded in 2012 and the one recorded in 2015. Borrower defaulted on the terms of the loan in October 2011, and a foreclosure complaint was ultimately filed by Plaintiff in 2017. Borrower filed a contesting answer that admitted that he had defaulted on the loan and the whole amount was due. The answer included several purported affirmative defenses, including a challenge to Plaintiff’s standing to enforce the loan documents. Plaintiff filed a motion for summary judgment based upon a certification of an employee from the loan servicer, who stated that Plaintiff was in possession of the original note and that the mortgage was properly assigned to Plaintiff and recorded prior to Plaintiff filing the foreclosure action. Borrower opposed the motion, arguing that Plaintiff had not demonstrated standing and the foreclosure action was time-barred. The trial court granted Plaintiff’s motion for summary judgment and ultimately entered a final judgment of foreclosure in Plaintiff’s favor.

On appeal, the Appellate Division noted that Borrower did not dispute that he (1) had signed the note and mortgage; and (2) had defaulted on the terms of the loan by failing to make a payment for over six years. The challenge, the Appellate Division stated, was to a lack of standing based on a purported problem with the assignments. While a plaintiff in a foreclosure suit has an obligation to establish that it has a right to foreclose on the mortgage by demonstrating that it “own[s] or control[s] the underlying debt,” a plaintiff can dispense with that obligation by establishing that it possessed the note or an assignment of the mortgage prior to initiating suit. Here, Plaintiff satisfied that obligation by way of certification from a loan servicer representative, who certified as to the business records demonstrating that Plaintiff was assigned the loan documents prior to the initiation of the suit. Thus, even if Plaintiff had not demonstrated that it possessed the original note, the duly-recorded assignments were sufficient to establish Plaintiff’s standing to foreclose.

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