

BANKING ALERT

October 2015

[District Court Finds Foreclosing Bank And Its Attorneys Are Not “Debt Collectors” Under FDCPA](#)

In *Coles v. Zucker Goldberg & Ackerman*, 2015 WL 4578479 (D.N.J. July 29, 2015), the United States District Court for the District of New Jersey dismissed a complaint alleging violations of the Fair Debt Collection Practices Act (“FDCPA”) against a foreclosing bank and two law firms that represented the bank in state court foreclosure proceedings. The plaintiff in *Coles* claimed that PNC Bank (“PNC”), Zucker Goldberg & Ackerman (“ZGA”) and Ballard Spahr LLP (“Ballard Spahr”) violated the FDCPA when they allegedly wrongfully commenced a state foreclosure action against plaintiff in 2009 and fraudulently misrepresented that PNC was the holder of plaintiff’s note and mortgage. After plaintiff defaulted on her residential mortgage loan, ZGA, as counsel for PNC, filed a foreclosure action against plaintiff in state court on August 5, 2009. Plaintiff filed a contesting answer. During discovery, plaintiff served interrogatories inquiring about PNC’s “role and/or connection” with the note and mortgage. Specifically, plaintiff asked if her mortgage and/or note had been included or incorporated into any type of Trust.

Prior to answering plaintiff’s interrogatories, Ballard Spahr substituted as counsel for PNC and, in August 2010, responded by objecting to plaintiff’s question as irrelevant and stating that her note and mortgage “have not be[en] assigned.” On September 13, 2013, the foreclosure action was administratively dismissed for lack of prosecution. On the same day, however, ZGA issued a notice to plaintiff informing her that PNC intended to revive the dismissed foreclosure action and apply for final judgment of foreclosure. In addition, on December 27, 2013, ZGA, on behalf of PNC issued a corrected/revised Notice of Intention to Foreclose to plaintiff, which named Wilmington Trust Company as the holder of plaintiff’s mortgage as of June 25, 2013. Plaintiff claimed that she did not become aware that Wilmington Trust Company was the holder of her mortgage until she was served with the revised notice from ZGA.

On March 23, 2014, plaintiff filed suit. Plaintiff claimed that based on the terms of a Pooling and Servicing Agreement pertaining to the Wilmington Trust Company, the assignment of her mortgage must have taken place prior to the 2009 state foreclosure action. Plaintiff claimed that

In This Issue

District Court Finds Foreclosing Bank And Its Attorneys Are Not “Debt Collectors” Under FDCPA
Pg 1

New Jersey Appellate Division Affirms Denial Of Motion To Vacate Final Judgment Of Foreclosure And Stay Of Sheriff’s Sale
Pg 2

New Jersey Appellate Division Finds That Bank Has Standing To Foreclose Even If Allonge To Note Is Not Affixed
Pg 3

Office Locations

New Jersey

210 Park Avenue
2nd Floor
Florham Park NJ 07932
973.302.9700

New York

805 Third Avenue
10th Floor
New York NY 10022
212.763.6464

Follow Sherman Wells on

LinkedIn  Twitter 

defendants collectively violated the FDCPA by misrepresenting PNC as her mortgage holder in the 2009 foreclosure action and purposely concealing the transfer of her loan by listing an incorrect, later date of June 2013 on the assignment of the mortgage.

The Court dismissed plaintiff's claim against ZGA under the one-year statute of limitations governing claims brought under the FDCPA. The Court noted that all of plaintiff's allegations as to ZGA related back to ZGA's filing of the state foreclosure action in 2009. Because plaintiff filed her complaint in March 2014, more than three years after the statute of limitations ran, her claim against ZGA had expired.

With regard to Ballard Spahr and PNC, however, the Court found that it was a close question whether the statute of limitations under the FDCPA should be equitably tolled based on plaintiff's allegations that Ballard Spahr and PNC fraudulently concealed the identity of the holder of plaintiff's note and mortgage when they responded to plaintiff's interrogatories in 2009. Nonetheless, the Court did not decide whether the statute of limitations should be equitably tolled because it found that Ballard Spahr and PNC are not "debt collectors" under the FDCPA.

The Court noted that as a threshold determination under the FDCPA, a defendant must be a "debt collector" as defined by the statute. To properly plead that a defendant is a "debt collector," a plaintiff must allege facts that the defendant regularly collects or attempts to collect debts. In addition, the Court explained that the FDCPA has been interpreted to apply to entities and persons that collect debts on behalf of others; however, the FDCPA, in general, does not apply to creditors collecting debts on their own behalf. The Court identified the following factors that a plaintiff may allege to sufficiently plead the regularity requirement: (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued; (2) the frequency of such communications and/or litigation activity; (3) whether defendant has personnel specifically assigned to work on debt collection activity; (4) whether defendant has systems or contractors in place to facilitate such activity; and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations.

Based on the foregoing factors, the Court found that plaintiff failed to sufficiently allege that PNC and Ballard Spahr were "debt collectors" within the meaning of the statute. Plaintiff appealed and the matter is now pending before the Third Circuit.

[New Jersey Appellate Division Affirms Denial Of Motion To Vacate Final Judgment Of Foreclosure And Stay Of Sheriff's Sale](#)

In *Wells Fargo, N.A. v. Amico*, 2015 WL 5837453 (N.J. App. Div. Sept 20, 2015), the Appellate Division affirmed the Chancery's Court's denial of defendants' appeal from the Chancery Court's Order denying defendants' motion to vacate a previously entered default final judgment of foreclosure and to stay the scheduled sheriff's sale on their home. Defendants-mortgagors, Mark and Kelley Amico ("Defendants"), argued that they were never properly served with the foreclosure complaint and various other notices, which established excusable neglect for not responding to the foreclosure complaint, and that plaintiff, Wells Fargo, N.A. ("Wells Fargo"), made misrepresentations and never owned the mortgage note at issue.

Wells Fargo filed the foreclosure complaint in 2010 against defendants based on their default in payment of a note given to Well Fargo's predecessor. In connection with the note, Defendants gave MERS, as nominee for the predecessor bank, a mortgage on their home. The mortgage was recorded on May 26, 2006. MERS assigned the mortgage and note to Wells Fargo on December 30, 2009, and the assignment was recorded on March 22, 2010.

Wells Fargo confirmed in numerous court filings that it was the owner of the mortgage and the note and provided copies to the Chancery Court. Wells Fargo also provided affidavits of service to the Chancery Court that the foreclosure complaint was left with defendant Kelley Amico at Defendants' home. Defendants never responded to the foreclosure complaint and Wells Fargo served a copy of its Notice of Motion for Entry of Final Judgment by regular mail. The Chancery Court entered final judgment on October 22, 2012, a copy of which Wells Fargo mailed to Defendants on October 24, 2012.

Defendants alleged that they were aware of the foreclosure proceeding sometime in December 2010, but did not take any action until they received a Writ of Execution, which was issued on October 22, 2012. A sheriff's sale was scheduled for July 20, 2013, and Defendants applied to the Chancery Court for entry of restraints to prevent the sale from proceeding.

The Chancery Court found that defendants took no action to defend against the foreclosure for an extended period of time and, thus, there was no "excusable neglect" for failure to respond to the foreclosure complaint. In addition, the Chancery Court found that Wells Fargo established proper service of the foreclosure complaint and notices and had standing to bring the foreclosure action.

On appeal, Defendants argued that they were entitled to have the foreclosure judgment vacated because they were never properly served and Wells Fargo made misrepresentations regarding the loan and mortgage. The Appellate Division first found that Defendants were properly served and discredited Kelley's self-serving statement that she and her husband were never served. The Appellate Division concluded that such statement was insufficient to contradict the filed affidavits and certifications confirming service. In addition, the Appellate Division noted that Defendants admitted they were aware of the foreclosure complaint in December 2010.

The Appellate Division rejected Defendants' argument that Plaintiff was not the owner of the mortgage and note and did not have standing to sue. Thus, the Appellate Division affirmed the Chancery Court's decision.

[Appellate Division Finds Bank May Foreclose Even If Allonge To Note Is Not Affixed](#)

In another ruling clarifying who possesses standing to initiate and maintain a foreclosure proceeding, the Appellate Division, in *U.S. Bank National Association v. Morris Bayonne Associates I*, 2015 WL 5254936 (N.J. App. Div. Sept. 9, 2015), found that a bank could proceed with a commercial foreclosure action, despite the fact that the allonge endorsing the note was not immediately affixed to the note when the loan was assigned.

In February 2007, the borrowers, a group of related limited liability companies, entered into a \$17,000,000 loan agreement with Countrywide Real Estate Finance, Inc. ("Countrywide") evidenced by a promissory note and secured by a mortgage on a shopping plaza. Immediately thereafter, Countrywide assigned the loan to LaSalle Bank. The assignments were duly recorded in September 2007. A few months later in June 2008, LaSalle Bank assigned the loan to U.S. Bank. While all of the documents evidencing the assignment were executed, the allonge endorsing the note to U.S. Bank was not attached to the note. After March 2012, the borrowers ceased making payments and defaulted under the terms of the note. One week prior to commencing a foreclosure action on the property, U.S. Bank, through its servicer, attached the allonge to the note.

The borrowers challenged U.S. Bank's standing to initiate and maintain a foreclosure action, arguing that discovery and affidavits provided by U.S. Bank and its servicer created a genuine issue of material fact as to who actually owned

the note. The trial court disagreed and found that U.S. Bank had established a “prima facie case” as to its standing to proceed with the foreclosure action.

The Appellate Division affirmed the trial court’s ruling, finding that U.S. Bank properly evidenced and produced documents establishing that the note was properly transferred from LaSalle Bank to U.S. Bank. The Appellate Division noted that there was no dispute that all of the documents involved in the transfer, including the allonge, were executed and submitted as part of U.S. Bank’s motion for summary judgment. The only contention raised by the borrowers – *i.e.*, that the allonge was not affixed to the note when it was originally executed -- was not supported by any binding authority as a basis to deny a holder of a negotiable instrument standing to foreclosure. The Appellate Division found that both the allonge and the assignment were properly authenticated and executed prior to the filing of the foreclosure complaint, which was all that was necessary for U.S. Bank to proceed with the foreclosure action.

If you have any questions about this Alert:

Attorney Contact Information

Anthony J. Sylvester

Partner

973.302.9713

asylvester@shermanwells.com

Charles R. Berman

Partner

973.302.9692

cberman@shermanwells.com

Timothy A. Kalas

Partner

973.302.9693

tkalas@shermanwells.com

Craig L. Steinfeld

Counsel

973.302.9697

csteinfeld@shermanwells.com

Caitlin T. Shadek

Associate

973.302.9672

cshadek@shermanwells.com

Arjun Shah

Associate

973.302.9698

ashah@shermanwells.com

Anthony C. Valenziano

Associate

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.

© 2015 Sherman Wells Sylvester & Stamelman LLP. All Rights Reserved.