

BANKING ALERT

March 2015

[District Court Upholds Enforceability of Limited Recourse Guaranty](#)

A recent decision in the United States District Court for the District of New Jersey upheld the enforceability of a limited recourse guaranty executed as part of a commercial lending transaction. In [In re Inn at Woodbridge](#), No. 14-7251, 2015 WL 1013585 (D.N.J. Mar. 9, 2015), Metroplaza Hotel Holdings, Inc. (“Metroplaza”), the borrower and owner and operator of hotel and office property located in Woodbridge New Jersey, entered into several financing agreements with its lender, Artesia Mortgage Capital Corporation. One of these agreements, a promissory note in the amount of \$36 million secured by a mortgage on the hotel and office property, was accompanied by a Limited Recourse Obligations Guaranty executed by Metroplaza’s managing member James K. Wolosoff (the “Guaranty”), which provided, in part, that Mr. Wolosoff would be personally liable for the outstanding balance of the loan in the event that Metroplaza filed for bankruptcy. The mortgage, note and other financing agreements were later assigned to Wbcmt 2006-C24 Wood Avenue, LLC (“Wood Avenue”).

On December 6, 2012, Metroplaza and Mr. Wolosoff’s affiliated company, Inn at Woodbridge, Inc., filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey. While Metroplaza and Wood Avenue were able to come to an agreement regarding transfer of ownership of the hotel and office property to Wood Avenue, a dispute arose regarding the enforceability of the Guaranty against Mr. Wolosoff. Wood Avenue moved for summary judgment, and the Bankruptcy Court found that Mr. Wolosoff was personally liable under the Guaranty. The parties stipulated to the amount of the Guaranty, so that Mr. Wolosoff could proceed with his appeal to the District Court.

On appeal, the District Court affirmed the Bankruptcy Court’s determination that the Guaranty was fully enforceable. The District Court initially noted that, absent a “settled principle of law that applies in these circumstances and precludes enforcement,” it was obligated to enforce the Guaranty because it was the product of negotiation by experienced business people that regulate their own financial affairs. The District Court then rejected all of Mr. Wolosoff’s arguments seeking to invalidate the Guaranty. First, the District Court rejected Mr. Wolosoff’s claim for breach of the covenant of good faith and fair dealing, holding that there

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was nothing unreasonable or unconscionable about requiring the parties to abide by the terms of the Guaranty because the Guaranty was executed prior to the settlement between the parties and Wood Avenue explicitly exempted the Guaranty from the settlement. The District Court also rejected Mr. Wolosoff's argument that the Guaranty was voidable as a matter of public policy, citing other state courts that had previously rejected similar arguments. Finally, the District Court held that, contrary to Mr. Wolosoff's contention, the Guaranty was not an unreasonable liquidated damages penalty. In so doing, the District Court relied on recent New Jersey Appellate Division precedent, CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114 (App. Div. 2009), which held that limited recourse guarantees operated not as an improper liquidated damages provision, but rather as a mechanism "to define the terms and conditions of personal liability" which "provide[d] for actual damages."

The holding in *In re Inn at Woodbridge* reaffirms the enforceability of limited recourse guarantees and provides lenders comfort in transactions where lenders seek such guarantees to protect their interests.

Court Dismisses Attempt By Mortgagor To Attack Assignment Of Mortgage Based On Allegations of "Robo-Signing"

In Song v. Bank of America, 2015 WL 248436 (D.N.J. Jan. 20, 2015), plaintiff-mortgagor Eun Ju Song ("Plaintiff") in default on his mortgage, brought an action against defendants Bank of America, America's Wholesale Lender, a former d/b/a of Countrywide Home Loans, Inc. ("Countrywide") and Green Tree Servicing LLC (collectively, "Defendants") based on an alleged "robo-signing" of an assignment of mortgage. Plaintiff executed and delivered a note to Countrywide and granted a mortgage on property to Countrywide's nominee. Plaintiff alleged that two weeks after the loan closed, Countrywide transferred the loan to the Fannie Mae Remic Trust 2006-22 (the "Trust"), the rights and obligations of which are governed by a pooling and services agreement (the "PSA"). Plaintiff asserted that the assignment was not properly effected under the PSA because no assignment of the mortgage was ever recorded in the Bergen County Clerk's Office. An assignment of mortgage actually was recorded in the Bergen County Clerk's office; Plaintiff alleged it was invalid because it was signed by a "robo-signer."

Plaintiff brought claims for a declaratory judgment quieting title to the property secured by the mortgage, conversion and violation of the Real Estate Settlement and Procedures Act ("RESPA"). Bank of America and Countywide moved to dismiss the Complaint.

In his count for declaratory judgment, Plaintiff asserted three bases for his claim that Defendants were not entitled to enforce the Loan: (1) that the transfers of the note and mortgage were improper; (2) that Defendants violated the PSA by failing to record an assignment of the mortgage to the Trust; and (3) that the assignment of the mortgage was invalid because it was executed by a robo-signer. The Court rejected Plaintiff's arguments and found that the subject note and mortgage allowed for an assignment of mortgage and Plaintiff, who was not a party to the PSA and assignment, did not have standing to attack the validity of the PSA. Thus, Plaintiff could not argue that the assignment was void by virtue of being executed by a "robo-signer."

The Court also rejected Plaintiff's claim for conversion. Plaintiff alleged that the Bank failed to apply mortgage payments against the loan or to forward them to the actual owner of the loan. The Court found that an action for conversion will not lie in the context of a mere debt and the mortgage payments to Defendants were a debt. Further, Plaintiff admitted that the mortgage payments did not belong to him but to the owner of the loan. Therefore, the Court found that Plaintiff failed to state a claim for conversion.

The Court did not address the RESPA claim because it was only directed towards defendant Green Tree Servicing, LLC. Banks are facing more suits by mortgagors attempting to attack the validity of mortgage assignments. The terms of the mortgage documents may be helpful in dismissing a claim when they expressly allow for assignments and, additionally, a non-party has no basis to challenge the validity of a third-party assignment.

District Court Dismisses Claims Alleging Violation of Fair Credit Reporting Act

In Mercedes v. Wells Fargo Home Mortgage, Inc., the United States District Court for the District of New Jersey entered summary judgment dismissing home mortgagors' claims alleging that their lender, defendant Wells Fargo, reported false and negative information about plaintiffs to credit reporting agencies ("CRAs") in violation of the Fair Credit Reporting Act ("FCRA"). No. 13-5814, 2015 WL 457299, (D.N.J. Feb. 3, 2015).

Plaintiffs obtained a home mortgage loan from Wells Fargo in July of 2009. After their home was damaged by Hurricane Sandy in 2012, plaintiffs struggled with their mortgage payments and requested assistance from Wells Fargo. Wells Fargo granted plaintiffs a temporary forbearance on their loan. After the forbearance period ended, plaintiffs did not resume making payments. Wells Fargo issued a Moratorium on the loan, which meant that for ninety days Wells Fargo would not notify CRAs that plaintiffs were late on payments. At the end of the Moratorium period, however, plaintiffs again failed to make their mortgage payments. Wells Fargo then offered plaintiffs a "trial" modification plan under which plaintiffs made some payments, however, plaintiffs ultimately rejected Wells Fargo's offer for a "final loan modification" under the belief that the modification would not sufficiently reduce the principal balance of their loan. After rejecting Wells Fargo's offer, plaintiffs did not reapply for a modification.

In September of 2013, after plaintiffs still had not resumed making payments, Wells Fargo reported to CRAs that plaintiffs had become delinquent on their loan. Shortly thereafter, plaintiffs complained about the negative credit report, emphasizing that they were victims of Hurricane Sandy and that they were going through a modification process. In response to plaintiffs' complaint, Wells Fargo investigated the accuracy of the information it had reported to CRAs and advised them that the information was indeed accurate (i.e., plaintiffs were delinquent on their mortgage loan).

Based on the negative credit report, plaintiffs filed a Complaint against Wells Fargo claiming that the bank reported false and negative information about plaintiffs to CRAs in violation of the FCRA and also asserting a promissory estoppel claim under New Jersey state law.

The Court entered summary judgment in favor of Wells Fargo, finding that plaintiffs did not demonstrate that Wells Fargo failed to investigate and modify any inaccurate information about the status of their loan as required to establish a claim under the FCRA. The FCRA seeks to ensure fair and accurate credit reporting, promote efficiency in the banking system and protect consumer privacy. In furtherance of such policies, the FCRA imposes certain duties upon furnishers of credit information. Specifically, furnishers must provide CRAs with accurate information and investigate information disputed by a consumer and report back to the CRA regarding its veracity. If the furnisher determines that information is incomplete or inaccurate, it must correct such information with the CRA.

The Court found that the information Wells Fargo reported (i.e., that plaintiffs became delinquent on their loan) was not inaccurate since plaintiffs admitted they were behind on their mortgage payments. Moreover, the record demonstrated that Wells Fargo properly investigated the information disputed by plaintiffs and verified that the reported information was consistent with its records as required under the FCRA. The Court also dismissed plaintiffs'

state law promissory estoppel claim because the FCRA preempts all state law claims for conduct allegedly violating the statute's provisions.

The District Court's opinion in Mercedes is a reminder to banks, mortgage lenders and other entities that furnish information to CRAs that they should verify the accuracy of the information they furnish, investigate and report back on any disputed information and, if such information is in fact inaccurate or incomplete, promptly correct the same.

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