Sherman Atlas Sylvester & Stamelman

BANKING ALERT

June 2021

New York Extends Limitation on Residential and Commercial Foreclosures until August 31, 2021

On May 4, 2021, Governor Cuomo signed legislation that extended New York's limitation on residential and commercial foreclosures until August 31, 2021. With regard to commercial foreclosures, the limitation applies to "small businesses" who have under fifty employees and who own ten or less units. Before New York courts will accept a new foreclosure filing, the party filing the action must certify that it provided the borrower with a form Hardship Declaration and that, at the time of filing, neither the foreclosing party nor its agent received a returned Hardship Declaration from the borrower. If the Hardship Declaration is not returned and a foreclosure action is commenced, the Court shall seek its own independent confirmation that the borrower indeed received a Hardship Declaration and did not return it to the foreclosing party. Only then can a new foreclosure proceeding begin.

New Jersey Appellate Division Affirms Grant of Partial Summary Judgment in Deficiency Action and Dismissal of Borrowers' Lender-Liability Based Counterclaims

In *BCB Community Bank v. Calandrillo*, Docket No. A-3753-19 (N.J. App. Div. June 2, 2021), the New Jersey Appellate Division affirmed the trial court's grant of partial summary judgment in favor of plaintiff BCB Community Bank ("BCB") and dismissal of counterclaims alleging violations of the Dodd Frank Act ("DFA") and the Truth-in-Lending Act ("TILA").

In 2003, defendants Nicholas and Patricia Calandrillo (together, "Defendants") spoke with their accountant, who was also a member of BCB's board of directors, about the purchase of a house in Sparta, NJ (the "Sparta Property"). BCB extended a mortgage loan to Defendants in the amount of $1,370,000 after Jordan Real Estate Group ("JRE") appraised the Sparta Property for $2,000,000. In 2011, Defendants owed $1,209,870 on the Sparta Property mortgage and applied for a second loan with BCB for the purchase of property in Andover, NJ (the "Andover Property"). The Andover Property was appraised at $1,175,000 by JRE. In connection with the application, a BCB employee expressed concerns due to

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Nicholas Calandrillo's credit card debt of approximately $20,000 per month, but Defendants' accountant responded that the credit cards were paid by Nicholas Calandrillo's business and that the Sparta Property was to be sold. Notably, Defendants' application for the Andover Property listed a monthly income of $38,833.33 and valued the Sparta Property at $2 million.

On September 16, 2011, Defendants executed a $880,000 promissory note to BCB secured by a mortgage on the Andover Property. Defendants sold the Sparta Property in February 2012 for $2.2 million and made monthly payments on the Andover Property until they defaulted in August 2014. Thereafter, Defendants requested a loan modification, and BCB granted an eight-month forbearance on the Andover mortgage until March 2015. As part of the forbearance agreement, Defendants waived any claims of "bad faith, fraud, duress, lender liability or excess of control" against BCB. In March 2015, BCB granted an additional six-month forbearance, after which Defendants continued to make payments on the note until they defaulted again in April 2017.

BCB commenced foreclosure proceedings, Defendants defaulted and, on November 28, 2017, a judgment of foreclosure was entered in favor of BCB for $895,253.83. In February 2018, the Andover Property was sold at a sheriff's sale. Prior to the sale, BCB obtained an appraisal of the Andover Property at $735,000, which was credited to Defendants. BCB received a sheriff's deed to the Andover Property and the report of sale for the Andover Property indicated a deficiency of $926,338.03. BCB eventually sold the Andover Property for $700,000. In October 2019, the parties entered into a settlement agreement in the foreclosure action, which, among other things, reduced the deficiency amount by the fair market value of the Andover Property to be determined by a court-appointed appraiser.

BCB also filed a deficiency action against Defendants in March 2018 for $191,338.03. Defendants asserted counterclaims, alleging that BCB violated the DFA and TILA by granting a loan that imposed a debt to income (DTI) ratio greater than 43% and by failing to adequately consider their ability to repay the Andover loan. On BCB's motion for summary judgment, the trial court rejected Defendants' claim that BCB violated the DFA and TILA and dismissed Defendants' counterclaims with prejudice. The trial court found that Regulation Z did not apply to the Sparta loan because the regulation did not become effective until October 1, 2009. The judge also determined that Regulation Z's DTI requirement did not apply to the Andover loan because the rule was not amended to prohibit a DTI exceeding forty-three percent until 2013. The trial court further concluded that Defendants failed to provide any supporting evidence to establish that BCB violated Regulation Z by failing to adequately consider their ability to repay the Andover loan. Specifically, the trial court rejected Defendants' assertion that BCB's assistant vice president blindly accepted Defendants' accountant's representations.

Defendants appealed the trial court's grant of summary judgment and argued, among other things, that there were disputed factual issues as to whether BCB falsified information on Defendants' mortgage application. The Appellate Division affirmed the trial court's order "substantially for the reasons detailed in the trial judge's comprehensive written statement of reasons." The Appellate Division also rejected Defendants' argument that the trial court erred by not allowing a hearing to determine the fair market value of the Andover Property, noting that Defendants' argument ignored the settlement agreement in which they agreed the fair market value would be established by a court-appointed appraiser.

Recent Changes to the New York Statutory Short Form Power of Attorney

On June 13, 2021, a revised law went into effect creating a new form of the New York Statutory Short Form Power of Attorney (the "Short Form POA"). As agents under a power of attorney ask banks and other financial institutions to accept the new form pursuant to a transaction with the bank, banks should be aware of the changes to determine whether a particular power of attorney form is a valid Short Form POA and whether the agent is authorized to make a particular transaction pursuant to it. A few of the major changes to the Short Form POA are highlighted below.

Whereas power of attorney forms were previously required to match the "exact wording" of the Short Form POA in order to be considered compliant with the statute, now they only need to "substantially conform" to the wording of the Short Form POA. This change invites some flexibility for principals and their agents who previously failed to create a proper Short Form POA due to minor errors. Now, banks cannot reject a new form solely on the basis that it does not match the exact wording.

Banks should nonetheless ensure that the new form has been properly executed in compliance with the revised statute. A Short Form POA must now have two witness signatures, and those witnesses cannot be named as agents or permissible recipients of gifts. In addition, a notary must acknowledge the principal's signature. The notary may also serve as a witness.

The revisions also eliminate the Statutory Gifts Rider. Instead, any gifting provisions must now occur in the Modifications section of the new form. This requires banks to review the Modifications section to determine whether an agent is authorized to make a specific gift transaction to a specific person or organization.

Banks should exercise extreme caution when refusing to honor a purported Short Form POA. Under the revised law, if a bank (or any third party) refuses to honor a Short Form POA, an action may be brought against the bank to compel acceptance, and if the court finds that the bank unreasonably rejected a valid Short Form POA, the court may award the plaintiff damages, including attorney's fees and costs.

Fortunately, the revised law offers banks some protection. First, a bank may in good faith accept and rely upon a properly executed Short Form POA such that the bank is not exposed to liability if the form is void, invalid, or terminated. However, if a bank has doubt about the form, or any transaction requested pursuant to it, the bank may ask for (i) an agent's certification under penalty of perjury of any factual matter concerning the principal and (ii) an opinion of counsel as to any matter of law. A request for an opinion of counsel, which must be made in writing, set out the reasons for the request, and state whether the principal is to pay for the opinion, must be made within 10 days of the bank receiving the form. The bank may then rely on the agent's certification and opinion of counsel without further inquiry.

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