Sherman Atlas Sylvester & Stamelman

BANKING ALERT

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United States Supreme Court Further Limits Standing in Consumer Class Actions

The United States Supreme Court issued a new decision, *TransUnion LLC v. Ramirez* (No. 20-297), addressing standing for certain claims under the Fair Credit Reporting Act ("FCRA"). Generally, to have standing a party needs to have a sufficient legal interest and injury. In *Ramirez*, 8185 consumers brought a class action suit against TransUnion LLC ("TransUnion"), a consumer reporting agency, based on alerts in their TransUnion credit files indicating their names were a "potential match" to a name on a list that the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintained of terrorists, drug traffickers, and other serious criminals considered threats to the security of the United States. The named plaintiff, Sergio Ramirez, alleged that as a result of his TransUnion file he had trouble obtaining credit and purchasing a car and suffered embarrassment after his name was matched to one on a terrorist list. However, the majority of the class never suffered a denial of credit or other injury as a result of the TransUnion files. The FCRA claims alleged that TransUnion did not use reasonable procedures to ensure accurate information and certain mailings the plaintiffs received from TransUnion contained formatting defects.

Ramirez obtained a multimillion-dollar jury verdict in the District Court for the Northern District of California against TransUnion for erroneously flagging him and more than 8,000 consumers as potential terrorists.

TransUnion appealed, arguing that the class definition included individuals who had suffered no injury. After the Ninth Circuit held that all of the class members would need to meet Article III standing, the Supreme Court ultimately granted *certiorari* on the question of whether Article III permitted a damages class action where most of the class had not suffered an actual injury.

The Supreme Court held that if a plaintiff does not suffer a real harm and the risk of future harm never materializes, there is no concrete harm and no standing, and thus a plaintiff/class of plaintiffs cannot maintain an FCRA action in federal court. With respect to reasonable procedures, the Supreme Court found that the 1,853

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class members whose reports had been disseminated to third-party businesses (such as car dealers) had suffered concrete harm, and therefore, had standing to pursue their FCRA claims. The Supreme Court held that the remaining class members whose reports were not disseminated to a third-party did not suffer concrete harm, reasoning that "[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm," and the Supreme Court rejected the plaintiffs' argument that inaccuracies could lead to future harm. With respect to the formatting defects, the Supreme Court held that the plaintiffs did not demonstrate that they had suffered any harm from the formatting violations, including confusion or reliance. Thus, the Supreme Court ruled that individuals lacking concrete harm cannot sufficiently show that they have been injured under the FCRA and, therefore, lacked standing.

New Jersey Appellate Division Applies Statute of Limitations to Bar Collection Action on Promissory Note

In *Wilmington Savings Fund, FSB v. Raposo*, No. A-3641-19 (N.J. App. Div. July 1, 2021), the Appellate Division applied the statute of limitations in N.J.S.A. 2A:50-8 to bar a collection action on a promissory note after foreclosure. N.J.S.A 2A:50-8 provides that if a mortgage is extinguished by a foreclosure of a prior mortgage and sale of the mortgaged premises, the party that holds a note secured by the extinguished mortgage can commence an action on the note within one year of the sale.

In 2006, Kareem Raposo and Lourdes Raposo purchased real property located in Paterson. To finance the purchase, the Raposos, on the same day, borrowed $200,000 from Decision One Mortgage Company, LLC ("Decision One"), secured by a first mortgage and note, and an additional $50,000 from Decision One, secured by a second mortgage and note. Both notes and mortgages were assigned to Mortgage Electronics Registration Systems, Inc. ("MERS"). Three years later, MERS assigned the first mortgage to Deutsche Bank National Trust Company, and Deutsche Bank filed a foreclosure action against the Raposos, naming MERS as a nominee for Decision One because of the second mortgage. A final judgment of foreclosure was entered against all defendants, and the property was sold at a 2014 sheriff's sale, thereby extinguishing the second mortgage.

At an unspecified time, Decision One assigned its interest in the second mortgage to Wilmington Savings. In 2019, Wilmington Savings filed a collection action against the Raposos for amounts due under the second note. The trial court dismissed the complaint with prejudice, finding that the claim was barred by N.J.S.A. 2A:50-8. The trial court also determined that a statutory exception to the requirement that a claim based on a note tied to an extinguished mortgage be brought within one year of the sheriff's sale did not apply. The exception -- found in N.J.S.A. 2A:50-2.3 -- applies if the second mortgage is subject to a prior mortgage held by a different institution. The Appellate Division affirmed, rejecting Wilmington Savings' argument that the exception to the one-year statute of limitations found in N.J.S.A. 2A:50-2.3(d) applied because it is a different banking institution than the one that held the original first and second mortgages. As the Appellate Division explained, Wilmington Savings stood, as an assignee, in the shoes of Decision One. The Appellate Division reasoned that if the exception was intended to apply to the case before it, the statute of limitations' "utility would be defeated." To avoid the statute of limitations bar, "the lender named in a first and second mortgage would merely have to, after foreclosing on a first mortgage, assign the secondary obligation to another entity." The Appellate Division concluded: "It is the fact that Decision One was the original lender for both the first and second mortgage that makes the one-year statute of limitations applicable. Thus, its successor-in-interest is not entitled to the exception that would have been in play had the second mortgage lender been a different banking institution."

New Jersey Appellate Division Affirms Decision to Vacate Judgment of Foreclosure When Complaint Was Not Properly Served on Real Title Holder

In *Tower DBW VI REO, LLC v. Sunshine Homes, LLC and Brisco Funding, LLC*, Docket No. A-1604-19 (N.J. App. Div. July 1, 2021), the Appellate Division affirmed the trial court's order granting defendant Sunshine Homes and Management, Inc. ("SHMI") the right to intervene and vacate a final default judgment of foreclosure. In December 2014, SHMI purchased the property at issue. A scrivener's error on the deed listed the owner of the property as "Sunshine Homes, LLC," a non-existent entity, but listed SHMI's correct address of 700 Park Avenue in Elizabeth. The property was encumbered by a $176,000 commercial loan extended by defendant Brisco Funding, LLC ("Brisco") to SHMI. The recorded mortgage incorrectly listed "Sunshine Homes, Inc." as the mortgagee with SHMI's address of 700 Park Avenue, Elizabeth. Before the mortgage and deed were recorded, Sunshine Homes, Inc.'s business status was revoked for failing to file an annual report for two consecutive years.

In June 2016, plaintiff purchased a tax sale certificate from the tax collector for the property, deeded to "Sunshine Homes, LLC." In January 2019, plaintiff sent "Sunshine Homes, LLC" a pre-action notice advising that it would institute foreclosure proceedings on the property unless the tax sale certificate was redeemed within thirty days. The letter was addressed to the non-existent Sunshine Homes, LLC, but was sent to SHMI's address at 700 Park Avenue, Elizabeth. SHMI's counsel acknowledged receipt of plaintiff's letter. On March 4, 2019, Plaintiff filed an action to foreclose the tax sale certificate against Sunshine Homes, LLC and Brisco. Plaintiff served Brisco and, after discovering Sunshine Homes, LLC did not exist, discovered Sunshine Homes, Inc. and its registered agent Sheldon Furman. Plaintiff subsequently served the foreclosure complaint upon Sunshine Homes, Inc. (a defunct entity that never had an interest in the property) at Mr. Furman's Montville address.

On April 17, 2019, after the foreclosure complaint was filed, a corrective deed for the property was filed and recorded, listing the grantor as "Sunshine Homes, LLC" with an address at 700 Park Avenue in Elizabeth and the grantee as SMHI at the same address. On April 22, 2019, plaintiff moved for entry of default against Sunshine Homes, LLC and Brisco for failing to appear. Plaintiff's motion was granted, and after redemption was not made, plaintiff obtained an uncontested final judgment against defendants Brisco and Sunshine Homes, LLC on August 14, 2019. On September 5, 2019, SHMI filed a motion to vacate final judgment, which was originally denied due to lack of standing because SHMI was not a party or legal representative of a party. SHMI subsequently filed a motion to intervene and vacate the final judgment. The trial court found that SHMI was the owner of the property and an interested party and, thus, it would be unfair to not allow it to intervene. The trial court also vacated the default foreclosure judgment.

In affirming the trial court's decision, the Appellate Division rejected plaintiff's argument that SHMI's motion to vacate was untimely. The Appellate Division reasoned that a delay of 64 days from the date of final judgment to the filing of the motion to vacate was not unreasonable. The Appellate Division also ruled that the motion judge did not abuse his discretion by vacating the default foreclosure judgment as SHMI was deprived of procedural due process when it was not served with the summons and foreclosure complaint. Finally, the Appellate Division found that plaintiff was not diligent in effectuating service upon SHMI. Indeed, while the deed and mortgage named incorrect parties as the owner of the property, both instruments correctly identified SHMI's address of 700 Park Avenue, Elizabeth.

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