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APPELLATE MORTGAGE NEWSLETTER

PIB Appellate Mortgage Newsletter

We are pleased to share with you the PIB Appellate Mortgage Newsletter.

This newsletter summarizes recent relevant appellate decisions from all of the jurisdictions in which we are located: New York, New Jersey, Pennsylvania, Massachusetts and California.

For ease of reference, each case summary begins with a brief synopsis of the topics that are generally covered in that case. If there are any particular decisions that you would like to review or discuss, please do not hesitate to let us know.

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MASSACHUSETTS

Fannie Mae's nonjudicial foreclosure of a mortgage does not violate the borrower's due process rights under the Fifth Amendment: *Montilla v. Fannie Mae*, 2021 U.S. App. LEXIS 16998 (1st Cir. June 8, 2021): Plaintiffs appeal from the order of the United States District Court for the District of Rhode Island, dismissing plaintiffs' putative class action that alleged defendants Fannie Mae and FHFA violated their Fifth Amendment procedural due process rights by conducting a nonjudicial foreclosure sale of plaintiffs' mortgaged properties.

By way of background, the First Circuit noted that Fannie Mae is a "private, publicly traded corporations ... created by federal charter to support the development of the secondary mortgage market", and buys and sells residential mortgages. In 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), which established and effectively appointed the Federal Housing Finance Agency ("FHFA") as conservator for Fannie Mae "for the purpose of reorganizing, rehabilitating, or winding up [its] affairs." As conservator, FHFA "immediately succeed[ed] to" the "rights, titles, powers, and privileges" of Fannie Mae, and the entity's shareholders and boards of directors.

Here, Fannie Mae acquired the subject loans upon which plaintiffs defaulted and, consistent with the loan documents and Rhode Island law, conducted nonjudicial foreclosure sales of the mortgaged properties.

The District Court granted FHFA and Fannie Mae's motions to dismiss plaintiffs' claims that their due process rights were violated. In doing so, the District Court held that "because FHFA stepped into [Fannie Mae]'s shoes as its conservator and its ability to foreclose was a contractual right inherited from [Fannie Mae] by virtue of its conservatorship, FHFA was not acting as the government when it foreclosed on the plaintiffs' mortgages and was not subject to the plaintiffs' Fifth Amendment claims." This decision created a split in the First Circuit, as an earlier Rhode Island district court held to the contrary in *Sisti v. Fed. Hous. Fin. Agency*, 324 F. Supp. 3d 273, 284 (D.R.I. 2018). On appeal, the First Circuit held that the district court's analysis in *Sisti* was "simply wrong and contrary to law."

First, "a federal agency exercising a portion of its statutory powers in one role is a government actor does not as a matter of law mean that it is a government actor for all purposes or in all exercises of its statutory powers." The First Circuit opined that, "[u]nder HERA's 'succession clause,' when FHFA became [Fannie Mae's] conservator, it succeeded to 'all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.' 12 U.S.C. § 4617(b)(2)(A). One of these rights was [Fannie Mae's] private contractual right to nonjudicially foreclose on appellants' mortgages, which FHFA instructed [Fannie Mae's] loan servicers to exercise." FHFA did not act as the government when it exercised this private contractual right to foreclose.

Second, applying a three-part test, the First Circuit rejected plaintiffs' argument that Fannie Mae is itself a government actor. While there was no dispute that the first two prongs were satisfied – *i.e.*, (1) Fannie Mae was created by the Government by special law, (2) for the furtherance of

governmental objectives – the third prong was not satisfied since the government did not retain "permanent authority to appoint a majority of the directors of that corporation".

The First Circuit opined that "FHFA controls [Fannie Mae] for the limited purpose of 'reorganizing, rehabilitating, or winding up [its] affairs.' 12 U.S.C. § 4617(a)(2) … Given the conservatorship's limited purpose, Congress is not required to assign a definite endpoint to FHFA's conservatorship to make the government's control temporary. Similarly, appellants' argument that the conservatorship has 'continued to exist well past its intended purpose' fails. The housing and mortgage financial markets are highly complex, as are the various indicators of their financial health, so the fact that FHFA has maintained the conservatorship for almost thirteen years does not mean that the government's control is permanent." The fact that the FHFA has all the powers of Fannie Mae's boards of directors, and has discretion to determine when the conservatorship will end, does not change the analysis.

Post-foreclosure judgment "Try Title" action subject to dismissal: *Poole v. U.S. Bank, as Trustee on behalf of the Holders of the JPMorgan Mortgage Acquisition Trust 2006-WMC2 Asset Backed Pass-Through Certificates Series 2006 WMC2* (1st Cir. July 18, 2021): Borrowers appeal the order from the United States District Court for the District of Massachusetts, which granted the Trust's motion to dismiss the borrowers' complaint. Order affirmed.

Borrowers filed their post foreclosure action in state court pursuant to the Massachusetts Try Title statute, G.L. c. 240, §§ 1-5, to challenge the Trust's chain of mortgage assignments and subsequent foreclosure. The Trust removed the case to federal court and moved to dismiss on multiple grounds, including *res judicata*. Specifically, borrowers previously litigated and lost a nearly identical pre-foreclosure challenge to the Trust's chain of assignments. In response, borrowers argued that that the Trust's claim to record title did not become "adverse" under the Try Title statute until after the foreclosure took place. *Abate v. Fremont Inv. & Loan*, 470 Mass. 821 (2015).

The District Court granted the Trust's motion to dismiss, ruling that the borrowers' substantive claims were adjudicated in prior state court proceedings. Borrowers appealed to the First Circuit, who affirmed the District Court's decision, ruling that the borrowers could not prevail in their post-foreclosure Try Title action without either altering or ignoring the effect of a prior state court judgment.

Where the order indicates it was not served, there is no clerical mistake therein as required for relief under Mass. R. Civ. P. Rule 60(a); a motion for relief under Rule 60(b)(2) based on newly discovered evidence must be brought within one year; a party is not entitled to relief under Mass. R. Civ. P. Rule 60(b)(6) (extraordinary circumstances) where their grievance could have been addressed via the appellate process: *Fed. Home Loan Mortg. Corp. v. Evans*, 2021 Mass. App. Unpub. LEXIS 444 (Mass. App. Ct. June 17, 2021): Defendant appeals denial of her motion for reconsideration of an order denying an earlier motion seeking to reopen an action that had been resolved three years earlier. Appeal denied.

In 2016, defendant sought review by a single justice of the court of a Housing Court judge's order that she make use and occupancy payments while she had an appeal pending. As a result, an

Order was entered staying eviction proceedings and remanding the matter to the Housing Court for a use and occupancy hearing. On the date of the hearing, defendant filed a motion to postpone the hearing due to her asserted disabilities and insufficient notice of the hearing date, and a second motion to postpone on the basis that plaintiff had not yet provided discovery responses, and to vacate the judgment as void based on newly discovered evidence. She did not attend the hearing, and the judge denied her two motions for lack of prosecution. The judge then issued an order for use and occupancy payments. In January 2017, plaintiff's motion to dismiss defendant's pending appeal was granted, and on January 31, 2017, the single judge lifted the stay and remanded the matter to the Housing Court, stating that "[t]his matter is now closed in this court."

In February 2020 – more than three years after the single justice's closure order – defendant filed a "Motion to Reopen Her Case for Clerical Mistake" based upon Rule 60. The motion was denied. On reconsideration, the court rejected defendant's argument that she was prejudiced by the clerk's failure to serve her with the order directing the Housing Court to hold the use and occupancy hearing.

Defendant then filed a motion for reconsideration, asserting that her motion to reopen was based not on her being aggrieved by the use and occupancy order itself, but instead on what she characterized as a clerical mistake under Rule 60(a): the failure of the clerk of this court to serve her with the single justice's October 26, 2016 order directing the Housing Court to hold the use and occupancy hearing.

On appeal, the Appeals Court concluded there was no basis under Rule 60 to grant defendant's motion to re-open. The Appeals Court noted that under Rule 60(a), a court may correct clerical mistakes in judgments and orders, but it "merely seeks to ensure that the record of judgment reflects what actually took place." Here, the order indicated that it was sent to various parties, but not the defendant. As this "accurately reflects what [defendant] claims to have occurred … there was no clerical mistake requiring correction."

In addition, defendant failed to file her motion within the one-year deadline under Rule 60(b)(2), which allows a court to relieve a party from a judgment or order based on newly discovered evidence. Here, defendant filed her motion to reopen more than three years after the single justice had taken final action on her request for review.

Likewise, although defendant alleged in one of her motions that the judgment was void, entitling her to relief under Rule 60(b)(4). she did not appeal from the order denying that motion. Nor were there "extraordinary circumstances" required for relief under Rule 60(b)(6). Defendant did not identify any prejudice flowing from the order that could not have been addressed through the normal appellate process.

Notice to quit naming trustee as owner does not defeat standing where the pleadings properly name the trust owner; occupants who are not parties to the loan have no standing to contest validity of foreclosure; omission of a second parcel in the legal description of the mortgage does not necessarily defeat foreclosure of that parcel: *Ten Diamond Street Worcester Realty Trust v. Farrar*, 2021 Mass. App. Unpub. LEXIS 482 (Mass. App. Ct. June 29, 2021): The defendants/occupants of residential property appeal from judgments of possession entered in favor

of the plaintiff. Defendant occupants Samantha Farrar and Brian Beebe also appeal from an order dismissing their summary process appeal for failure to pay use and occupancy. Appeals denied.

As an initial matter, the Appeals Court found that the judge properly dismissed the appeal of occupants Farrar and Beebe, as they "neither timely sought review of the bond order to a single justice of this court nor complied with the bond order by making regular use and occupancy payments."

As to plaintiff's standing to bring its summary process proceedings after it purchased the premises at public auction, the Appeals Court held that standing was not defeated by the fact that the notices to quit identified plaintiff's trustee, Kensington Management, as the owner, while the pleadings identified plaintiff as the owner. The Appeals Court agreed with the lower court that, although the plaintiff "could have been more precise in identifying the nature of Kensington Management's interest in the [p]roperty," the quitclaim deed from the bank to the trust and the trustee's certificate demonstrated that the plaintiff was in fact the record owner of the property. In addition, although the trust had not been created on the date the property was deeded to plaintiff, the trust had been created by the date the deed was recorded, and the notices to quit were served on defendants.

In addition, none of the defendants, other than the borrower, had standing to challenge the validity of the foreclosure. They were not parties to the loan agreement or mortgage and did not have "bona fide tenant status or any tenancy relationship with the bank." In addition, the borrower raised standing as a defense in an earlier summary process action, which she did not appeal. That decision "has res judicata effect, [and she] cannot collaterally attack it by reasserting the defense and counterclaim in this proceeding."

In response to the borrower's argument that the foreclosure sale illegally included a second parcel, the Appeals Court opined that, "although the legal description of the property in the mortgage extended only to parcel one, it also described the property covered as '[b]eing the same premises conveyed to Beverly A. Farrar by deed dated February 25, 2005,' which included both parcels. Moreover, the loan modification agreement dated October 16, 2009, amended and supplemented the mortgage, and plainly covered both parcels, including the property occupied by the defendants."

Finally, as the occupants never rented or leased the premises, the judge properly ruled that they were not entitled to raise defenses or counterclaims under the rent withholding statute. Likewise, their quiet enjoyment defenses and counterclaims failed, either because of the absence of a landlord-tenant relationship with the trust, or based upon the disposition of the prior self-help eviction action.

NEW JERSEY

Respondent must cross-appeal to obtain relief from an order on appeal: *Santander Bank, N.A. v. Lopez*, 2021 N.J. Super. Unpub. LEXIS 1224 (App. Div. June 23, 2021): In response to Defendant's appeal of an order granting foreclosing plaintiff summary judgment and an order in which the trial court reduced the final judgment by $37,457.54, because plaintiff had impermissibly charged late fees, plaintiff sought to vacate the latter order without cross-appealing.

The Appellate Division found Defendant's appeal to be meritless. As to plaintiff's argument that the trial court erred in reducing the final judgment, the Appellate Division opined that, "[w]ithout cross-appealing, a party may argue points the trial court either rejected or did not address, so long as those arguments are in support of the trial court's order, but a respondent must cross-appeal to obtain relief from a judgment. Because plaintiff did not cross-appeal, we decline to consider plaintiff's challenge to part of the final judgment."

Loan that originated prior to enactment of Regulation Z debt-to-income limits is not subject to those limits; waiver of claims set forth in forbearance agreement will be upheld; a hearing as to fair market value and inspection may be waived in deficiency judgment settlement agreement: *BCB Cmty. Bank v. Calandrillo*, 2021 N.J. Super. Unpub. LEXIS 1049 (App. Div. June 2, 2021): Defendants appeal: (1) a Law Division order that granted plaintiff partial summary judgment on its deficiency action and dismissed defendants' counterclaims; and (2) an amended order of final deficiency judgment awarding plaintiff $186,438.02.

In their counterclaims, defendants allege that plaintiff violated the Dodd Frank Act, Truth in Lending Act, and Regulation Z by granting two loans "that imposed a debt to income . . . ratio [(DTI)] exceeding [forty-three] percent" and by "failing to adequately consider [their] ability to repay the loan." The Appellate Division found that the Superior Court correctly concluded that Regulation Z did not apply to the first loan because the regulation became effective after it originated. Likewise, it did not apply to the second loan because the DTI requirement was not amended to prohibit a DTI exceeding 43% until 2013.

In addition, evidence by way of emails exchanged during the loan application process between defendants' accountant (who was on plaintiff's board at the time of origination) and plaintiff's assistant vice president ("AVP") indicated that plaintiff did not ignore concerns about defendants' credit card debt, as alleged by defendants. Rather, plaintiff's AVP sought "confirmation on which credit cards were paid for by defendant's business." Likewise, an unsigned loan application that defendants claimed falsely reported income and inflated property values was countered by a signed loan application that did not report the false income and included lower property values. In addition, the Superior Court correctly noted that "[d]efendants have not submitted a copy of the mortgage application that was allegedly forged by [their accountant], nor have they provided a transcript of plaintiff's [AVP's] deposition testimony that allegedly 'identified' the application."

Moreover, defendants had entered into two forbearance agreements in connection with one of the loans in which they waived their claims. The Appellate Division agreed that defendants "provided no support that the waiver of 'any claims of bad faith, fraud, duress, lender liability or excess

control against the [l]ender based upon any events that occurred prior to the execution of this [a]greement,' were in any way improper in their formation or otherwise unjust."

As to the fair market value of the property and the calculation of the deficiency, the Appellate Division concluded that the lower court did not err by declining to hold a hearing as to the fair market value and not requiring an inspection of the property:

> Defendants' argument completely ignores the terms of the parties' settlement agreement [regarding plaintiff's claims for a deficiency judgment] in which they agreed that the fair market value of the property would be established by a court appointed appraiser. The agreement further provided that 'the independent court-appointed appraiser shall endeavor to do an on-site inspection of the premises and toward that, plaintiff and its counsel shall cooperate in attempting to arrange the same.' Defendant acknowledged that by agreeing to the settlement, he waived his right to a hearing on the fair market value. Here, the appraiser was only required to attempt an on-site appraisal, with the assistance of plaintiff's counsel. As the record indicates, despite plaintiff's counsel's best efforts, he was unable to obtain permission to conduct an on-site appraisal from the current occupants of the Andover property. Accordingly, the appraiser relied upon 'various documents including previous appraisals, photo surveys, and listing information' to determine the property's value at $740,000. We are satisfied that the judge's decision not to conduct a hearing to determine the fair market value, and his findings supporting the final judgment, are amply supported by the record.

NEW YORK

FDCPA claims must be brought within one year of the alleged offending activity; to sustain a claim under the FDCPA, the misrepresentation must be material; Plaintiff must allege that defendant is a "debt collector within the meaning of the FDCPA": *Walker v. Pitnell*, 2021 U.S. App. LEXIS 20062 (2d Cir. July 7, 2021): Plaintiff appeals dismissal of his FDCPA and state law claims against HSBC Bank USA, NA, its attorneys, and others, based on allegations that defendants pursued foreclosure against him after fraudulently assigning his mortgage to HSBC. Appeal denied.

The Second Circuit found that Plaintiff's FDCPA claims are time-barred, as they were required to be brought within one year from the date on which the violation occurred. Plaintiff's allegations are based upon: (1) the execution of a mortgage assignment in 2008; (2) the commencement of a foreclosure action in 2008; and (3) court filings in 2014, 2017 and 2018. Since plaintiff filed the instant action in July 2019, the FDCPA claims are time-barred, as all of the allegations concern acts that occurred more than one year before the filing of the within action, other than those involving an affirmation-in-opposition filed by HSBC's attorneys in November 2018.

As for the November 2018 affirmation-in-opposition, the District Court had concluded that the claim based thereon "was also untimely because it contained the same alleged misrepresentation … as earlier filings that were the basis for the time-barred claims." The Second Circuit noted that it has not "decided whether a repeated but otherwise identical misrepresentation in a court filing counts as a separate FDCPA violation for statute of limitations purposes." Nevertheless, the Second Circuit found that it need not decide this issue here, because the plaintiff failed to "allege sufficient facts to state an FDCPA claim, even assuming that he could bring a timely claim based on the November 2018 affirmation," as he did not allege a "material" misrepresentation; that is, the misrepresentation has "the potential to affect the decision-making process of the least sophisticated consumer."

The Second Circuit opined that the November 2018 affirmation "did not prevent [the plaintiff] from filing a reply affirmation or from continuing to challenge the foreclosure judgment in appellate proceedings. Nor did it misrepresent the nature of [the plaintiff's] debt or somehow prevent him from responding to it."

In addition, plaintiff failed to allege that HSBC was a debt collector within the meaning of the FDCPA. The Second Circuit noted that, under the FDCPA, a debt collector "means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." Here plaintiff "alleged only that HSBC 'was a debt collector, and not a creditor,' and that the 2008 mortgage note assignment was fraudulently backdated at the time the foreclosure action began." The Second Circuit opined that "[t]hese conclusory allegations are insufficient to state a claim under the FDCPA."

Finally, as the District Court properly dismissed the FDCPA claims – the only claims over which the court had original jurisdiction – the Second Circuit held that the District Court did not abuse

its discretion by declining to exercise supplemental jurisdiction over the borrower's state law claims.

Foreclosure complaint accelerated entire debt even if defendant was not served: *Fed. Nat'l Mtge. Ass'n v. Woolstone*, 2021 N.Y. App. Div. LEXIS 4458 (2nd Dept. July 14, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), granting defendant's motion pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. Order affirmed.

The Second Department found that defendant established that the six-year statute of limitations under CPLR 213(4) began to run on the entire debt in January 2010, when plaintiff commenced a prior action to foreclose the mortgage, which was dismissed in September 2014 based upon defendant's cross-motion to dismiss for lack of personal jurisdiction. The Second Department rejected plaintiff's argument that the dismissal of the prior complaint for failure to effect personal service invalidated plaintiff's election to accelerate the underlying debt. Nor did the Second Department find any merit in plaintiff's argument that mailing the 30-day and 90-day notices after the prior action was dismissed constituted a revocation of that prior acceleration.

Restoring a case marked on the calendar as inactive is "automatic", if case is pre-Note of Issue and if no 90-day notice was issued pursuant to CPLR 3216: *Wells Fargo Bank v. Oziel*, 2021 N.Y. App. Div. LEXIS 4478 (2nd Dept., July 14, 2021): Defendant appeals from orders of the Supreme Court, Nassau County (Thomas A. Adams, J.), restoring the case to the active calendar, for summary judgment and order of reference in favor of plaintiff, and for judgment of foreclosure and sale.

Plaintiff filed the foreclosure action on June 25, 2009. The case was removed from the court's active calendar. In December 2016, plaintiff moved to restore the case to the active calendar, as well as for summary judgment and an order of reference. The court granted plaintiff's motion, and then also granted plaintiff's later motion for judgment of foreclosure and sale.

On appeal, the Second Department first found that the trial court properly granted plaintiff's motion to restore: "Where, as here, the case was marked inactive before a note of issue had been filed, there was no 90-day notice pursuant to CPLR 3216, and there was no order dismissing the complaint pursuant to 22 NYCRR 202.27 for failure to appear at a compliance conference, 'restoring a case marked "inactive" is automatic.'" The Court found that, under such circumstances, it did not even matter if plaintiff had a reasonable excuse for the delay, or whether it engaged in "dilatory conduct".

The Second Department did find, however, that plaintiff failed to demonstrate its standing to foreclose. Plaintiff relied upon an affidavit of possession from an employee of its loan servicer, who said that plaintiff was in possession of the note on the date the complaint was filed, based upon her review of business records. Plaintiff, however, had failed to identify and produce those business records, in violation of the Second Department's decision in *Gordon*.

Two prior voluntary dismissals of foreclosure complaint revoked acceleration: *Citibank, N.A. v Goldy Kletzky*, 2021 N.Y. App. Div. LEXIS 4356 (2nd Dept., July 7, 2021): Foreclosing

plaintiff appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), denying the plaintiff's motion for summary judgment, and granting defendant's cross motion pursuant to CPLR 3211(a)(5) and 3217(c) to dismiss the complaint. Appeal granted to the extent of vacating the order dismissing the complaint.

Plaintiff voluntarily discontinued two prior foreclosures pursuant to CPLR 3217(a), thus revoking the prior acceleration of the debt. As a result, the Second Department found that the instant, third foreclosure action – which was filed more than six years after the first foreclosure action had been filed – was timely.

Further, the Second Department found that the trial court erred by treating the second voluntary discontinuance as an adjudication "on the merits" under CPLR 3217(c). While not described in the opinion itself, a review of the underlying trial court docket reflects that the "stipulation of discontinuance" in the second foreclosure action was only signed by plaintiff's attorney.

Delay in seeking default against non-responding defendant under CPLR 3215(c), without a reasonable excuse, may result in dismissal: *US Bank, N.A. v. Davis*, 2021 N.Y. App. Div. LEXIS 4335 (2nd Dept. July 7, 2021): Defendants Ray Osborn Davis ("Davis") and 964-966 Myrtle, LLC ("Myrtle"), appeal from a judgment of foreclosure and sale of the Supreme Court, Kings County (Lawrence Knipel, J.), entered upon an order of the same court (Peter P. Sweeney, J.), granting the plaintiff's motion for summary judgment against Davis, and denying the cross motion of defendants Davis and Myrtle to dismiss the complaint. Appeal granted to the extent of vacating the final judgment and dismissing the Complaint as abandoned as Myrtle pursuant to CPLR 3215(c).

Plaintiff served Myrtle on July 22, 2010, but did not seek default judgment until it filed its motion for summary judgment as to Davis on August 13, 2013. The Second Department concluded that plaintiff did not provide a reasonable excuse for failing to proceed to entry of default judgment against Myrtle within one year from its default. On August 17, 2011, the case was released from the settlement conference part, almost two years before plaintiff sought default judgment. Likewise, more than a year had passed from the time the matter was released from the settlement part and when plaintiff put a hold on the foreclosure from October 30, 2012 until March 21, 2013, due to Hurricane Sandy. The Second Department held that "[a]n excuse which matures after the expiration of the statutory limit for entering a default judgment with the Clerk is legally insufficient to justify a plaintiff's failure to enter the default judgment."

The Second Department rejected plaintiff's argument that it had manifested its intent not to abandon the case by moving for summary judgment in 2013:

> While it is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) and a plaintiff is not even required to specifically seek a default judgment within a year, but may take the preliminary step toward obtaining a default judgment of foreclosure and sale by moving . . . for an order of reference pursuant to RPAPL 1321 that preliminary step still must be taken within one year of [a defendant's] default. Here, since the plaintiff moved for summary judgment and an order of

> reference almost two years after the default, when the statutory time within which to enter a default had long since expired, it was too late for the plaintiff to manifest an intent not to abandon the case.

Defendant must show reasonable excuse for default when seeking to vacate judgment on the grounds of intrinsic fraud: *JPMorgan Chase Bank, N.A. v. Multani*, 2021 N.Y. App. Div. LEXIS 4492 (2nd Dept. July 14, 2021): Defendant appeals from an order of the Supreme Court, Queens County (Howard G. Lane, J.), denying his motion pursuant to CPLR 5015(a)(3) to vacate a judgment of foreclosure and sale. Appeal denied.

In the Supreme Court, defendant was served with the summons and complaint, but failed to appear or answer the complaint. Plaintiff moved for and obtained the JFS. Six months later, Defendant moved pursuant to CPLR 5015(a)(3) to vacate the JFS on the grounds that, *inter alia*, the assignment of mortgage was invalid based upon an alleged conflict of interest, *i.e.*, that the attorney for plaintiff executed the assignment of mortgage on behalf of the assignor when representing the assignee (namely, the plaintiff). The Supreme Court denied defendant's motion, and defendant appealed.

On appeal, the Second Department held that the Supreme Court properly denied defendant's motion. As the Second Department recognized, if a defendant moves to vacate default under CPLR 5015(a)(3) based upon intrinsic fraud – *i.e.*, on the basis that plaintiff's allegations in the complaint are in fact false – then the defendant must establish both a reasonable excuse and a potentially meritorious defense to the action.

In this case, the Second Department found that the defendant failed to provide any excuse, let alone a reasonable one for defaulting in failing to appear or answer the complaint. Therefore, it was unnecessary to even consider whether defendant had a potentially meritorious defense.

Summary judgment in favor of plaintiff will be denied if plaintiff fails to demonstrate the RPAPL 1304 notice included list of housing agencies: *US Bank N.A. v. Gurung*, 2021 N.Y. App. Div. LEXIS 4458 (2nd Dept., July 14, 2021): Defendant appeals from orders of the Supreme Court, Queens County (Salvatore J. Modica, J.), granting foreclosing plaintiff's motion for summary judgment and an order of the same court denying defendant's motion for summary judgment dismissing the complaint. Appeal granted to the extent of vacating entry of summary judgment in favor of Plaintiff.

Plaintiff failed to demonstrate compliance with RPAPL 1304. "[T]he RPAPL notices submitted by the plaintiff … failed to demonstrate that the notices contained five housing agencies that served the region where the defendant resided." Thus, the Second Department held that the Supreme Court should have denied summary judgment. Defendant, however, was not entitled to dismissal "as she failed to affirmatively demonstrate, as a matter of law, that the plaintiff failed to comply with RPAPL 1304."

Unauthorized appearance by an attorney does not confer jurisdiction: *Fed. Nat'l Mtge. Assn v. Beckford*, 2021 N.Y. App. Div. LEXIS 4476 (2nd Dept. July 14, 2021): Defendant Marcia Beckford ("Beckford") appeals from an order of the Supreme Court, Kings County (Noach Dear, J.), dated January 22, 2018 denying her motion to vacate the judgment of foreclosure and sale and

pursuant to CPLR 3211(a)(8) to dismiss the complaint. Appeal granted to the extent of reversing the order and remitting the matter to the Supreme Court for a new determination on the motion.

The Supreme Court erred in concluding that defendant waived the defense of lack of personal jurisdiction. The notice of change of address that included Beckford's name filed by an attorney on behalf of a co-defendant did not constitute an appearance on behalf of Beckford. The attorney provided an affidavit that the inclusion of Beckford's name in the notice of change of address was due to a scrivener's error and Beckford attested that she never authorized the attorney to appear on her behalf. As "an unauthorized appearance by an attorney is insufficient to confer jurisdiction" the matter was remitted to the Supreme Court for a "new determination of the defendant's motion, including whether her submissions were sufficient to rebut the presumption of proper service arising from the process server's affidavit of service."

Summary judgment must be denied if issue is not joined; a stipulation waiving the right to contest the foreclosure is a waiver of the right to seek dismissal under CPLR 3215(c): *Onewest Bank v. Bernstein*, 2021 N.Y. App. Div. LEXIS 4491 (2nd Dept. July 14, 2021): Defendants appeal from an order of the Supreme Court, Queens County (Mojgan Cohanim Lancman, J.), denying their motion for summary judgment to dismiss the complaint. Appeal denied.

Defendants entered into a stipulation agreeing to the jurisdiction of the court and that they would not submit an answer or make a pre-answer motion to dismiss. Nevertheless, the Supreme Court denied plaintiff's motion for an order of reference on the basis that plaintiff did not possess the note and mortgage at the time the action was commenced. In reliance thereon, defendants moved for summary judgment to dismiss the Complaint for lack of standing.

The Second Department found that the Supreme Court correctly denied the defendants' motion. "Where, as here, the defendants have not served an answer before moving for summary judgment, issue has not been joined and the defendants are precluded from seeking summary judgment. The requirement that a motion for summary judgment may not be made before issue is joined (see CPLR 3212[a]), is strictly adhered to."

Further, the Second Department held that defendants are not entitled to dismissal pursuant to CPLR 3215(c). "Here, the defendants appeared in this action by stipulating to the jurisdiction of the court, and waived all defenses that they might have had, including their right to dismissal upon the plaintiff's failure to timely seek a default judgment under CPLR 3215(c), by stipulating that they would not serve an answer or make a pre-answer motion to dismiss and adhering to those terms."

Property owner acquiring title to the property after the notice of pendency is filed is not a necessary party to the foreclosure action; RPAPL 1301(3) prohibiting multiple actions to enforce a mortgage debt does not apply where the actions are consolidated: *Wells Fargo Bank, N.A. v. Lance*, 2021 N.Y. App. Div. LEXIS 4355 (2nd Dept. July 7, 2021): Defendant Grand National Realty 1, LLC, appeals from an order of the Supreme Court, Queens County (Mojgan C. Lancman, J.), which granted the foreclosing plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint or, in the alternative, pursuant to RPAPL 1301(3) to dismiss the complaint. Appeal denied.

By way of background, in 2010, the plaintiff commenced this action to foreclose a mortgage (hereinafter the first action) against the borrowers, Aneala Lance and Charles Richardson, and filed a notice of pendency. Plaintiff was unable to timely serve Richardson and in 2012, the plaintiff commenced a second foreclosure action against only Richardson. The two foreclosure actions were consolidated. Meanwhile, in 2011, title to the property was conveyed to Grand National Realty 1, LLC (hereinafter Grand National). Grand National sought to dismiss the action for failure to join it as a necessary party.

The Supreme Court correctly determined that since Grand National acquired its interest after the notice of pendency had been filed, it was bound by any foreclosure judgment without the necessity of adding it as a defendant to the foreclosure. "Here, it is undisputed that the notice of pendency in the first action was filed on July 29, 2010, and the deed conveying the subject property from Lance and Richardson to Grand National was recorded on January 10, 2012. Accordingly, Grand National had constructive notice of the foreclosure action at the time its conveyance was recorded, and the Supreme Court properly declined to dismiss the complaint on the ground that Grand National was a necessary party."

Likewise, the Second Department held that Grand National was not entitled to dismissal based on RPAPL 1301(3) which prohibits the commencement of an action to "recover any part of the mortgage debt without leave of court" when an action is already pending. The Second Department opined, "[b]y the time Grand National moved to dismiss the complaint based upon the plaintiff's alleged violation of RPAPL 1301(3), the Supreme Court had already granted the plaintiff's motion to consolidate the second action with the first action. Therefore, none of the defendants were prejudiced by any failure of the plaintiff to comply with RPAPL 1301(3), since none were placed in the position of having to defend against more than one lawsuit to recover the mortgage debt."

Where a prior foreclosure was dismissed for lack of standing, the loan was not accelerated and the statute of limitations did not commence to run: *Fed. Nat'l Mtge. Ass'n v. 4721 Ditmars Blvd*, 2021 N.Y. App. Div. LEXIS 4350 (2nd Dept. July 7, 2021): Defendant 4721 Ditmars Blvd, LLC, appeals from an order of the Supreme Court, Queens County (Bruce M. Balter, J.), granting plaintiff's motion for summary judgment on the complaint and dismissing that defendant's affirmative defense alleging that the action is barred by the statute of limitations. Appeal denied.

A prior foreclosure commenced in 2007 was dismissed on defendant's motion based on the ground that the plaintiff therein lacked standing. The instant foreclosure was commenced in 2018. The Supreme Court correctly determined that the statute of limitations had not expired: "Since the 2007 foreclosure action was dismissed on the ground that the plaintiff lacked standing, the purported acceleration was a nullity, and the statute of limitations did not begin to run at the time of the purported acceleration."

To rely on records under the business records exception, Plaintiff's affiant must attest to familiarity with the record-keeping practices of the entity that created the records or attest that the records were incorporated into the plaintiff's records and routinely relied upon by plaintiff: *US Bank N.A. v. Weinman*, 2021 N.Y. App. Div. LEXIS 4127 (2nd Dept. June 23, 2021): Defendant appeals from orders of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), granting foreclosing plaintiff's motion for summary judgment. Appeal granted.

The Second Department found that the plaintiff failed to meet its prima facie burden of establishing its standing to commence this action:

> In support of its motion, the plaintiff submitted, inter alia, the affidavit of James Green, a vice president of loan documentation for Wells Fargo Bank, N.A., the plaintiff's loan servicer. Green averred, based upon his review of "the business records relating to the subject mortgage loan," that the plaintiff obtained possession of the note on June 14, 2006, and was in possession of the note as of the commencement of the action. However, Green did not attest that he was personally familiar with the record-keeping practices and procedures of the entity that generated the records or that those records were incorporated into the loan servicer's records and routinely relied upon by the loan servicer in its own business. Thus, Green failed to lay a foundation for the admissibility of the records he relied upon to support his claim that the plaintiff had possession of the note as of the commencement of the action.

To be entitled to an extension of time to serve process under CPLR 306-b, plaintiff must demonstrate good cause or that it is in the interest of justice: *Wells Fargo Bank, N.A. v. McCarthy*, 2021 N.Y. App. Div. LEXIS 4145 (2nd Dept. June 23, 2021): Foreclosing plaintiff appeals from (1) an order of the Supreme Court, Suffolk County (John J. Leo, J.), dated July 11, 2018, denying plaintiff's motion for an extension of time to serve defendants and (2) an order of the same court dated December 18, 2018, entered after a hearing, that granted defendants' motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction. Appeal granted. Plaintiffs are granted an extension of time to serve defendants.

The Second Department concluded that plaintiff failed to demonstrate good cause for an extension of time to serve defendants under CPLR 306-b. Defendants filed affidavits in May 2016 in support of their motion to vacate the default judgment and dismiss the complaint, in which they contested service and set forth significant discrepancies between the process server's description of Lorraine to whom the documents were supposedly delivered and Lorraine's actual physical description. Yet, plaintiff waited until December 2017, after the court scheduled a traverse hearing, to file its motion for an extension of time to serve. "As such, the plaintiff failed to demonstrate that it exercised reasonable diligence in attempting to effect service."

The Second Department, did, however, conclude that the plaintiff was entitled to an extension of time for service of the summons and complaint in the interest of justice. "The plaintiff timely commenced the action, the statute of limitations had expired at the time the plaintiff made its motion, the plaintiff had a potentially meritorious cause of action, and there was no demonstrable prejudice to the defendants as a consequence of the delay in service."

To establish good cause to extend time to serve under CPLR 306-b, the plaintiff must demonstrate diligence in attempting to serve process; Plaintiff should be prepared to demonstrate an excuse for the delay in serving the defendant when seeking an extension of time to serve in the interest of justice: *JPMorgan Chase Bank, N.A. v. Gluck*, 2021 N.Y. App.

Div. LEXIS 4152 (2nd Dept. June 23, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Kings County (Ingrid Joseph, J.), that denied the plaintiff's motion pursuant to CPLR 306-b to extend the time within which to serve the defendant Fishel Gluck. Appeal denied.

By way of background, in December 2013, the Supreme Court granted Gluck's motion pursuant to CPLR 306-b to dismiss the complaint on the ground that the court lacked personal jurisdiction, because the plaintiff failed to establish due diligence in attempting to serve Gluck via personal service under CPLR 308(1) or the "leave and mail" method in CPLR 308(2), and thus, the service made via the "nail and mail" method in CPLR 308(4) was not authorized. In September 2018, the Supreme Court denied the plaintiff's motion to serve a supplemental summons on Gluck, without prejudice to the plaintiff commencing a new action against Gluck or moving to extend the time to serve Gluck. Thereafter, in January 2019, plaintiff moved pursuant to CPLR 306-b to extend the time within which to serve Gluck.

Although the Second Department affirmed denial of plaintiff's motion, it concluded the Supreme Court's basis for denying the motion was in error:

> [W]e disagree with the court's conclusion that the motion should have been denied because the complaint had already been dismissed insofar as asserted against Gluck. This Court recently rejected the view that a motion pursuant to CPLR 306-b to extend the time for service, made in a pending action but after the Supreme Court issued an order granting a motion to dismiss based on lack of personal jurisdiction, should be denied without consideration of its merits. An action is deemed pending until there is a final judgment. Here, no judgment has been entered. Inasmuch as no judgment was entered dismissing the action, the action was pending when the plaintiff moved to extend the time to serve [Gluck] with process.

Nevertheless, the Second Department opined that the plaintiff did not show good cause to extend time. The Second Department rejected plaintiff's argument that good cause existed because "it promptly moved for the extension after being directed to do so by the Supreme Court." Rather, the Second Department opined that when the Supreme Court granted Gluck's motion to dismiss in 2013, "the court specifically stated that the plaintiff had failed to exercise diligence in attempting to serve Gluck pursuant to CPLR 308(1) and CPLR 308(2)," and the plaintiff failed to dispute that conclusion on appeal. "[T]hus, the plaintiff has failed to demonstrate good cause within the meaning of CPLR 306-b."

Likewise, in these circumstances, the fact that the statute of limitations may have expired did not warrant an extension of time in the interest of justice:

> In considering the interest of justice standard, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant … Here, in view of the more than five-year delay of the plaintiff in seeking this extension of time, and the lack of any excuse for the delay, the extension is not warranted in the interest of justice.

Actual notice of a tax sale must be given to all parties with a substantial interest in the property whose names and addresses are reasonable ascertainable: *Bayview Loan Servicing v. City of Middletown*, 2021 N.Y. App. Div. LEXIS 4136 (2nd Dept. June 23, 2021): In an action pursuant to RPAPL article 15 to quiet title to real property, the defendant City of Middletown appeals from (1) an order of the Supreme Court, Orange County (Maria S. Vazquez-Doles, J.), denying the City's motion for summary judgment to dismiss the complaint and granting plaintiff's motion for summary judgment and (2) entry of judgment vacating the City's tax lien sale upon the condition that the plaintiff pay the entirety of the tax lien due, plus costs and interest. Appeal denied.

In September, 2014, Bayview's predecessor in interest obtained an amended judgment of foreclosure against the subject property. On December 6, 2014, the City, without notice to Bayview, conducted a tax sale and sold the subject property to the defendant Praise God Corporation of New York.

In affirming judgment vacating the sale, the Second Department opined that "[t]he constitutional guarantee of due process requires that a party who has a substantial property interest which may be affected by a tax lien sale receive notice that is reasonably calculated to apprise it of an impending sale. Thus, actual notice of a tax sale must be given to all parties with a substantial interest in the property whose names and addresses are reasonably ascertainable. A mortgagee has a legally protected property interest and is legally entitled to notice of a pending tax sale."

Since section 93 of the City Charter of the City of Middletown "does not provide for notice of pending tax lien sales to parties other than the owner, but provides only for post-sale notice 60 days prior to the divesting of all rights in the property", it "fails to comport with due process requirements because it makes no provision for actual notice of impending tax sales to be given to mortgagees of record."

An affidavit used to establish default must have the business records relied upon by the affiant attached thereto: *Bank of Am., N.A. v. Huertas*, 2021 N.Y. App. Div. LEXIS 4132 (2nd Dept. June 23, 2021): Defendant NMNT Realty Corp. appeals from an order of the Supreme Court, Nassau County (Thomas A. Adams, J.), granting plaintiff's motion for summary judgment. Appeal granted.

The Second Department concluded that the affidavit submitted by a foreclosure specialist employed by plaintiff's servicer was insufficient to establish defendant's default:

> In her affidavit, Dunbar stated that Huertas "defaulted under their note for $227,136.00 owing to the Plaintiff . . . by having failed to make monthly payments on September 01, 2009 to date." Dunbar did not state that she had personal knowledge of the default, but averred that she had "personal knowledge of the [p]laintiff's records and record making practices, and how such records [were] made, used and kept." Dunbar's affidavit was sufficient to provide a foundation for the admission, under the business records exception to the rule against hearsay (*see* CPLR 4518[a]), of records related to the subject mortgage, including, contrary to

> the defendant's contention, "prior servicer's records," which, Dunbar stated, were "needed and relied on in the performance of functions of the business". However, Dunbar's purported knowledge of Huertas's default was based upon her review of unidentified business records, which she failed to attach to her affidavit. Accordingly, her assertions regarding Huertas's default, without the business records upon which she relied in making those assertions, constituted inadmissible hearsay."

A loan modification agreement that does not consolidate two or more mortgages is not equivalent to a CEMA; Attesting to knowledge of the standard office mailing procedure, describing that procedure, and attaching relevant records is sufficient to establish compliance with RPAPL 1304; Submitting a copy of the proof of DFS filing is sufficient to establish compliance with RPAPL 1306: *United States Bank Trust, N.A. v. Mehl*, 2021 N.Y. App. Div. LEXIS 4266 (2nd Dept. June 30, 2021): Defendants appeal from orders of the Supreme Court, Westchester County (John P. Colangelo, J.), granting foreclosing plaintiff's motion for summary judgment. Appeal denied.

The Second Department held that Defendants mischaracterize the loan modification agreement they entered into as a consolidation, extension, and/or modification agreement ("CEMA"). "Unlike in cases where two or more liens are consolidated by a CEMA, here, the modification agreement did not create a new consolidated lien, represented by a new consolidated note and secured by a new consolidated mortgage. The modification agreement simply modified several provisions of the note and mortgage, referred to in the modification agreement as the 'Loan Documents.' In fact, Paragraph 3(H) of the modification agreement specifically provides, in relevant part, '[t]hat all terms and provisions of the Loan Documents, except as expressly modified by this Agreement, remain in full force and effect.'"

In addition, plaintiff established compliance with RPAPL 1304. Plaintiff submitted an affidavit from the plaintiff's loan servicer and attorney-in-fact, in which the affiant attested "to his personal knowledge of the standard office mailing procedure employed by Caliber, described that procedure in detail, and attached copies of the relevant records created and maintained by Caliber."

Likewise, the plaintiff demonstrated its compliance with RPAPL 1306 by submitting a copy of a proof of filing statement from the New York State Department of Financial Services indicating that, on August 17, 2016, the plaintiff had filed the information required by RPAPL 1306. In opposition, the defendants failed to raise a triable issue of fact.

Voluntarily discontinuing the foreclosure action revokes acceleration: *21st Mortg. Corp v. Rivera*, 2021 N.Y. App. Div. LEXIS 4249 (2nd Dept. June 30, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Westchester County (Lawrence H. Ecker, J.), which denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint and granting her counterclaim, pursuant to RPAPL article 15 to cancel and discharge of record the mortgage. Appeal granted to the extent of granting plaintiff

summary judgment dismissing defendant's counterclaim and remitting the matter to the Supreme Court for a determination on plaintiff's motion for summary judgment.

A prior foreclosure commenced in 2009 was voluntarily discontinued in 2012 and the current foreclosure was commenced in 2017. Citing *Engel*, the Second Department opined that, "although the mortgage debt was accelerated by the commencement of the 2009 action, the plaintiff demonstrated, prima facie, that the 2009 action was voluntarily discontinued, such that the acceleration of the debt was revoked." Accordingly, plaintiff was entitled to summary judgment dismissing defendant's counterclaim, and since the statute of limitations was the basis for denying plaintiff's motion for summary judgment, the matter was remitted to the Supreme Court for a determination thereon.

Service of a tax foreclosure notice is deficient only if both the certified and first class mailings are returned as undeliverable: *James B. Nutter & Co. v. County of Saratoga*, 2021 N.Y. App. Div. LEXIS 4162 (3rd Dept. June 24, 2021): Plaintiff appeals from an order of the Supreme Court, Saratoga County, (Crowell, J.), granting a cross motion by defendants County of Saratoga and Stephen M. Dorsey for summary judgment dismissing the complaint against them. Appeal denied.

Plaintiff, mortgagee, filed this action seeking to vacate a tax foreclosure judgment arguing that service of the tax foreclosure notice was deficient. The certified mailing, although addressed to the address on the mortgage, was delivered to a post office box. Neither the certified mailing, nor the first class mailing, was returned. Based thereon, the Third Department concluded that defendants satisfied their burden of demonstrating that they complied with the service requirements in RPTL 1125. Plaintiff was required to establish that both the certified and first class mailings were returned as undeliverable. As such, any question of fact as to whether the certified mailing was properly sent, does not defeat defendants' motion to dismiss.

The Third Department further opined that, "although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned. As mentioned, there is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned."

Judge Pritzker dissented, finding that plaintiff established issues of material fact as to defendants' compliance with the mailing requirements. Although "there was no proof that the relevant mailings were returned to defendants and, as such, were 'deemed received' by plaintiff., this is merely a rebuttable presumption." Moreover, "statutes authorizing tax sales are to be liberally construed in the owner's favor because tax sales are intended to collect taxes, not forfeit real property." While mere denial of receipt is insufficient to rebut the presumption, plaintiff submitted the USPS tracking information indicating that the certified mailing was delivered to an unspecified post office box rather than to plaintiff's address, which "raises troubling questions of fact that are best resolved at trial." In addition, the county's affidavits of service by mail were inconsistent with the uncontested tracking information. Moreover, plaintiff's recent payment of a tax bill, approximately two months prior to the alleged mailing of the required foreclosure proceeding notices, strongly suggested that plaintiff did not intend to forfeit the property.

Finally, Judge Prizker opined, "plaintiff, whose mailing address is in Missouri, was not afforded sufficient procedural due process because the County filed the tax foreclosure proceeding and published notice of the proceeding in two local newspapers. Under the circumstances, the foregoing was neither reasonably calculated to apprise plaintiff of the pendency of the tax foreclosure proceeding nor did it afford plaintiff an opportunity to present objections."

Prepayment penalty may not be enforced when mortgagor redeems in response to acceleration of the debt; Breach of contract claims by mortgagee are extinguished by full payment of note: *Virkler v V.S. Virkler & Son,* 2021 N.Y. App. Div. LEXIS 4541 (4th Dept, July 16, 2021): Plaintiff appeals from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.) which granted in part defendants' motion for partial summary judgment. Appeal denied.

By way of background, Plaintiff transferred his share of a corporation to defendant, Joseph Vickler, in exchange for a note secured by a mortgage on the co-defendant company's property. Thereafter, plaintiff's attorney sent a letter accelerating the balance due on the note and commenced a foreclosure on the mortgage. Defendants moved for partial summary judgment on the issue of whether they may exercise their right of redemption under the mortgage and sought a declaration that they must pay only the amount then due on the note.

Plaintiff cross-moved for a declaration that defendants must also pay all future interest payments because the loan documents gave him the right to refuse to accept prepayment of the amount due. The Fourth Department rejected plaintiff's argument, noting that the plaintiff accelerated the debt by sending an acceleration letter. Thus, the "defendants were not seeking to prepay the amount due under the note, rather plaintiff accelerated the remaining amount due by instituting a foreclosure action and sending the demand letter. … An unconditional tender of the full amount due is all that is required to exercise the right of redemption. … Inasmuch as the accelerated payment here is the result of plaintiff-mortgagee having elected to bring this foreclosure action, he may not exact a prepayment penalty."

The Supreme Court also correctly dismissed plaintiff's first and third causes of action which arose from alleged breaches of the loan documents. "The debt reflected in the note and contract and secured by the mortgage was satisfied by defendants' payment of the full amount due under the transfer documents and, once the mortgagor pays in full the person entitled to enforce the note, the note is discharged and the mortgage that secures it is extinguished."

PENNSYLVANIA

The existence of a different version of the Note in a prior foreclosure does not defeat standing; General denials constitute admissions: *U.S. Bank Nat'l Ass'n v. Primiano*, 2021 Pa. Super. Unpub. 1477 LEXIS (Pa. Super. Ct. June 8, 2021): Defendant appeals from the entry of summary judgment in favor of foreclosing plaintiff. Appeal denied.

The Superior Court held that Defendant's argument that there are two conflicting notes which places plaintiff's standing into question is without merit. Defendant relies on the fact that the copy of the Note presented in a prior foreclosure did not contain an endorsement, whereas the Note relied on in the present action is endorsed. The Superior Court opined that a plaintiff in a mortgage foreclosure action "can prove standing either by showing that it (i) originated or was assigned the mortgage, or (ii) is the holder of the note specially indorsed to it or indorsed in blank." Here, plaintiff produced "copies of the original recorded Note and Mortgage, as well as the recorded assignments from Chase to Wells Fargo and from Wells Fargo to U.S. Bank. [and] an affidavit from the mortgage servicer confirming that U.S. Bank is currently in possession of the original Note."

Further, "U.S. Bank does not have the burden of explaining the existence of an unendorsed note in a case in which it was not a party. Therefore, the averments and evidence used in the [prior] action are not relevant to U.S. Bank's instant action and the trial court did not err in failing to consider them." Moreover, defendant offered "no evidence to rebut the presumption that the endorsement in the Note presented in the instant case was authentic and authorized."

As to defendant's claims that plaintiff overcharged him for forced-placed insurance when he was already paying for insurance, the defendant offered no evidence to support these bald assertions other than his "self-serving affidavit, in which he conclusory states he is not in default of the loan and that he was overcharged for insurance payments", whereas plaintiff provided "extensive financial documentation and business records evidencing nonpayment."

Finally, defendant's "amended answer and new matter only contained general denials and claims of lack of knowledge in response to U.S. Bank's assertions of default and amount due under the loan. It is well-settled that general denials constitute admissions in mortgage foreclosure actions. Further, general denials by mortgagors that they are without information sufficient to form a belief as to the truth of averments as to the principal and interest owing [on the mortgage] must be considered an admission of those facts." Thus, defendant's general denials constituted admissions since he could not claim to not have knowledge of the default or amount due.

CALIFORNIA

Allegations of pre-HBOR "Dual-Tracking" are not necessarily actionable under HAMP Guidelines or common law: *Bundick v. Penny Mac Loan Services LLC,* 2021 WL 2309954, 2021 Cal.App. Unpublished LEXIS 3701 (filed June 7, 2021): Borrower filed a lawsuit challenging the validity of a 2012 non-judicial foreclosure sale, on the primary theory that he had submitted a second loan mod application under HAMP guidelines prior to the foreclosure sale, and therefore the foreclosure sale was invalid on the basis of improper "dual-tracking."

Although "dual-tracking" is also prohibited under the California HBOR (the Homeowner Bill of Rights, HBOR did not become effective until 2013. Following a series of prior demurrers that narrowed the borrower's sole remaining claim to breach of the covenant and fair dealing, the court sustained the servicer's demurrer to the third amended complaint without leave to amend. This appeal followed, in which plaintiff challenged the trial court's rulings on the successive demurrers.

In considering the appeal, the California Court of Appeal, Third District, addressed whether the borrower had sufficiently pled causes of action for wrongful foreclosure, negligence, and breach of the covenant of good faith and fair dealing. Ultimately, the Court affirmed the lower court's rulings in favor of the servicer, concluding that the borrower failed to adequately plead any of the causes of action and that the trial court did not err in denying leave to amend to assert a claim for intentional interference with contract.

In reviewing the borrower's wrongful foreclosure claim, the Court provided an analysis of the elements to establish this cause of action and found that the borrower had not alleged facts establishing that the servicer had initiated a second loan modification review or that the servicer had engaged in dual-tracking in violation of HAMP regulations. In regard to the borrower's negligence claim, the Court likewise provided an analysis of California case law on the issue of whether a duty of care exists during the course of a loan mod review. In affirming the lower court's ruling on the negligence cause of action, the Court determined that the borrower failed to allege that the servicer agreed to consider his second loan mod application or that the servicer engaged in conduct beyond the role of a conventional lender. In disposing of the borrower's breach of covenant claim, the Court cited to the "Sham Pleading Doctrine" in affirming the lower court's ruling, finding that the borrower had admitted in prior pleadings that there was no contract between him and the servicer, and thus could not later state a viable claim that he had a contract with the servicer. As it did in addressing the borrower's other claims, the Court provides a helpful summary of the Sham Pleading Doctrine.

(Note, this decision was not certified for publication and thus cannot be cited as legal authority in court filings. The decision, however, does provide a thorough recitation of published California case law on claims frequently made by borrowers to challenge foreclosure proceedings.)

Borrower's preemptive challenge to non-judicial foreclosure proceedings, based on allegation that MERS lacked assignment authority, fails: *Courtois v. Mortgage Electronic*

Registration Systems, Inc., 2021 WL 2674826, 2021 Cal.App. Unpublished LEXIS 4308 (filed June 30, 2021). Borrower obtained a purchase money loan in 2006 that was secured by a deed of trust in which MERS was named as the nominee beneficiary. Several assignments of the deed of trust occurred and then a notice of default was recorded in May 2012.

In March 2017, the borrower filed a lawsuit against a number of institutions that had either been or held the role of beneficiary or servicer; MERS was not named as a defendant in the original complaint. In February 2019, the borrower filed a first amended complaint in which she named MERS as a defendant and asserted claims for cancelation, slander of title, and violation of California's unfair competition. Each of her claims was premised on the theory that MERS lacked authority to issue the initial assignment of the deed of trust and, therefore, each subsequent event in non-judicial foreclosure proceedings was invalid.

MERS filed a motion for judgment on the pleadings, arguing that the borrower could not preemptively challenge the foreclosure proceedings, that it was undisputed that MERS had authority to assign the deed of trust, that the borrower's claims were time-barred, and that there was no legal basis to support any of the borrower's claims. The trial court granted the MJOP and denied leave to amend. The borrower appealed.

The California Court of Appeal, Fourth District, affirmed, finding that MERS had authority to assign the deed of trust and, thus, the borrower failed to state any valid claims for relief. Additionally, the Court held that the borrower's lawsuit was barred on the basis that it was a preemptive challenge to non-judicial foreclosure proceeding and that her claims were time-barred by the applicable statute of limitations. In affirming that the borrower's claims were time-barred, the Court rejected the borrower's "delayed discovery" argument, providing an analysis of the elements of the "delayed discovery" rule.

(Note, this decision was not certified for publication and thus cannot be cited as legal authority in court filings. Although this decision was not published, it provides a helpful summary of California law on the prohibition of lawsuits filed by borrower to challenge non-judicial foreclosure proceedings before the foreclosure sale has occurred.)

An award of attorneys' fees to a lender who prevails in litigation is not barred by California anti-deficiency law, CCP § 580d: *Rincon EV Realty LLC, et al. v. CP III Rincon Towers,* 2021 WL 2374772, 2021 Cal.App. Unpublished LEXIS 3806 (filed June 10, 2021): Following multiple trial proceedings and appeals, the defendant lender received an award of approximately $9 million for attorneys' fees incurred during the litigation.

In this appeal, the borrower challenged the attorneys' fees award on two theories. First, the borrower argued that the loan was non-recourse and the non-recourse provisions of the loan barred the lender's motion for a fee award. Second, the borrower contended that the award was barred by California's anti-deficiency laws, specifically Section 580d of the Code of Civil Procedure. In support of these challenges, the borrower argued that attorneys' fees awarded to the lender as the prevailing party become part of the loan debt. And, because the foreclosure sale occurred in 2010 and the legal fees were incurred post-foreclosure, the non-recourse provisions of the loan and Section 580d each bar the award of attorneys' fees as a post-foreclosure deficiency.

The Court of Appeal disagreed, holding that the non-recourse provisions of the loan were not intended to preclude the recovery of attorneys' fees incurred by the lender in litigation commenced by the borrower. The Court held further that "California appellate courts have rejected similar arguments and have held that an award of prevailing-party attorney fees to a lender in an action brought by the borrower is not a 'deficiency judgment' prohibited by section 580d." (citations omitted)

(Note, this decision was not certified for publication and thus cannot be cited as legal authority in court filings. This *Rincon* case involves years of litigation arising from the default and subsequent foreclosure on a commercial loan against a San Francisco apartment complex. Although this decision is unpublished and relates to a commercial loan, it is worth noting for its discussion of authorities concerning the post-foreclosure award to the lender of attorneys' fees incurred after years of litigation.)