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APPELLATE MORTGAGE NEWSLETTER

ISSUE 4

PIB Appellate Mortgage Newsletter

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

This newsletter summarizes recent relevant appellate decisions from the following jurisdictions in which our lawyers practice: New York, New Jersey, Pennsylvania, Massachusetts, Connecticut and California.
For ease of reference, each case summary begins with a brief synopsis of the topics that are generally covered in that case.

Below are a few highlighted cases that are covered in this edition of the newsletter:

- **New York**: A CPLR 3012-b certificate of merit is an ethical obligation, not an evidentiary one; on a motion to dismiss based upon lack of standing, defendant has the burden to establish lack thereof (*Matamoro*)
- **New Jersey**: Mortgagee owes an implied covenant of good faith and fair dealing to the borrower when deciding how to apply insurance proceeds (*Daw*)
- **New Jersey**: The state court retains jurisdiction over the foreclosure action when the loan has been placed into a FDIC receivership; state foreclosure proceedings may proceed while a federal action is pending that asserts causes of action unrelated to the foreclosure (*Roggio*)
- **Massachusetts**: Omission of the debtor's name from certificate of acknowledgement in mortgage was a material defect under Massachusetts law, rendering mortgage void because a bona fide purchaser would not have constructive knowledge of instrument (*Desmond*)

In addition to the case summaries, here are several additional highlights:

- **New Jersey**: The New Jersey Judiciary has announced that, effective November 19, 2021, the courts resumed post-trial foreclosure activity, including issuance of writs of possession, for residential foreclosure matters. This is in conformity with Executive Order 249, which suspended certain residential property removals through November 15, 2021. **Read the notice**.
- **New York**: Effective December 1, 2021, the Supreme Court of New York's Commercial Division is requiring corporate parties to file corporate disclosure statements akin to the statement required under Rule 7.1 of the Federal Rules of Civil Procedure. **View the Court's Administrative Order 289/21 enacting Rule 35**.

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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NEW YORK

A CPLR 3012-b certificate of merit is an ethical obligation, not an evidentiary one; on a motion to dismiss based upon lack of standing, defendant has the burden to establish lack thereof: *Wilmington Sav. Fund Socy., FSB v. Matamoro*, 2021 N.Y. App. Div. LEXIS 5774, 2021 NY Slip Op 05741, 2021 WL 4888803 (2nd Dept. Oct. 20, 2021): Defendants appealed from an order of the Supreme Court, Kings County (David B. Vaughn, J.), denying their motion pursuant to CPLR 3211(a) to dismiss the complaint and a subsequent order denying their motion pursuant to CPLR 2221 for leave to reargue and renew their prior motion. Order affirmed.

The Second Department rejected defendants' suggestion that the foreclosure must be dismissed because the unendorsed Note attached to the certificate of merit was insufficient to establish standing. A motion to dismiss grounded on plaintiff's lack of standing "is not necessarily determined based on the adequacy or inadequacy of the certificate of merit filed by the plaintiff's counsel pursuant to CPLR 3012-b." Rather, CPLR 3012-b requires "the filing of a mere 'certificate' from counsel, which falls short of the oath requirements of an affirmation." According to the Second Department, counsel's obligation in this regard is an ethical one, and does not go to the "ultimate meritoriousness of a claim":

> Counsel's reasonable beliefs contained in a certificate of merit are irrelevant to whether defendants, in moving to dismiss a complaint under CPLR 3211(a), establish their own defined burden of proof for the dispositive relief of dismissal. Indeed, the certificate of merit does not itself demonstrate the ultimate meritoriousness of a claim, but merely assures that counsel is satisfied that there is a reasonable basis for the commencement of the action.

In addition, the unendorsed note and mortgage were only attached to the certificate of merit, and not to the complaint. As such, the Second Department opined that, when the defendants "argued that perceived deficiencies with the certificate of merit necessitated the dismissal of the complaint, they cross-pollinated CPLR 3211(a) with CPLR 3012-b in assuming that the certificate of merit must conclusively address all evidentiary aspects of a potential CPLR 3211(a) motion for the complaint to survive a challenge."

As to the specifics of defendants' motion to dismiss, standing is an affirmative defense, and plaintiff was not required to allege standing in the complaint. Here, plaintiff's "gratuitous" allegation in the complaint of various assignments did not alleviate defendants from the burden of proving entitlement to dismissal under CPLR 3211(a). To defeat defendants' motion to dismiss, plaintiff had no burden to establish standing.

Further, to succeed on their motion to dismiss, defendants needed to "affirmatively prove that the plaintiff was not in direct privity with them, was not in physical possession of the note indorsed to it or in blank at the time of the commencement of the action, and that the assignment of the note to the plaintiff was invalid." Defendants failed to do so, as the documents attached to the certificate of merit did not "utterly refute the plaintiff's standing."

The Second Department also rejected defendants' argument that they were entitled to dismissal because the certificate of merit did not comply with CPLR 3012-b, in that it "did not identify by name the plaintiff's representative who was consulted" and "failed to expressly state that the plaintiff was the creditor failed to expressly state that the plaintiff was the creditor entitled to enforce its rights under the relevant documents." Reason being, in opposition to defendants' motion to dismiss, plaintiff's counsel filed an amended certificate curing the technical defects.

In conclusion, the Second Department held that, "under the circumstances of this case, the technical infirmities with the language of the original certificate of merit caused no prejudice to any party and was correctable under the grace provisions of CPLR 2001" – which permits correction of mistakes or irregularities at any stage in an action. Nor was there any showing of willful noncompliance with CPLR 3012-b, which is required to permit dismissal under CPLR 3012-b(e).

Judge Barros dissented, finding that the obligations under CPLR 3012-b are not just ethical, but rather serve "the legislative purpose of expediting the resolution of mortgage foreclosure actions by having documentation in place to resolve any issue regarding the plaintiff's standing at the outset of litigation. … Defendants need not answer a complaint and make demands upon the plaintiff through CPLR article 31 disclosure (see CPLR 3120) for the same documentation that the plaintiff is already statutorily mandated to supply through CPLR 3012-b. Where, as here, the plaintiff's counsel has attached documents to her certificate purporting to comply with the requirement that all of the instruments of indebtedness and assignments have been provided to the court, a defendant challenging the plaintiff's standing need rely only upon those documents."

According to Judge Barros, defendants met their prima facie burden on their motion to dismiss, and plaintiff failed to raise a question on fact in opposition to the motion to dismiss.

CPLR 3408(b) required the Supreme Court to determine whether defendants who appeared at settlement conference without legal counsel were entitled to assignment of legal counsel; defendants were not entitled to file a late answer under CPLR 3408(m), or guidance from the court pursuant to CPLR 3408(l), when the initial settlement conference occurred prior to the enactment of those statutes: *Carrington Mtge. Servs., LLC v. Fiore*, 2021 N.Y. App. Div. LEXIS 5804, 2021 NY Slip Op 05743, 2021 WL 4897209 (3rd Dept. Oct. 21, 2021): Defendants appealed entry of judgment of foreclosure and sale entered upon earlier orders of the Supreme Court, Warrant County (Muller, J.), which: (1) denied their motion for leave to file a late answer, (2) granted plaintiff's motion for a default judgment, and (3) denied a motion by defendant Glenn Fiore to vacate the default judgment. Matter remitted to the Supreme Court for a determination as to whether defendants are eligible for assigned counsel pursuant to CPLR 3408(b).

While plaintiff's motion for a default judgment was pending, the defendants served an answer, which the plaintiff rejected as untimely. Thereafter, the action was referred to the settlement conference part, at which defendants appeared *pro se*. The parties were unable to settle. Once the matter was released from the settlement conference part, the defendants filed a motion to dismiss, alleging that plaintiff lacked standing, and alternatively sought leave to file a late answer. The Supreme Court denied defendants' motion and granted plaintiff's motion for default judgment. The defendants then filed a motion to vacate default judgment, which was also denied. Final judgment in plaintiff's favor was entered and this appeal followed.

Defendants argued that, in rendering its decisions, the Supreme Court violated CPLR 3408(l) and (m). CPLR 3408(l) requires the Court to provide a defendant at the first settlement conference with certain instructions on answering the complaint and the consequences of not answering the complaint. CPLR 3408(m) essentially provides that the time for the defendant to file an answer is extended for 30 days from the date of the initial appearance at the settlement conference. The Third Department disagreed with defendants' argument, noting that those provisions came into effect during the pendency of the foreclosure action, and that the initial settlement conference at which defendants appeared pre-dated the enactment of the statute by six months. Further, the Supreme Court was not "required to apply those provisions to the

settlement conferences that occurred later, considering the circumstances and the legislature's plain language."

The Third Department opined, however, that the Supreme Court should have considered whether the defendants were entitled to assignment of legal counsel pursuant to CPLR 3408(b), which provides that, "at the initial foreclosure settlement conference, 'any defendant currently appearing pro se[] shall be deemed to have made a motion to proceed as a poor person under [CPLR 1101]. The court shall determine whether such permission shall be granted pursuant to standards set forth in CPLR 1101." Accordingly, the Third Department concluded that "the eligibility for assigned counsel is a threshold issue that must be resolved" before it could determine the merits of the appeal, and remitted the matter to the Supreme Court to determine defendants' eligibility for assigned counsel.

Separate 90-day notices must be sent to each borrower: *Wells Fargo Bank, N.A. v. Yapkowitz*, 2021 N.Y. App. Div. LEXIS 5248, 2021 NY Slip Op 05139, 2021 WL 4448061 (2nd Dept. Sept. 29, 2021): Foreclosing plaintiff appealed from: (1) an order of the Supreme Court, Rockland County (Gerald E. Loehr, J.), dated September 26, 2017 denying plaintiff's motion for summary judgment, (2) a decision (Paul I. Marx, J.) dated May 21, 2018, and entered after a bench trial concluding that plaintiff failed to comply with RPAPL 1304, (3) an order (Paul I. Marx, J.) dated July 23, 2018, denying plaintiff's motion to set aside the decision.

In an issue of "first impression," the Second Department held that under RPAPL 1304, a plaintiff cannot mail a 90-day notice jointly addressed to two or more borrowers in a single envelope. Rather, as a condition precedent to the plaintiff filing its foreclosure action, the plaintiff must mail a 90-day notice addressed to each borrower in separate envelopes.

In reaching its decision, the Second Department reviewed the statutory language of both RPAPL 1304(1) and RPAPL 1304(2). Under RPAPL 1304(1), giving "notice to the borrower," in the singular, at least 90 days prior to commencement of a foreclosure action is a prerequisite to that action "against the borrower, or borrowers." RPAPL 1304(2), however, requires the notice to be sent by registered or certified mail, and also by first-class mail, "to both (1) 'the last known address of the borrower' and (2) 'the residence that is the subject of the mortgage,'" in a "separate envelope from any other mailing or notice." The Second Department opined that, if the New York Legislature had intended RPAPL 1304(2) to be satisfied by mailing a notice jointly addressed to two or more borrowers, it would have stated – as it did in RPAPL 1304(1) – that the notice "must be mailed to 'the last known address of the borrower or borrowers.'"

Further, the Second Department identified the "problematic circumstances" that might arise if the Legislature had in fact drafted RPAPL 1304(2) to permit the mailing of the notice to the "last known address of the borrower or borrowers": one borrower who receives the joint mailing may not notify the other borrower or borrowers as to the receipt of that notice.

Judge Dillon concurred in part and dissented in part. Judge Dillon stated that he believed the plaintiff satisfied RPAPL 1304, and he cited ten different reasons to support his belief, including: (1) the outer envelopes and the notices themselves were addressed to both borrowers; (2) neither RPAPL 1304(1) nor (2) contain any language that requires "separate" parallel notices that are addressed to each individual co-borrower; (3) although RPAPL 1304 is "a statute steeped in minutiae, detail, and legislative micro-management," the Legislature did not place "actual language into the statute" stating that, "if a note and mortgage are executed by co-borrowers, each co-borrower is entitled to a duplicative, separately enveloped, separately mailed, and separately saluted notice"; and (4) the majority's concern about mail

received by one borrower being conveyed to the other is "not only wholly speculative but begs the issue, as the outer envelopes are addressed and delivered to both addressees."

Submission of proof of mailing of 90-day notices with reply in support of motion for summary judgment insufficient to establish prima facie burden on initial motion for summary judgment: *Caliber Home Loans, Inc. v. Weinstein*, 2021 N.Y. App. Div. LEXIS 5147, 2021 NY Slip Op 05021, 197 A.D.3d 1232 (2nd Dept. Sept. 22, 2021): Defendants appeal from judgment of foreclosure and sale of the Supreme Court, Suffolk County (John H. Rouse, J.), entered upon an earlier order granting plaintiff's motion for summary judgment and from an order denying their cross-motion for leave to renew their opposition to plaintiff's motion for summary judgment. Appeal granted; summary judgment vacated.

The Second Department found that Plaintiff failed to establish compliance with RPAPL 1304. The 90-day notices attached to plaintiff's affidavit of mailing in support of its motion for summary judgment were addressed to an incorrect address, and plaintiff did not provide copies of any 90-day notices properly addressed to the property where defendants resided – despite averring in the affidavit that they were sent thereto. The submission of such 90-day notices as part of Plaintiff's reply in support of its subsequent motion to confirm the order of reference and for foreclosure judgment were "insufficient to satisfy the plaintiff's prima facie burden on its initial motion, among other things, for summary judgment. A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance."

In addition, the affiant did not attest that he was familiar with the mailing practices and procedures of the third party vendor that sent the notices.

Under the version of RPAPL 1304 in effect in 2015, Plaintiff was required to send RPAPL 1304 notice even though borrower no longer resided in the premises, but was not required to wait 90 days therefrom to commence foreclosure: *Nationstar Mtge., LLC v. Jong Sim*, 2021 N.Y. App. Div. LEXIS 5099, 2021 NY Slip Op 04979, 197 AD3d 1178, 2021 WL 4185803 (2nd Dept. Sept. 15, 2021): Foreclosing plaintiff appeals from an order of the Supreme Court, Rockland County (Robert M. Berliner, J.), denying its motion for summary judgment and a subsequent order denying its motion for leave to renew. Order affirmed.

The Second Department rejected plaintiff's argument that RPAPL 1304 was inapplicable because the subject loan was not a "home loan" thereunder. The version of RPAPL 1304(5) in effect when the foreclosure was commenced in 2015, defined "home loan" as a loan "secured by a mortgage … on real estate … which is or will be occupied by the borrower as the borrower's principal dwelling ...." It also provided that "[t]he ninety day period specified in the notice … shall not apply, or shall cease to apply … *if the borrower no longer occupies the residence as the borrower's principal dwelling*." In 2016, the Legislature added the following sentence to RPAPL 1304(3): "Nothing herein shall relieve the lender, assignee or mortgage loan servicer of the obligation to send such notice, which notice shall be a condition precedent to commencing a foreclosure proceeding."

Reading RPAPL as a whole, the Second Department opined that the statute "cannot be interpreted … to relieve the plaintiff altogether of the notice requirements of RPAPL 1304 where the borrower no longer occupies the mortgaged property as his principal dwelling." Noting that the Court has previously held that filing of a bankruptcy petition relieved plaintiff only of the 90-day requirement, and not from the obligation to send the notice prior to foreclosing, the Second Department concluded that similarly, where a borrower no longer occupies the residence, plaintiff is relieved only of the 90-day requirement and not of the obligation to send the notice.

Here, as the property was defendant's "primary residence from the time of the loan until he was transferred to California in 2011," plaintiff was required to serve the RPAPL 1304 notice, but was relieved of the 90-day requirement.

Plaintiff also failed to establish that the RPAPL 1304 notice was sent to defendants. The affiant in the affidavit of mailing did "not attest to having personal knowledge of the mailing, and the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the notices were actually mailed to the defendant. In addition, the plaintiff failed to provide "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure."

As to the motion for leave to renew, the Second Department rejected plaintiff's belief that RPAPL 1304 does not apply as a basis to grant the motion for leave to renew: "[A] movant's mistaken reliance on one argument is not a reasonable justification for failing to submit sufficient evidence to support another."

Plaintiff is required to provide notice and give defendant opportunity to cure default where plaintiff accepted late payments without objection: *Maspeth Fed. Sav. & Loan Assn. v. Elizer*, 2021 N.Y. App. Div. LEXIS 5139, 2021 NY Slip Op 05029, 197 AD3d 1252, 2021 WL 4301695 (2nd Dept. Sept. 22, 2021): Foreclosing plaintiff appealed from an order of the Supreme Court, Kings County (Mark I. Partnow, J.), entered after a framed-issue hearing, finding that the plaintiff improperly accelerated the subject mortgage and granting defendant's motion for leave to amend its answer to assert three counterclaims. Order affirmed.

> The Supreme Court did not err in relying upon the Referee's determination, made after the framed-issue hearing [on whether the plaintiff properly accelerated the mortgage debt], in granting Yeshiva's motion for leave to amend its answer. The record supports the Referee's determination that, under the circumstances of this case, [the plaintiff's] course of conduct in regularly accepting late payments from [defendant] without objection precluded Maspeth from accelerating the debt without first providing [defendant] with notice and an opportunity to cure any default.

Allonge must be firmly affixed to the Note to be effective to confer standing: *Federal Natl. Mtge. Assn. v. Hollien*, 2021 N.Y. App. Div. LEXIS 5484, 2021 NY Slip Op 05321, 2021 WL 4558385 (2nd Dept. Oct. 6, 2021): Defendants moved for leave to reargue their appeal from orders of the Supreme Court, Suffolk County (C. Randall Hinrichs, J.), granting plaintiff summary judgment and denying defendant's motion for summary judgment. Motion granted and appeal granted to the extent of vacating entry of summary judgment in favor of Plaintiff.

> The plaintiff attempted to demonstrate that it was the holder of the underlying note by attaching to the complaint a copy of the note with an allonge. The purported allonge contains an endorsement in blank, has no pagination, is undated, and contains no writing in any way to demonstrate its connection to the note or that it was firmly affixed thereto. An affirmation of the plaintiff's counsel and an affidavit of a representative of the plaintiff's loan servicer, submitted in support of the plaintiff's motion, also failed to indicate that the purported allonge is connected to the note or that it was firmly affixed thereto. Therefore, the plaintiff failed to establish that the purported allonge was so firmly attached to the note as to become a part thereof, and thus failed to establish, prima facie, its standing to commence this foreclosure action.

Plaintiff foreclosing on a CEMA is not required to establish standing as to the first or second notes, rendering any issue as to an erroneous satisfaction academic: *Ridgewood Sav. Bank v. Glickman*, 2021 N.Y. App. Div. LEXIS 5085, 2021 NY Slip Op 04985, 197 AD3d 1189, 2021 WL 4185829 (2nd Dept. Sept. 15, 2021): Defendants appeal from a judgment of foreclosure and sale of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered upon an earlier order granting the plaintiff's motion for summary judgment, and denying the defendants' cross motion for leave to amend their answer. Judgment affirmed.

Here, plaintiff was foreclosing on a CEMA. As such, plaintiff was not required to establish standing to enforce either the first note or the second note: "By executing the CEMA, the defendants agreed that the consolidated note 'will supersede all terms, covenants, and provisions of the [first and second] Notes,' and agreed 'to be bound by the terms set forth in the Consolidated Mortgage which will supersede all terms, covenants and provisions of the [first and second] Mortgages.'" For the same reason, the Second Department concluded that the "issue of the allegedly erroneous satisfaction of the first mortgage is academic."

As to defendants' motion for leave to amend their answer, the Second Department held that defendants had "failed to offer any reasonable excuse for their delay of more than two years in seeking leave to amend their answer despite knowledge of the allegedly erroneous mortgage satisfaction since the commencement of the action, and the proposed affirmative defenses were patently devoid of merit."

A party's right to appeal from a contested motion does not extend to other uncontested motions: *Nationstar Mtge., LLC v. Reitman*, 2021 N.Y. App. Div. LEXIS 5601, 2021 NY Slip Op 05575, 2021 WL 4763161 (2nd Dept. Oct. 13, 2021): Defendant appeals judgment of foreclosure and sale of the Supreme Court, Westchester County (Terry Jane Ruderman, J.), entered upon an order entering default judgment and for an order of reference. Appeal denied.

Defendant unsuccessfully opposed plaintiff's motion for leave to enter default, but failed to file any opposition to plaintiff's subsequent motion for final judgment. The Second Department dismissed the appeal of the entry of final judgment, on the basis that "[n]o appeal lies from an order or judgment made upon the default of the appealing party." But, as defendant had contested the earlier motion for leave to enter default, the appeal of that order was properly before the Second Department: "an appeal from such judgment brings up for review those matters which were the subject of contest before the Supreme Court."

Defendant claiming plaintiff fraudulently obtained judgment must offer reasonable excuse for default; motion to vacate default filed four years after default in appearing was not made within reasonable time: *CitiMortgage, Inc. v. Nunez*, 2021 N.Y. App. Div. LEXIS 5762, 2021 NY Slip Op 05689, 2021 WL 4888727 (2nd Dept. Oct. 20, 2021): Defendant appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), denying her motion pursuant to CPLR 5015(a)(3) to vacate an earlier order and judgment of foreclosure and sale and, pursuant to CPLR 3025(b), for leave to amend her answer. Appeal denied.

The Second Department recognized that Defendant's allegation that that plaintiff fraudulently obtained the order and judgment "by making false allegations in the complaint about its standing" amounted to a claim of intrinsic fraud. As such, Defendant was required to offer a reasonable excuse for her default in answering the motion. As she did not do so, it was irrelevant as to whether she presented a potentially meritorious defense. In addition, defendant's motion to vacate her default was not made "within a reasonable time," as it was filed more than four years after she failed to oppose plaintiff's motion for summary judgment.

Likewise, the Second Department opined that defendant's "extensive and unexplained delay" in filing the motion to amend "would have resulted in unfair surprise and prejudice to the plaintiff."

Delays caused by Hurricane Sandy, AO 548/10, and loss mitigation efforts were not reasonable excuses for failing to comply with CPLR 3215(c): *Deutsche Bank Natl. Trust Co. v. Bakarey*, 2021 N.Y. App. Div. LEXIS 5599, 2021 NY Slip Op 05543, 2021 WL 4763010 (2nd Dept. Oct. 13, 2021): Defendant appeals from a judgment of foreclosure entered in the Supreme Court, Kings County (Lawrence Knipel, J.) entered upon an earlier order (Peter P. Sweeney, J.), denying her motion pursuant to CPLR 3215(c) to dismiss the complaint as abandoned or, in the alternative, to vacate her default, for an extension of time to serve and file an answer to the complaint, and, thereupon, to dismiss the complaint insofar as asserted against her for lack of standing. Appeal granted and complaint dismissed.

Service upon defendant via publication was complete on September 23, 2010, and defendant's time to answer expired on October 25, 2010. Nevertheless, plaintiff did not take any proceedings for entry of judgment until July 30, 2014, when it moved to vacate a conditional order of dismissal that had been entered in February 2014. As such, plaintiff was required to provide a reasonable excuse for the delay in proceeding with the foreclosure action.

The Second Department determined that plaintiff failed to do so. Plaintiff's asserted efforts to comply with Administrative Order 548/10, the closure of the Baum law firm, and delays caused by Hurricane Sandy were "insufficient to excuse the lengthy delay of this action, even when coupled with a change of counsel." In addition, plaintiff did not substantiate its claimed loss mitigation efforts with a copy of the loss mitigation application or any other evidence. In any event, the Second Department opined that "even a completed loss mitigation application does not automatically toll a plaintiff's deadline under CPLR 3215(c) during the time that the plaintiff is purportedly reviewing the application."

Non-appearing defendant not entitled to notice of motion seeking entry of foreclosure judgment under CPRL 3215(g)(1): *21st Mtge. Corp v. Raghu*, 2021 N.Y. App. Div. LEXIS 5148, 2021 NY Slip Op 05016, 197 AD3d 1212, 2021 WL 4301662 (2nd Dept. Sept. 22, 2021): Nonparty Courchevel 1850, LLC, appeals from an order of the Supreme Court, Queens County (Marguerite A. Grays, J.), denying appellant's motion to vacate an order and judgment of foreclosure. Order affirmed.

Plaintiff commenced its foreclosure action in 2007, and defendant Fremont failed to answer or otherwise appear. In July 2007, an order was entered appointing a referee to compute the amount due to the plaintiff. In 2016, after adding additional defendants to the action, the plaintiff moved for leave to enter a default judgment and for an order of reference (the "2016 Motion"), which was granted in April 2017. Thereafter, in June 2017, plaintiff moved to confirm the referee's report and for foreclosure judgment (the "2017 Motion"). Judgment was entered on May 22, 2018.

After entry of final judgment, Courcheval 1850 LLC ("Courcheval") – successor in interest to Fremont – sought to vacate the judgment on the basis that plaintiff failed to comply with CPLR 3215(g)(1) by not serving the 2017 Motion.

Here, Fremont was entitled to notice pursuant to CPLR 3215(g)(1) of the 2016 Motion, as it was made more than one year after Fremont's default. Courcheval, however, did not claim that plaintiff failed to serve notice of the 2016 motion on Fremont. As to the 2017 Motion, the Second Department found that since Fremont did not appear in the action, and since the 2017 Motion was not an application for default judgment, Fremont was not entitled to notice because CPLR 3215(g)(1) did not apply:

> CPLR 3215(g)(1) requires the plaintiff to provide "notice of the time and place of the application" for a default judgment … It does not, once triggered, require a plaintiff to provide five days' notice of every subsequent motion or application in the action. The 2017 motion was not an 'application' for a default judgment within the meaning of CPLR 3215(b). Rather, the 2017 motion sought confirmation of the referee's report and entry of a judgment of foreclosure and sale" and the plaintiff was required only to serve those parties who appeared. … We recognize that dicta from this Court may be read to indicate that CPLR 3215(g)(1) notice is applicable to a motion to confirm a referee's report and for a judgment of foreclosure and sale. We now clarify that CPLR 3215(g)(1) merely applies to an application for a default judgment which must be made to determine the amount of damages due pursuant to CPLR 3215(a) or (b). Once notice of such an application is provided, CPLR 3215(g)(1) is satisfied, and, without more, the general notice provisions of CPLR 2103(e) revert back into operation to govern any future requests for relief.

Letters sent to defendants during the prior foreclosure sufficiently de-accelerated the debt: *U.S. Bank Trust, N.A. v. Mohammed*, 2021 N.Y. App. Div. LEXIS 5106, 2021 NY Slip Op 04990, 197 AD3d 1205, 154 N.Y.S.3d 80, 2021 WL 4185818 (2nd Dept. Sept. 15, 2021): Defendants appeal from an order of the Supreme Court, Queens County (Marguerite A. Grays, J.), granting foreclosing plaintiff's motion for summary judgment and denying defendants' cross-motion for summary judgment dismissing the complaint. Order modified.

The loan was accelerated by way of a prior foreclosure action in 2010, more than six years prior to the commencement of the current foreclosure action. The plaintiff, however, produced two letters from its loan servicer de-accelerating the mortgage that were sent to defendants in 2015. The letters stated that, "as of the date of this letter, the maturity of the Loan is hereby de-accelerated, immediate payment of all sums owed is hereby withdrawn, and the Loan is re-instituted as an installment loan." The Second Department held that this language was "sufficiently clear and unambiguous to be valid and enforceable."

Statute of limitations not renewed where foreclosure discontinued more than six years after it was commenced, or when payments are made pursuant to a conditional loan modification: *Bradley v. New Penn Fin., LLC*, 2021 N.Y. App. Div. LEXIS 5362, 2021 NY Slip Op 05187, 2021 WL 4487421 (4th Dept. Oct. 1, 2021): Defendant appealed from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), which denied defendant's motion for summary judgment and granted plaintiff's cross motion for summary judgment on its complaint seeking to cancel and discharge defendant's mortgage on the basis that the statute of limitations expired on defendant's time to foreclose. Appeal denied.

The Fourth Department found that the statute of limitations was not renewed upon defendant's discontinuance of its foreclosure action, because the discontinuance occurred two years after the statute of limitations expired.

Likewise, plaintiff's payments made as part of a conditional offer to modify the mortgage did not renew the statute of limitations. To renew the statute of limitations, partial payments must be "made under circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder." Here, any promise to pay the debt could be inferred to "merely be a promise conditioned upon the parties entering into a mutually satisfactory modification agreement." In reaching this conclusion the Fourth Department explicitly rejected *Wells Fargo Bank N.A. v Grover*, 165 AD3d 1541, 86 N.Y.S.3d 299 [3d Dept 2018], and noted that in *Grover*, the borrower entered into a modification agreement pursuant to which he was to make

three payments during a trial period. Here, in contrast, plaintiff never executed the proposed trial modification agreements.

The Fourth Department also upheld dismissal of defendant's counterclaim sounding in unjust enrichment. "It is well settled that '[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter.' Because the disputed payments of taxes and insurance 'fall entirely within the [mortgage] contract, there is no valid claim for unjust enrichment.' Contrary to defendant's contention, the counterclaim did not state a cause of action for waste in addition to unjust enrichment."

Plaintiff's failure to address both alternative grounds for the lower court's dismissal resulted in denial of its appeal: *Deutsche Bank Natl. Trust Co. v. 9th St, LLC*, 152 N.Y.S.3d 612, 2021 N.Y. App. Div. LEXIS 5587, 2021 NY Slip Op 05542, 2021 WL 4763004 (2nd Dept. Oct. 13, 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.

In finding that the action was untimely, the Supreme Court rejected the plaintiff's contention that monthly invoices sent to defendant's counsel de-accelerated the mortgage. The Supreme Court offered two alternative grounds for its determination: (1) the invoices were not sent to the proper address as specified in the mortgage; and (2) the invoices failed to constitute clear and unequivocal notice of the plaintiff's election to de-accelerate the outstanding mortgage debt.

On appeal, plaintiff argued only as to the second alternative basis for dismissal – *i.e.*, whether the invoices were clear and unequivocal notice of de-acceleration. Because the plaintiff failed to address and rebut the Supreme Court's first alternative basis for dismissing the complaint – *i.e.*, that the notices were sent to an improper address – the Second Department determined that it need not address the arguments as they related to the second alternative ground.

Process server's affidavits admissible at traverse hearing where process server cannot be compelled to appear: *Chase Home Fin., LLC v. Kahana*, 151 N.Y.S.3d 625, 2021 N.Y. App. Div. LEXIS 5153, 2021 NY Slip Op 05022, 197 AD3d 1237, 2021 WL 4301656 (2nd Dept. Sept. 22, 2021): Defendants appeal from an order of the Supreme Court, Rockland County (Gerald E. Loehr, J.), entered after a traverse hearing, that denied their cross motion pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction. Order affirmed.

At the traverse hearing, the process servicer did not testify, but his affidavits of service were admitted into evidence pursuant to CPLR 4531. The Second Department concluded that the affidavits were properly admitted, "since the hearing evidence supported the Supreme Court's conclusion that the process server could not be compelled with due diligence to attend the hearing." The Second Department further opined that it found "no basis to disturb the determination of the Supreme Court, which saw and heard the witnesses at the hearing, that the defendants were properly served with the summons and complaint."

Foreclosing plaintiff was required to disclose the existence of a senior lien to prospective bidders: *SRP 2012-4, LLC v. Darkwah*, 2021 N.Y. App. Div. LEXIS 5750, 2021 NY Slip Op 05740, 2021 WL 4888806 (2nd Dept. Oct. 20, 2021): Plaintiff appeals from an order of the Supreme Court, Queens County (Rudolph E. Greco, Jr., J.), that granted the motion of the successful bidder at foreclosure sale to set aside the sale and to direct the referee to return the down payment to the movant. Order affirmed.

Approximately two weeks after the referee sale, the successful bidder moved to set aside the sale on the grounds that the plaintiff had failed to disclose that a senior mortgage encumbered the property, and sought return of the deposit.

The Second Department found that, as a threshold matter, the bidder – although a nonparty – had standing to move to set aside the sale. The Second Department distinguished *U.S. Bank, N.A. v Qurachi* (163 AD3d 888, 80 N.Y.S.3d 441) as "factually inapposite": in *Qurachi*, the bidder "who, on appeal, sought to set aside the foreclosure sale failed to seek leave to intervene in the action and did not present any evidence of fraud, collusion, mistake, or misconduct in connection with the foreclosure sale that would warrant setting the sale aside." Here the bidder sought to intervene and demonstrated that plaintiff failed to disclose the senior mortgage in the Complaint, Judgment or terms of sale.

In rejecting plaintiff's argument that it was a "unilateral mistake" on the bidder's part, the Second Department stated that a court "has the discretion to set aside a judicial sale where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale … The failure to disclose, in any document readily available to prospective bidders at the foreclosure sale, a known encumbrance on the property constituted a mistake or misconduct that cast ''suspicion on the fairness of the sale."

Likewise, plaintiff's claim that the bidder failed to exercise due diligence was unavailing. "The rule that a buyer must protect himself against undisclosed defects does not apply in all strictness to a purchaser at a judicial sale. A sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire."

Finally, the Second Department found plaintiff's argument that the senior mortgage did not affect the marketability of the property to be without merit. "[M]arketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession … As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title … A purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title."

The amount bid at referee sale, and an uncertified year-old appraisal, were insufficient to establish the fair market value of the property: *U.S. Bank, N.A. v. 199-02 Linden Blvd. Realty, LLC*, 2021 N.Y. App. Div. LEXIS 5104, 2021 NY Slip Op 04991, 197 AD3d 1208, 153 N.Y.S.3d 558, 2021 WL 4185795 (2nd Dept. Sept. 15, 2021): Nonparty VNB New York Corp. appeals from an order of the Supreme Court, Queens County (Leonard Livote, J.), that: (1) denied, without a hearing, VNB's motion to confirm a referee's report of sale of the mortgaged premises, to determine the fair market value of the mortgaged premises as of the date of sale, and for leave to enter a deficiency judgment against the defendants 199-02 Linden Blvd. Realty, LLC, and Jerome Greenbaum in the principal sum of $988,405.16, and (2) denied that branch of the motion that was, in effect, in the alternative, for a hearing to determine the fair market value of the mortgaged premises as of the date of sale.

In seeking a deficiency judgment, the lender bears the burden of "demonstrating, prima facie, the property's fair market value as of the date of the auction sale." The Second Department opined that "RPAPL 1371 does not require the court to hold an evidentiary hearing; however, where 'a triable issue as to the reasonable market value is presented, that issue should not be decided upon affidavits, but by the court or a referee, so that the witnesses may be subject to observation and cross-examination.'"

Here, the lender relied on the auction price of $450,000, along with an appraisal that pre-dated the sale by a year that estimated the value as $450,000. The appraisal, however, was neither certified nor

accompanied by an affidavit from the appraiser. In addition, the Second Department noted that "the appraisal stated that the value indicated by the income approach was in the amount of $450,000, while the value indicated by the sales comparison approach was in the amount of $480,000 [and] there was no explanation as to why the Supreme Court should accept the value based on the income approach as opposed to the sales comparison approach."

Records relied on in calculating the amount due must be provided to the referee: *U.S. Bank N.A. v. Chait*, 2021 N.Y. App. Div. LEXIS 5292, 2021 NY Slip Op 05182, 197 AD3d 1077, 154 N.Y.S.3d 62, 2021 WL 4464392 (1st Dept. Sept. 30, 2021): Defendant appealed an order of the Supreme Court, New York County (George J. Silver, J.), that granted plaintiff's motion to confirm the referee's report and awarded judgment of sale and foreclosure. Appeal granted, and matter remanded to Supreme Court for a new report computing the amount due plaintiff.

> In his report of amount due upon the subject note and mortgage, the Referee relied on an April 13, 2018 affidavit by a vice president of plaintiff's loan servicer that, according to plaintiff's books and records pertaining to defendant's loan and payment history, defendant had been in default since August 1, 2011, and owed plaintiff the stated amount. However, because the books and records themselves were not submitted, the affidavit is inadmissible hearsay.

Failure to attach business records to affidavit dooms motion for summary judgment; unsworn allegations in counsel's memorandum of law lack probative value: *Freedom Mtge. Corp. v. Engel*, 2021 N.Y. App. Div. LEXIS 5740, 2021 NY Slip Op 05694, 2021 WL 4888793 (2nd Dept. Oct. 20, 2021): Defendant appeals from an order of the Supreme Court, Orange County (Sandra B. Sciortino, J.), denying his motion for summary judgment dismissing the foreclosure and granting plaintiff's cross motion for summary judgment. Order granting plaintiff's cross-motion reversed and matter remitted to Supreme Court for further proceedings.

Plaintiff failed to establish standing where its affiant did not identify and produce the business records that she relied upon in her affidavit of note possession. For the same reason, plaintiff failed to establish compliance with the notice of default provision in the mortgage. Likewise, the unsworn allegations contained in counsel's memorandum of law regarding counsel's possession of the note were without probative value.

NEW JERSEY

Bankruptcy Code's automatic stay does not stay a foreclosure eviction where the sheriff's deed was recorded prior to the filing of the petition: *Barel v. Phelan Hallinan Diamond & Jones, PC (In re Barel)*, 2021 U.S. App. LEXIS 28571, 2021 WL 4279594 (3d Cir. Sept. 16, 2021): Defendants filed a motion to summarily dismiss Plaintiff's appeals of an Order of the United States District Court for the District of New Jersey, which dismissed four consolidated appeals from orders of the United States Bankruptcy Court. Motion granted and appeals dismissed.

The Third Circuit rejected plaintiff's argument that Federal National Mortgage Association (*i.e.*, Fannie Mae) and its attorneys violated the automatic stay by seeking to evict plaintiff from his foreclosed home after he filed a petition for bankruptcy. The eviction occurred after plaintiff was discharged in the bankruptcy, and after an order was entered abandoning the property.

In affirming the Bankruptcy Court's conclusion that was itself affirmed by the District Court, the Third Circuit opined:

> Fannie Mae was the owner of the property at the time Barel filed for bankruptcy protection and, therefore, the property did not become part of the bankruptcy estate. To the extent that Barel had a possessory interest in the property, it was insufficient to trigger the protections of the automatic stay. Regardless, the automatic stay expires by operation of law upon discharge as to acts against the property of the debtor. See 11 U.S.C. § 362(c)(2)(C). Therefore, as the Bankruptcy Court concluded, even assuming that Barel had a cognizable possessory interest in the property, there was no violation of the automatic stay because the writ of possession was secured after Barel was granted a Chapter 7 discharge.

Mortgagee owes an implied covenant of good faith and fair dealing to the borrower when deciding how to apply insurance proceeds: *Wilmington Sav. Fund Soc'y, FSB v. Daw*, 2021 N.J. Super. LEXIS 132, 2021 WL 4928430 (App. Div. Oct. 22, 2021): This appeal addressed the mortgagee's obligation to a borrower in connection with the disposition of insurance proceeds. In remanding the matter to the trial court for additional review, the Appellate Division set forth detailed guidelines as to the mortgagee's obligations and the factual issues remaining to be resolved in this matter.

In this foreclosure, the defendants' home was damaged by Superstorm Sandy in October 2012. In February 2014, the defendants defaulted on the mortgage, and plaintiff commenced the foreclosure action in March 2016. In the meantime, in September 2015, the plaintiff advised that it was in receipt of $150,000 in flood insurance proceeds. Under the terms of the mortgage, the insurance proceeds were to "be applied to restoration or repair of the Property, if the repair is economically feasible and lender's security interest is not lessened. … During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly." If repair is not economically feasible, or the lender's security would be lessened, the mortgage provided that the insurance proceeds would be applied to the loan.

Defendants sought release of the funds and contended that the insurance proceeds – coupled with a $150,000 state grant they received – would enable them to fully complete the repairs, which the state estimated would cost $292,000. The state grant was contingent on the defendants living in the property and it not being foreclosed. Defendants contended that they would not be able to repair the home without

the $150,000 in insurance proceeds. They provided the grant documentation and details as to the repairs and costs to the plaintiff.

In March 2017, the trial court issued an order finding that the plaintiff failed to abide by the mortgage because the plaintiff neither deducted the $150,000 from the amount due nor approved the repairs. The parties thereafter engaged in additional loan modification negotiations, which were unsuccessful. The plaintiff insisted on holding back $100,000 of the insurance proceeds, whereas the defendants stated they needed the funds to make the repairs and not lose for the grant.

In summer 2018, plaintiff moved for final judgment. Defendants cross-moved for discovery and an evidentiary hearing, arguing that plaintiff's improper withholding of the insurance proceeds drove up the interest by about $40,000. Defendants also sought reimbursement of $42,000 they spent of their own money in making emergency repairs.

After oral argument on the motions, the trial court issued final judgment in September 2019. The judgment applied the insurance proceeds to the amount due on the loan, but not retroactive to the date when those proceeds had been received by plaintiff over three years earlier. Defendants appealed.

The Appellate Division agreed with defendants that "a mortgage lender owes an implied covenant of good faith and fair dealing to the borrower when deciding how to apply such insurance proceeds." It noted that the mortgage does not set forth any "factors to guide the lender's assessment of economic feasibility," and opined as to the "objective consideration of facts" to be considered:

> Logic and common sense suggest that the economic feasibility and security impairment analyses must turn upon an objective consideration of facts, including but not limited to: (1) the estimated cost of repairs; (2) the reasonableness of the prices and quantities used in the estimate; (3) the market value of the premises in its present state before repairs are performed; (4) the projected increase, if any, in market value after such repairs are made; (5) the length of time it will take to complete repairs; and (6) the existence and extent of any default by the borrowers and whether it was caused by the storm event.

The Appellate Division also noted that the mortgage does not set forth a time limit for making the decision on how to apply the proceeds, and concluded that upon receiving relevant information such as market value and estimated repair costs, the lender must make a decision within "a reasonable time frame" and "promptly."

In addition, the lender must not "act arbitrarily or capriciously, or purposely deprive the borrower of fair use of the insurance funds." For example, a lender who rejects a reasonable repair proposal so as to reap greater accrued interest, or to wipe out borrower's equity in the property, engages in bad faith conduct. On the other hand, "a lender should be free to protect its security and other business interests within the zone of fair competition."

Finally, another element of the implied covenant "is transparency and clear communication with the homeowners. [Mortgagees] must convey their decisions and reasons concerning the disposition of insurance proceeds to homeowners with clarity and consistency."

In setting forth these guidelines, the Appellate Division opined that this approach comported with Section 4.7(b) of the *Restatement (Third) of Property (Mortgages)*, which explains:

> [I]f restoration … is reasonably feasible within the remaining term of the mortgage with the funds received by the mortgagee, together with any additional funds made available by the mortgagor, and if after restoration the real estate's value will equal or exceed its value at the time the mortgage was made, *the mortgagee holds the funds received subject to a duty to apply them*, at the mortgagor's request and *upon reasonable conditions, toward restoration*.

As a remedy for breaching the implied covenant of good faith and fair dealing, the court "has the power to abate the accrued mortgage interest if the borrower proves the lender or its agent acted in bad faith with respect to the disposition of the insurance proceeds." In determining the abatement date, the Appellate Division concluded that the date of default is not necessarily the proper date. Rather, the mortgagee must apply the proceeds "promptly" to the mortgage balance, "unless otherwise agreed upon by the parties. The Appellate Division advised that "'[p]romptly' in this context could mean at the end of the next billing cycle, or some other reasonable time frame, consistent with the overall implied covenant of good faith and fair dealing."

In addition, an extension of the deadline to apply the insurance funds is justified by any "mutual agreement of the parties to engage in loan modification negotiations, but if they are unsuccessful, the lender should act promptly." In the meantime, the insurance funds should be placed in an interest-bearing account until their disposition is finally determined.

In remanding the matter to the trial court for additional discovery and a further evidentiary hearing, the Appellate Division offered additional guidelines as to open issues that needed to be addressed: (1) Was the $100,000 holdback fair, or was it patently unrealistic to believe that the defendants could do the necessary repairs to salvage their home without those funds and without violating the conditions of the grant? (2) Were conflicting letters sent by plaintiff to defendants – some stating that plaintiff would work with defendants to facilitate repairs, and others stating repairs were not economically feasible – "excusable bureaucratic lapses or instead persuasive evidence of a lack of fair dealing?" (3) Did plaintiff complete an adequate economic feasibility analysis before the loan modification negotiations commenced? (4) Was the BPO plaintiff obtained part of that economic analysis? (5) If so, was the BPO's opinion that the proposed repairs would only have marginally increased the property's "as-is" market value reliable? (6) Was the BPO dispositive, given the changes in the real estate market after the Jersey Shore area recovered from the Superstorm? In addition, the defendants' "about-face" in requesting that the funds be applied to the mortgage, after years of demanding release for repairs, "perhaps induced by plaintiff's insistence on retaining the $100,000, must be factored into an overall assessment of the comparative equity between the parties within the totality of circumstances."

As to the defendants' claim for reimbursement of $42,000 that they expended on emergency repairs in the month after the Superstorm, the Appellate Division agreed with the trial court that the borrowers did not "provide a sound contractual, legal, or equitable basis to warrant being paid those sums by their mortgage lender. A mortgagor's duty to avoid waste does not carry with it a right to be paid for expenses incurred in restoring or preserving the property damaged by natural causes." In addition, they were not entitled to reimbursement under the doctrines of *quantum meruit* and unjust enrichment, because their rights were already dealt with in the mortgage contract.

Defendants' motion to vacate judgment as void seven months after entry of judgment was not made within a reasonable time: *Athene Annuity & Life Assur. Co. v. Sergio Henriques Cunha*, 2021 N.J. Super. Unpub. LEXIS 2500, 2021 WL 4824077 (App. Div. Oct. 18, 2021): Defendant appeals from a Chancery Division order denying her motion to vacate the foreclosure judgment. Affirmed.

Plaintiff's affidavits of service and UPS tracking information for service of the motion for default judgment reflected that plaintiff served the notice of intention, summons and complaint, entry of default and motions on defendants at the address listed on the note and mortgage. There was no evidence that defendants changed their address at any time. Likewise, the Appellate Division found that there was "no real discrepancy with the descriptions in the Affidavits of Service [of the NOI] compared to defendants' drivers licenses, and there was sufficient tracking information demonstrating that the notice to enter default and notice to enter final judgment were also served on defendants. The minor difference in the descriptions set forth in the affidavits of service compared to defendants' licenses is not clear and convincing evidence that defendants were not properly served."

In addition, although defendants were not required to show excusable neglect in their Rule 4:50-1(d) motion to vacate judgment as void, they were required to file it within a "reasonable time after entry of judgment." The Appellate Division concluded that defendants did not do so: "They inexplicably waited more than seven months to do so. … An unexcused, lengthy delay in asserting the defense of lack of standing post-judgment, coupled with the plaintiff's legal right to enforce the note at the time final judgment was entered, "would not constitute a meritorious defense to the foreclosure complaint."

The state court retains jurisdiction over foreclosure action when the loan has been placed into a FDIC receivership; state foreclosure proceedings may proceed while a federal action is pending that asserts causes of action unrelated to the foreclosure: *Roggio v. JPMorgan Chase Bank, N.A.*, 2021 N.J. Super. Unpub. LEXIS 2502, 2021 WL 4824069 (App. Div. Oct. 18, 2021): Plaintiffs appeal the grant of summary judgment in favor of defendant Chase, dismissing their complaint alleging that Chase lacked standing under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") to foreclose two loans that were acquired by Chase from the Federal Deposit Insurance Corporation ("FDIC") as receiver for Washington Mutual Bank ("WaMu").

The Appellate Division rejected plaintiffs' argument that the state court lacks jurisdiction over mortgages that were foreclosed upon by Chase in separate foreclosure actions because Chase allegedly never properly acquired the mortgages that were originally held by WaMu: "The FDIC receivership has no direct impact on the ability of state courts to address mortgage foreclosures, so long as the plaintiff in those proceedings owns the debt." Moreover, the Appellate Division held that, as those arguments were made in the foreclosure action and rejected, they were barred by collateral estoppel.

The Appellate Division also found to be meritless Plaintiffs' argument that the state foreclosure proceedings cannot continue while a federal action is pending: "[P]laintiffs' misconduct allegations against WaMu and the FDIC are wholly unrelated to Chase's in rem claims in the foreclosure proceedings. These are different causes of action with different remedies. Repeatedly asserting that the District Court maintains exclusive jurisdiction does not make it so. … While FIRREA dose strip jurisdiction from state courts over other borrowers' claims, FIRREA in no way bars mortgage foreclosure proceedings from moving forward."

Finally, the Appellate Division rejected plaintiffs' argument that the court's prior decisions were based on "false certifications" from Chase. A letter from the FDIC that it could not determine the owner of the loans based on information provided by plaintiffs did not "demonstrate a false certification by any Chase employee."

Debtor in bankruptcy not entitled to vacate trustee's sale, where the purchaser paid appropriate value; trustee was not obligated to enter into a sale contract that was "illusory": *In re 388 Route 22 Readington Holdings*, 2021 U.S. App. LEXIS 30892, 2021 WL 4811409 (3d Cir. Oct. 15, 2021): Debtor appeals the District Court's affirmation of an order entered in its bankruptcy denying its motion to vacate an order under Bankruptcy Court 363(b) approving the sale of its real property. Appeal denied.

In 2018, the Debtor filed a petition for bankruptcy after the mortgagee obtained a foreclosure judgment in 2011. The trustee allowed the mortgagee to proceed with the foreclosure, and the mortgagee gave the Trustee until the end of September 2019 to sell the property. The trustee hired a realtor and received an offer of $5 million, which it turned down because the proposal: (1) would have permitted cancellation for "any reason or for no particular reason," (2) requested a due diligence period that would have required the sale to take place after the end of the previously agreed foreclosure stay period, and (3) contained other contingencies that were out of the trustee's control. Instead, the property was thereafter sold at auction for $3.2 million. The sale price was sufficient to pay the mortgagee and all claims against the estate with a surplus of over $100,000 distributed to the debtor. Nevertheless, the debtor sought to vacate the sale.

Under Bankruptcy Code 363(m), a trustee's sale will not be vacated if the buyer purchased the property in good faith, which requires the purchase be for "appropriate value." Here, a competitive auction was held, and there was no allegation of collusion that "strongly indicates that a purchaser has paid appropriate value." In addition, the auction was well-marketed, and 15 prospective bidders deposited money to participate in the auction. Ultimately, the property sold for approximately 40% more than its assessed value in 2014.

The Third Circuit found to be baseless Debtor's argument that a prior offer of $5 million was a better indicator of value. The trial court appropriately concluded that offer was "illusory," as it contained two "substantial, perhaps insurmountable, contingencies," and the mortgagee could not be required to delay its sale beyond the stay agreed to between the trustee and the mortgagee, which would be required under the proposed purchaser's offer.

Finally, in affirming the sale, the Third Circuit noted that "Section 363(m) serves to promote the finality of sales," and that the District Court properly recognized that "[Debtor]'s challenge to the sale fails as moot."

Appellate Division defers to the trial court's findings in an evidentiary hearing when supported by credible evidence: *Mtglq Investors, L.P. v. Brylinski*, 2021 N.J. Super. Unpub. LEXIS 2442, 2021 WL 4783103 (App. Div. Oct. 14, 2021): Defendants appeal an order entered after an evidentiary hearing that declared plaintiff sent the requisite notice of intent to defendants. Order affirmed.

At the evidentiary hearing, plaintiff called a witness who testified about whether Bank of America, N.A. (*i.e.*, the assignor of the mortgage to plaintiff) had sent a notice of intent to defendants. Defendant cross-examined the witness, but did not testify nor call any witnesses to rebut the plaintiff's witness. At the end of the hearing, the judge rendered oral findings in support of his conclusion that the witness was credible, and that the notice of intent was sent.

In affirming the trial court's order, the Appellate Division stated that "our standard of review requires that we defer to judge-made findings when supported, as here, by credible evidence in the record."

Standing is established by possession of the note or assignment of the mortgage prior to filing the foreclosure complaint; allegations of predatory lending in general is insufficient to establish that the borrower was a victim thereof: *United States Bank Trust v. Adamson*, 2021 N.J. Super. Unpub. LEXIS 2427, 2021 WL 4735041 (App. Div. Oct. 12, 2021): Defendant appeals from: (1) an order granting summary judgment to foreclosing plaintiff; (2) an order denying his objection to final judgment; and (3) final judgment. Appeal denied.

The Appellate Division held that Defendant's argument that plaintiff lacked standing to foreclose was belied by the evidence: plaintiff established both that it was assigned the mortgage before filing the complaint and that it possessed the note. Likewise, defendant's assertion that his original loan was the result of predatory lending or fraud was unsupported by any evidence. The Appellate Division found that general reference to the lender's "past practice of predatory lending is not enough to show that plaintiff was one of the individuals affected by that practice."

***Colorado River* was not a proper basis for dismissal where Plaintiffs challenge a separate foreclosure action:** *Farina v. Bank of N.Y.*, 2021 U.S. App. LEXIS 29268, __ Fed. Appx. __, 2021 WL 4439250 (3d Cir. Sept. 28, 2021): Plaintiffs appealed an Order dismissing their complaint alleging defendant lacked standing in a separate foreclosure action with prejudice under the *Colorado River* doctrine. Appeal granted.

Federal court jurisdiction "does not cease whenever there is parallel litigation in state court." Under *Colorado River*, the federal court should abstain only in "exceptional circumstances – *i.e.*, when a "combination of factors counselling against [the] exercise of jurisdiction creates the clearest of justifications for dismissal."

Factors to be considered are: (1) desirability of avoiding piecemeal litigation, and only if there is "a strongly articulated *congressional policy* against piecemeal litigation in the specific context of the case under review"; (2) in an *in rem* case, "which court first assumed jurisdiction over the property"; (3) "the inconvenience of the federal forum"; (4) "the order in which jurisdiction was obtained"; (5) "whether federal or state law controls"; and (6) "whether the state court will adequately protect the interests of the parties." The balancing of these factors is "heavily weighted in favor of the exercise of jurisdiction."

Here, the Third Circuit found that there is no "strongly articulated congressional policy against piecemeal litigation in the specific context of [this] case"; New Jersey law is not congressional policy. As to the remaining *Colorado River* factors: (1) the state court first obtained jurisdiction, which weighs in favor of abstention; (2) the inconvenience of the federal court was a neutral factor; (3) the predominance of state law issues – *i.e.*, New Jersey foreclosure law – did not support abstention, because defendants do not allege that these issues are "intricate and unsettled"; and (4) the state court's ability to "adequately protect the interests of the parties," by itself, "does not counsel in favor of abstention, given the heavy presumption [under *Colorado River*] . . . in favor of exercising federal jurisdiction." Accordingly, the Third Circuit concluded that "this case does not satisfy the exceptional circumstances standard, and we conclude that abstention under *Colorado River* was not a proper basis for dismissal."

New Jersey resumes post-trial foreclosure activity: The New Jersey Judiciary has announced that, effective November 19, 2021, the courts resumed post-trial foreclosure activity, including issuance of writs of possession, for residential foreclosure matters. This is in conformity with Executive Order 249, which suspended certain residential property removals through November 15, 2021.

In making the announcement, the Hon. Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts, noted that the courts are in the process of identifying how federal and state relief programs and loss mitigation options affect the court's current processes.

Judge Grant also advised that the Judiciary is exploring the possibility of an interim process that will allow eligible homeowners to stay a sheriff sale on the basis that they may be eligible for financial assistance under the American Rescue Plan.

Read the notice.

PENNSYLVANIA

Plaintiff precluded from seeking post-bankruptcy plan payments that came due before borrower was discharged in bankruptcy, where plaintiff did not object to the trustee's final report under Bankr. R. 3002.1: *Cascade Funding Mortg. Trust 2017-1 v. Smeltzer*, 2021 Pa. Super. LEXIS 620, 2021 PA Super 199, 2021 WL 4537805 (Pa. Super. Ct. Oct. 5, 2021): Plaintiff appealed from a judgment dismissing its mortgage foreclosure action. Dismissal affirmed.

In April 2013, plaintiff's predecessor, Waterfall, obtained an order in defendants' bankruptcy that permitted Waterfall to receive defendants' mortgage loan payments directly – rather than through the trustee – and to seek relief from the automatic stay upon filing a certificate with the Bankruptcy Court if defendants defaulted on payments. In April 2014, Waterfall filed a certificate of default, and the court granted Waterfall relief from the automatic stay.

Thereafter, in August 2016, the trustee sent the notice required under Bankr. R. 3002.1 to all creditors, including Waterfall. Under Bankr R. 3002.1, within 30 days after a debtor completes all payments under the debtor's bankruptcy plan, the trustee is required to notify claim holders that the debtor "has paid in full the amount required to cure any default on the claim." The notice must also inform the claim holder of its obligation to file and serve a response under Bankr. R. 3002.1(g).

Bankr. R. 3002.1(g), in turn, requires claim holders to advise the trustee within 21 days as to any amounts remaining due to cure any default on the claim and as to any default in post-petition payments. If the claim holder fails to do so, Bankr. R. 3002.1(i) provides that the claim holder may be precluded "from presenting the omitted information as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless."

In this case, the Trustee's notice advised that the trustee had filed his final report, and required that "[a]ny answer, objection, responsive pleading, or request for hearing with regard to the discharge of the debtors, including any request to delay the entry of discharge . . . must be filed with the Clerk . . . within 30 days. … [I]n the absence of any objection, the Court may enter the Order of Discharge." No one objected, and defendants were granted a discharge in September 2016. As a result, the mortgage was deemed to be current as of the date of discharge.

In March 2017, Waterfall filed a foreclosure complaint alleging that the defendants defaulted on paying the mortgage in July 2012. Defendants answered, "averring that they completed a Chapter 13 plan that included all payments due to Plaintiff, and that the Chapter 13 Bankruptcy cured the deficiency which existed at the filing of their bankruptcy and at the time of their discharge."

The Superior Court upheld the Court of Commonwealth Pleas' dismissal of the foreclosure action, in light of a claim holder's obligations under Bankr. R. 3002.1(g):

> Despite Cascade's right to pursue a foreclosure action against the defendants, Rule 3002.1(f) is clear that a holder of a claim has an "obligation to file and serve a response under subdivision (g)" of the rule. Moreover, under Rule 3002.1(g), a holder's obligation to file and serve a statement is mandatory. Here, where Waterfall never filed a responsive statement to the court's Rule 3002.1 notice indicating its disagreement with the proposed cure of default on the defendants' mortgage obligation or claiming that the defendants were not current on their Plan payments, it has waived any right to contest

> whether the Plan was completed satisfactorily, the accuracy of the post-petition amount, or whether any pre-discharge payments remain due.

As to any post-discharge default, the Superior Court noted that the "trial court credited Mrs. Smeltzer's testimony that she and her husband 'continued to pay their monthly mortgage into escrow, despite the many roadblocks that their creditors set up to prevent the fulfillment of their monthly mortgage obligation,'" and that the plaintiff's servicers rejected their tender of post-discharge payments.

MASSACHUSETTS

Omission of the debtor's name from certificate of acknowledgement in mortgage was a material defect under Massachusetts law, rendering mortgage void because a bona fide purchaser would not have constructive knowledge of instrument: *U.S. Bank, N.A. v. Desmond (In re Mbazira)*, 15 F.4th 106, 2021 U.S. App. LEXIS 29677, 70 Bankr. Ct. Dec. 189 (1st Cir. Oct. 1, 2021): This appeal arose out of an adversary action filed by a debtor in a Chapter 11 proceeding in the United States Bankruptcy Court for the District of Massachusetts.

The subject of the action was a mortgage granted by the debtor, Safina Mbazira ("Debtor"), and held by U.S. Bank, N.A. ("U.S. Bank"). Under the so-called "strong arm" provision of the Bankruptcy Code, 11 U.S.C. § 544, the Bankruptcy Court allowed Debtor to void her mortgage because the certificate of acknowledgement accompanying it failed to state that Debtor signed the mortgage as her free act and deed. The mortgage in question included a notarized certificate of acknowledgement, but the space for Debtor's name was left blank. After the District Court affirmed, U.S. Bank timely appealed the Bankruptcy Court's ruling.

Under Massachusetts law, a mortgage must include a certificate of acknowledgment, signed before a notary public or similar official, that the grantor has voluntarily signed the mortgage instrument. A properly recorded mortgage provides notice of a security interest, but a recording is not effective and in fact is literally barred under Massachusetts law, unless there is a certificate of acknowledgment or proof of its due execution attached. Massachusetts law requires the grantor to acknowledge that he or she has executed the instrument as his or her free act and deed, and statute requires that a certificate reciting that the grantor appeared before the officer making the certificate and made such acknowledgment be attached to the instrument in order to entitle it to be recorded. Under the Bankruptcy Code, a mortgage may be avoided if a hypothetical bona fide purchaser of the mortgaged properly would not be charged with constructive notice of the mortgage. The effect of avoidance is to render the debt unsecured, leaving the creditor to stand at the end of the line with other unsecured creditors in sharing unencumbered assets of the debtor.

Here, U.S. Bank sought to dismiss the adversary proceeding by arguing that the recording of a mortgage with the "missing name" defect was nonetheless effective to provide constructive notice of the mortgage. In the alternative, U.S. Bank asked the Bankruptcy Court to certify to Massachusetts' highest court the questions concerning the effect of the missing name. The Bankruptcy Court denied both U.S. Bank's motion to dismiss and its request to certify any questions to the Massachusetts Supreme Judicial Court ("SJC"). It held that the incomplete certificate of acknowledgment was materially defective under Massachusetts law and that, therefore, third parties do not have constructive notice of the encumbrance on the property. The court then invited Debtor to file a motion for judgment on the pleadings, which became a motion for summary judgment once additional documents were appended. Following its prior ruling, the court granted Debtor's motion and allowed her to avoid the mortgage.

In affirming the Bankruptcy Court's ruling, the First Circuit held that the weight of the precedent leans decidedly in favor of strictly construing the statutory requirement for certificates of acknowledgement, and that the precedent requires strict formality in the execution of mortgage acknowledgements. The First Circuit further noted that the SJC had twice declined the opportunity to question the presumed ineffectiveness of a missing name on a certificate of acknowledgement. Thus, the First Circuit concluded that the recording of the mortgage absent Debtor's name on the acknowledgement was not effective to give constructive notice to third parties.

Notably, the First Circuit added that this type of defect is easily avoided in the first instance by the mortgagee at the time the mortgage is granted, or even thereafter, by way of an affidavit filed and recorded that: (1) supplies the omitted names of the mortgagors, (2) explains the circumstances of the omission, and (3) confirms that in fact the affiant did witness the voluntary execution of the mortgage by the mortgagors on the date stated operates to cure the original defect in the acknowledgement.

Borrowers barred by the doctrine of res judicata from re-litigating claims that were or could have been adjudicated in prior action: *Hall v. Fed. Nat'l Mtge. Ass'n*, 2021 Mass. App. Unpub. LEXIS 620, 100 Mass. App. Ct. 1108, 2021 WL 4483742 (Mass. App. Ct., Oct. 1, 2021): Plaintiffs-borrowers ("Borrowers") appealed a ruling by the Southeast Housing Court that granted Federal National Mortgage Association's ("Fannie Mae's") dispositive motion, on the grounds that Borrowers' claims were barred by the doctrine of res judicata. Affirmed.

In earlier litigation commenced in Superior Court, Borrowers challenged the prior mortgagee's right to foreclose on a mortgage after default. The Superior Court dismissed Borrowers' suit, Borrowers appealed, and the Superior Court's ruling was upheld. Fannie Mae subsequently commenced a summary process (eviction) action in the Southeast Housing Court, which Borrowers contested by raising the same claims as were raised in the Superior Court matter. The Southeast Housing Court granted summary judgment to Fannie Mae based on the doctrine of res judicata, a decision which the Borrowers did not appeal. Rather, Borrowers filed a separate suit in the Southeast Housing Court, advancing many causes of action, and seeking relief from the pending eviction and sale of the property. Borrowers' claims were again dismissed by the Southeast Housing Court, pursuant to the doctrine of res judicata. Borrowers appealed the Southeast Housing Court's ruling to the Appeals Court.

Relying on the doctrine of res judicata, the Appeals Court affirmed the Southeast Housing Court's ruling. The Appeals Court held that the prior court rulings were final, that the necessary parties were present in the earlier suits, and that the claims advanced by Borrowers were or could have been asserted by Borrowers in the earlier matters. Borrowers argued that their claim related to Fannie Mae refusing to sell the property to the Borrowers' agent was not barred by the doctrine of res judicata. The Appeals Court did not disagree, but noted that this claim was dismissed by the Southeast Housing Court pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim, and that Borrowers offered no argument on appeal as to the Southeast Housing Court's dismissal of this claim; thus, Borrowers waived their right to appellate review. The Appeals Court added that even if the issue had not been waived, it saw no error in the Southeast Housing Court's dismissal of the claim.

Proof of a borrower's receipt of notice of the right to cure default and notice of foreclosure sale not required, and notice of default letter neither deceptive nor misleading: *Ricci v. Rushmore Loan Mgmt. Servs.*, 2021 Mass. App. Unpub. LEXIS 653, 100 Mass. App. Ct. 1110, 2021 WL 4824181 (Mass. App. Ct. Oct. 18, 2021): Borrower appealed the lower court's grant of summary judgment in favor of mortgagee and servicer. Affirmed.

After borrower obtained a mortgage loan and subsequently defaulted, the mortgagee and loan servicer sent borrower the prerequisite notice of the right to cure default and foreclosure notices pursuant to G.L. c. 244 §§ 14 and 35(a) and foreclosed the mortgage. Borrower filed suit, seeking a declaratory judgment that the foreclosure sale was invalid because: (i) he never received the notice of the right to cure in violation of state statute and the mortgage, and (ii) the notice of default and notice of the right to cure did not comply with Paragraph 22 of the mortgage.

The Appeals Court affirmed the lower court's holding that proof of receipt of the notice of right to cure default is not required. Rather, proof of mailing supported by way of affidavits from the loan servicer based on personal knowledge is sufficient to satisfy the burden of establishing that the notices were sent. That the borrower submitted an affidavit professing a lack of recollection of receiving the notices was insufficient to create a genuine issue of material fact as to whether the notices were mailed.

Further, the Appeals Court rejected borrower's argument that the motion judge had erred by deciding that the notice of default and right to cure notices strictly or substantially complied with paragraph 22 of the mortgage. The Appeals Court cited the Supreme Judicial Court's recent decision in *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286, 288 (2020), which concluded that the language in the notice of default stating that a mortgagor may tender a payment at any time prior to a foreclosure sale is "neither deceptive nor misleading."

Borrowers ordered to pay attorney's fees in relation to frivolous appeal: *U.S. Bank N.A. v. Faith*, 2021 Mass. App. Unpub. LEXIS 636, 100 Mass. App. Ct. 1109, 2021 WL 4614571 (Mass. App. Ct. Oct. 7, 2021): Borrowers appealed from the Housing Court's grant of summary judgment in favor of mortgagee in a post-foreclosure summary process (eviction) matter. Affirmed.

Borrowers appealed, arguing that the Housing Court erred by: (1) awarding the mortgagee possession of the property, and (2) entering separate and final judgment as to borrowers' third party claims against third party financial institutions. The Appeals Court affirmed the lower court's holding as to possession, noting that borrowers had not only mailed keys to the property to mortgagee after the eviction matter was commenced (thus surrendering possession to the property), but also represented their intent to surrender possession of the property to the lower court. The Appeals Court also upheld the lower court's entry of separate and final judgment as to the third party financial institutions, observing that dismissal on the merits pursuant to Mass. R. Civ. P. 12(b)(6) had already entered.

Notably, the Appeals Court allowed the request of the mortgagee and third party financial institution's request for attorney's fees related to the appeal, because borrowers' appeal was frivolous. The Appeals Court noted that mere unpersuasive arguments do not render an appeal frivolous; where, however, each of borrowers' arguments concerned settled law, there was no reasonable expectation of a reversal, and borrowers' briefs contained several mischaracterizations of the record and case law, the borrowers' appeal was frivolous. Further, the Appeals Court recognized that "[a] frivolous appeal imposes costs not only upon the party forced to defend it, but also upon the public whose taxes supporting this court and its staff are wasted on frivolous appeals."

CONNECTICUT

Appellate Court of Connecticut upholds ruling in favor of defendants in foreclosure action based upon defense of unclean hands and balancing of the equities: *Ocwen Loan Servicing, LLC v. Sheldon*, 208 Conn. App. 132, 2021 Conn. App. LEXIS 351 (App. Ct. Oct. 5, 2021): Plaintiff appeals from judgment in favor of the defendants. Judgment affirmed.

Plaintiff Ocwen Loan Servicing, LLC ("Ocwen") filed an action in the Superior Court of Connecticut, Judicial District of Windham, to foreclose a mortgage on property owned by Sandra and James Sheldon ("Borrowers"). Upon origination of the subject mortgage loan in 2007, Borrowers agreed to a "bisaver program," through which they made payments to the originating lender (GMAC Mortgage, LLC) every two weeks via a direct withdrawal from a checking account.

GMAC stopped withdrawing payments in 2008, despite a lack of any request or authorization from Borrowers, and reported Borrowers as delinquent to several credit reporting agencies. Borrowers and GMAC subsequently reached an oral agreement to "restore" Borrowers' credit, but the restoration did not occur. Borrowers then stopped making payments on the loan.

Subsequently, GMAC assigned the note to Ocwen, who filed the subject foreclosure proceeding in 2017. Borrowers asserted multiple special defenses to the action, including unclean hands. After a trial, the Superior Court concluded that Borrowers had satisfied their burden of proof on the defense of unclean hands and rendered judgment in their favor, holding that they had equitable title to the to the property. PHH Mortgage Corporation ("PHH"), who had since substituted in as the plaintiff in place of Ocwen, appealed.

The Appellate Court affirmed. First, it found that the lower court's factual finding that GMAC did not restore Borrowers' credit was not clearly erroneous. In this regard, the court credited James Sheldon's testimony that GMAC had never sent letters to the credit agencies to correct its error and restore borrowers' credit. Also, the court was not required to credit evidence submitted by PHH which purportedly demonstrated that GMAC had restored Borrowers' credit.

Next, the Appellate Court found that the lower court had properly balanced the equities in concluding that PHH's legal title to the subject property was unenforceable based upon its ruling in favor of Borrowers on their unclean hands defense. It further found that the lower court did not abuse its discretion in determining that a reasonable balancing of the equities weighed in favor of Borrowers' equitable title to the property, determining that their "economic downfall" was a greater inequity than their failure to make a mortgage payment for more than ten years.

Moreover, the Appellate Court held that the lower court properly applied the doctrine of unclean hands in concluding that GMAC's failure to take payments and to restore Borrowers' credit after having reported them to be in default caused their credit to be "destroyed." The Appellate Court further held that the trial court's findings that GMAC's conduct was willful, that Borrowers came to the court with clean hands, and that GMAC caused Borrowers' "economic downfall" were not clearly erroneous, as evidence submitted at trial linked Borrowers' economic difficulties to GMAC's actions in failing to restore their credit.

Finally, the remedy ordered by the lower court did not eliminate Borrowers' obligations under the note, and PHH could still pursue its legal remedy to enforce the amounts due under the note. As a result of the ruling, however, PHH was no longer entitled to the equitable remedy of foreclosure.

CALIFORNIA

As nominee of the lender, MERS is an indispensable party to quiet title claim: *Mortgage Electronic Registration Systems, Inc. v. Koeppel*, 2021 U.S. App. LEXIS 28857, __ Fed. Appx. __, 2021 WL 4317136 (9th Cir. Sept. 23, 2021): Defendants appealed entry of an order entered in the United States District Court for the Northern District of California (Edward J. Davila, J.), which granted Mortgage Electronic Registration Systems, Inc.'s ("MERS'") motion for judgment on the pleadings, and found that the Koeppels failed to name MERS as a party in the Koeppels separate state court quiet title action. Appeal denied.

The Ninth Circuit held that, because MERS was designated as nominee of the lender and lender's assignees under the deed of trust, MERS held an adverse interest to the Koeppels' quiet title claim. As such, MERS was an indispensable party, and the Koeppels could not obtain a quiet title judgment without having named MERS as a party defendant. The Ninth Circuit also found that the Koeppels' counterclaims were properly dismissed, based on well-established California authority rejecting preemptive lawsuits challenging a party's authority to foreclose before a foreclosure sale has actually occurred.

Non-party to bankruptcy lacks standing to challenge order annulling automatic stay in favor of creditor: *Thee Aguila, Inc. v. Pico Rivera First Mortg. Inv'rs, LP (In re Malley)*, 2021 Bankr. LEXIS 2930, 2021 WL 4938090 (9th Cir. BAP Oct. 21, 2021): Plaintiff appealed from an order annulling the automatic stay, which in effect concluded that defendant's foreclosure sale did not violate the automatic stay. Appeal denied.

In 2015, appellant Thee Aguila, Inc. ("Thee Aguila") obtained a $5.7 million loan from Pico Rivera First Mortgage Investors, LP ("Pico Rivera"), which was secured by real property. Thee Aguila later defaulted on the loan. On May 24, 2017, Thee Aguila recorded a deed of trust to secure a purported loan in the amount of $2 million in favor of Guinevere Malley ("Debtor"), allegedly to secure a debt it owed to Debtor for past due legal fees. This purported loan was not disclosed to the bankruptcy court in Debtor's bankruptcy, nor listed in the Debtor's schedules.

Thereafter, Pico Rivera held a foreclosure sale and gave notice of the sale to the Debtor as a junior lienholder. Neither the Debtor nor Thee Aguila objected to the sale, and the property was sold to an unrelated third party. After a dispute arose between Thee Aguila and Pico Rivera concerning the validity of the sale in light of the automatic stay, Pico Rivera filed a motion to annul the stay, which was granted. After Thee Aguila's motion for reconsideration was denied, this appeal followed.

The Ninth Circuit Bankruptcy Appellate Panel dismissed the appeal, finding that Thee Aguila lacked standing to challenge the annulment order, because it was neither the debtor, creditor, nor the estate. In sum, Thee Aguila "had no legal right to protection from the automatic stay."

Table funding is not a basis to challenge the loan documents; MERS, as the nominee for the lender, had authority to assign the deed of trust: *Gray v. Ocwen Loan Servicing, LLC*, 2021 Cal App. Unpub. LEXIS 5818, 2021 WL 4164232 (4th Dist., Div. 1, Sept. 14, 2021): Plaintiff appealed from an Order entered in the Superior Court of Santa Clara (James Stoelker, J.), granting summary judgment to defendants. Appeal denied.

Plaintiff defaulted on her mortgage loan and, after a notice of default was recorded by trustee Western Progressive, LLC ("Western Progressive"), plaintiff filed a lawsuit to stop the foreclosure sale. Plaintiff

alleged that the note and deed of trust were not valid legal documents because the loan was "table funded," and that defendants Finance America, LLC ("Finance America") and Lehman Brothers Holdings, Inc. ("Lehman") materially misrepresented the true parties to the note and deed of trust. Plaintiff also alleged that the note and deed of trust were void because the note is not a negotiable instrument and is only payable to Finance America. Defendants filed a motion for summary judgment as to each cause of action, and supported the motion with evidence of the loan origination and subsequent transfers. The motion was ultimately granted, and a judgment of dismissal was entered.

The 4th District Court of Appeal affirmed the trial court's ruling that there was no authority under California law to void a note or deed of trust based on table funding. The appellate court also rejected plaintiff's claim that Mortgage Electronic Registration Systems, Inc. lacked authority to execute assignments of the deed of trust because MERS was expressly appointed as nominee for Finance America and its assigns in the deed of trust. Further, the appellate court rejected plaintiff's claims based on violations of California's Homeowner Bill of Rights ("HBOR"), finding that the note, deed of trust, and assignments predated the enactment of the HBOR, and that defendants submitted evidence that they complied with the statutory requirements under the HBOR.

Appeal of order dismissing cross-complaint premature when the complaint is still unresolved: *Cooper-Karanikola v. Champion Mortg. Co. (Nationstar Mtge. LLC)*, 2021 Cal. App. Unpub. LEXIS 6066, 2021 WL 4316890 (1st Dist., Div. 3, Sept. 23, 2021): Carla Cooper-Karanikola ("Carla") appealed from an order entered in Alameda County Superior Court dismissing her cross-complaint. Appeal dismissed.

Carla and Eddie Cooper ("Eddie") held title on the subject property as joint tenants. In 2004, Eddie obtained a reverse mortgage from Champion Mortgage Company ("Champion") that was secured by a deed of trust. Carla did not sign the deed of trust, and Eddie passed away in 2015. After Eddie's death, Champion filed a lawsuit against Carla for quiet title, equitable subrogation, and declaratory relief, alleging that Carla's failure to sign the deed of trust resulted in a cloud on its interest in the property. Carla filed a cross-complaint alleging that Champion negligently gave Eddie the loan without her signature.

Champion filed a demurrer to the cross-complaint, which was sustained without leave to amend. In sum, the trial court found that Carla's foreclosure claims failed because no foreclosure had occurred and Carla lacked standing to assert negligence and unfair competition claims because she was not the borrower.

On appeal, the appellate court held that the dismissal of the cross-complaint was not appealable, because Champion's complaint had not been resolved and the appeal was prematurely filed in violation of the one final judgment rule, which provides that "where a complaint and cross-complaint, involving the same parties have been filed, there is no final, appealable judgment until both have been resolved."

In addition, the collateral order doctrine is inapplicable. For the doctrine to apply, a collateral order "must (1) finally determine (2) a matter collateral to the litigation and (3) require the payment of money or performance of an act." The claims are not collateral, but rather in both the complaint and cross-complaint, they concern the mortgage and title to the property. Further, the order being appealed from does not require the payment of money or performance of an act.