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THE PIB REPORT

New York's Appellate Division Holds That Voluntary Discontinuance of Foreclosure Complaint May Constitute De-Acceleration of Mortgage Loan

On June 28, 2017, New York's Appellate Division, Second Department issued a decision suggesting that the voluntary discontinuance of a foreclosure complaint can, by itself, constitute a de-acceleration of the subject loan.

In *NMNT Realty Corp. v. Knoxville 2012 Trust*, 2017 N.Y. Slip. Op. 05230 (2d Dept June 28, 2017), plaintiff commenced a quiet title action against the lender under RPAPL 1501(4) to cancel and discharge of record the mortgage, on the ground that any action to foreclosure would be barred by the statute of limitations. Plaintiff cited the foreclosure action that was previously filed by the lender's predecessor-in-interest ("Homecomings") on or about July 27, 2006, thereby accelerating the loan at that time. On August 16, 2011, however, Homecomings had moved for an order discontinuing the foreclosure action, cancelling the notice of pendency, and vacating the judgment of foreclosure and sale that was previously granted. And on September 22, 2011, the court granted Homecoming's motion. Thus, the foreclosure action had been voluntarily discontinued prior to the expiration of the six-year statute of limitations.

Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment on the complaint. The Second Department found that a "triable issue of fact" existed as to whether Homecomings' motion "constituted an affirmative act by the lender to revoke its election to accelerate" (citing *Federal Nat'l Mtg. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994). The Second Department found that, "[c]ontrary to plaintiff's contention, this case is distinguishable from the cases in which, because '[t]he prior foreclosure action was never withdrawn by the lender, but rather, dismissed … by the court, [i]t cannot be said that [the] dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate." (citations omitted). Further, the Second Department held that plaintiff's conclusory statements that the "Order of Discontinuance was the result of procedural deficiencies in the proceedings … do not disprove an affirmative act of revocation." ■

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New Jersey's Appellate Division Confirms that, Under Certain Circumstances, Borrowers Need Not Receive Actual Notice of Adjourned Sheriff's Sale

In *Deutsche Bank Nat'l Trust Co. v. Hwang*, Docket No. A-2949-15 T2 (July 13, 2017), New Jersey's Appellate Division provided some relief to lenders when a borrower claims that the lender failed to serve notice of an adjourned sheriff's sale – holding that this will not automatically render the sale void.

By way of background, under New Jersey Rule 4:65-2, at least ten days prior to the date set for a sheriff's sale, the party obtaining the order or writ must serve, via registered or certified mail, a notice of sale upon "every party who has appeared" and the "owner of record." Rule 4:65-4, in turn, allows the sheriff to continue the sale "by public adjournment, subject to such limitations and restrictions as are provided specifically therefor." Rule 4:65-4 does not require each adjourned sheriff's sale, however, receive the notices required by Rule 4:65-2.

In August 2010, in the underlying foreclosure action, the lower court entered a final judgment of foreclosure in the amount of $3.3 million. The sheriff's sale was scheduled for December 2010, but it was adjourned at the request of the borrowers. The sale was then adjourned again multiple times, while the parties engaged in loss mitigation efforts and the borrowers filed for bankruptcy multiple times. In August 2013, Judge Toskos denied borrowers' application to stay the sheriff's sale.

On December 4, 2015, the property was sold at a sheriff's sale. At borrowers' request, the court extended the ten-day redemption period from December 11, 2015 to January 6, 2016, as borrowers claimed they did not receive notice of the sheriff's sale. Instead of redeeming, however, borrowers filed a motion to vacate the sheriff's sale, arguing that they were not notified of the December 4, 2015 sale date. Judge Toskos denied their motion, recognizing that his discretion to vacate a sheriff's sale should be exercised only in "rare circumstances" to "remedy a plain injustice." With these principles in mind, Judge Toskos concluded that although borrowers did not have actual notice of the sale date, the appropriate remedy was to extend the redemption period.

On appeal, in an unpublished opinion, the Appellate Division affirmed the lower court's decision, finding that Judge Toskos did not abuse his discretion in denying borrowers' motion and affirmed the trial court's order. The Appellate Division first acknowledged its prior ruling in *First Mutual Corp. v. Samojeden*, 214 N.J. Super. 122, 126-27 (App. Div. 1986). In *Samojeden*, the defendant did not receive notice of the sheriff's sale and kept making monthly mortgage payments. The Appellate Division held there that "actual knowledge of the effective sale date" was implicit in Rule 4:65-4's requirement to make public the adjournment of the sale – but also found that, where there was a failure of actual notice, "the appropriate relief will depend upon the circumstances."

Applying this precedent, the Appellate Division concluded that, under the circumstances of *Hwang*, the appropriate remedy was to extend borrowers' time to redeem, given that borrowers were given notice of the initial sale date and were active in adjourning prior sale dates. This placed the borrowers "in the same position [they] would have been in had [they] received notice."

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PIB Obtains Favorable Decision in California Appellate Court Regarding Impact of Void Default Judgment in Chain of Title of Property

On July 13, 2017, in a case handled by PIB Law, the California Court of Appeal, Fourth Appellate District, affirmed the trial court's granting of summary judgment in favor of the trustee bank, finding that a default judgment obtained against the bank that was subsequently voided did not pass good title, even to a bona fide purchaser.

In *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2005-WL3 v. Alan Pyle et al.*, defendant Denise Saluto ("Saluto") had recorded a grant deed to real property in Rancho Mirage, California in 2004. The next year, Saluto obtained a $517,000.00 loan secured by a deed of trust ("DOT") from Long Beach Mortgage Company ("LBMC"). Washington Mutual Bank ("WaMu") became the successor-by-merger to LBMC. In 2007, Saluto defaulted on the loan, and plaintiff ("Deutsche Bank") acquired the property in July 2007 at a trustee's sale, and recorded its trustee's deed upon sale. On September 25, 2008, JPMorgan Chase Bank, N.A. ("Chase") acquired WaMu's loans and loan commitments through a Purchase and Assumption Agreement between Chase and the Federal Deposit Insurance Corporation.

In February 2009, in a separate action, Saluto sued Deutsche Bank, alleging she was the lawful owner of the property free and clear of the DOT. On December 15, 2009, the trial court entered default judgment in favor of Saluto, cancelling and setting aside the trustee's deed and DOT, and enjoining Deutsche Bank and WaMu from asserting any interest in the property. Saluto recorded the default judgment, and Chase only learned about the default judgment when Saluto attempted to obtain a refinance on the property. Saluto also caused to have recorded a series of false transactions regarding the subject property, which was ultimately sold to two third party purchasers (collectively the "Purchasers").

In November 2013, however, after the Court of Appeal reversed an order setting aside the default judgment, Deutsche Bank and Chase filed a third motion based upon extrinsic fraud, alleging that the proofs of service of the summons and complaint were false, and that neither Deutsche Bank nor Chase were ever served. The trial court agreed and granted the motion, declaring the default judgment *void ab initio*. Judgment was entered in favor of Deutsche Bank.

In January 2014, Deutsche Bank initiated the instant action, seeking to quiet title, cancel the numerous false instruments and regain possession of the property from the Purchasers. Summary judgment was entered in favor of Deutsche Bank in September 2015. The Purchasers appealed.

On appeal, the Court's analysis focused on two issues: (1) whether the Purchasers were entitled to bona fide purchaser or encumbrancer status; and (2) the impact of the void default judgment in the chain of title. The Court held that, when the default judgment that Saluto obtained in 2009 was set aside and found to be *void ab initio*, the default judgment was "eliminated" from the record, leaving Deutsche Bank's 2007 deed in the chain of title. The Court also found that that the equities favored Deutsche Bank, including but not limited to the fact that Deutsche Bank had no knowledge of Saluto's fraud. As a result, the Purchasers were not bona fide purchasers and could not obtain clear title to the property. ■

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