

PIB Law Obtains Favorable Ruling from New York's Appellate Division Regarding Standing to Foreclose

On March 2, 2017, New York's Appellate Division, Third Department issued an order unanimously affirming the trial court's granting of summary judgment in favor of JPMorgan Chase Bank, National Association ("Chase"). In its decision, the Third Department found that Chase established its standing to bring the foreclosure complaint, that Chase established its compliance with the pre-foreclosure notice requirements of RPAPL 1304, and that RPAPL 1304 in any event did not apply because borrower's loan was not a home loan.

In *JPMorgan Chase Bank, National Association v. Venture*, borrower executed a note in July 2004 in the amount of \$160,000.00 in favor of Mortgageit, Inc. ("Mortgageit"), secured by a mortgage executed to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Mortgageit. MERS assigned the mortgage to Chase, prior to Chase's filing of the foreclosure complaint. Borrower failed to make the pay-

ment due on his loan on April 1, 2009.

On June 5, 2013, Chase filed the foreclosure complaint. Borrower filed an answer that included an affirmative defense challenging Chase's standing to bring the complaint, along with a counterclaim. Chase moved for summary judgment, and borrower cross-moved for dismissal of the complaint. The trial court granted Chase's motion.

On appeal, the Third Department found that Chase established its prima facie right to foreclose by submitting the mortgage and unpaid note, along with evidence of borrower's default. Because borrower raised the issue of standing in his answer, Chase was also required to prove its standing to obtain the relief sought in its complaint. The Third Department found that the assignment of mortgage from MERS did not also assign the note – even though the assignment purported to do so – because there was no evidence that MERS had the authority to assign

the note to Chase. The Third Department concluded, however, that Chase nonetheless established its standing by alleging in the complaint it was the current holder of the note, and by attaching a copy of the note to the complaint. Further, the Third Department found that borrower failed to raise a triable issue of fact in opposition to Chase's motion.

The Third Department also found that borrower's cross-motion was properly denied; borrower waived his affirmative defense of lack of personal jurisdiction on the basis of improper service of process, because he failed to move to dismiss the complaint on that ground within 60 days after serving his answer. The Third Department found that this defense was also waived when borrower asserted a counterclaim unrelated to this action. In light of this, the Third Department held that borrower could not challenge the trial court's granting of Chase's motion for an extension of time to serve borrower with process beyond the 120-day period

provided for in CPLR 306-b.

Finally, the Third Department held that Chase was not required to comply with RPAPL 1304, which requires lenders to send a pre-foreclosure form notice of default to borrowers. Borrower's loan was not a "home loan" under the definition of RPAPL 1304,

based upon: (1) the second home rider attached to the mortgage, and (2) borrower's own submissions established that the subject property was not the borrower's primary residence.

The Third Department found that, in any event, Chase established compliance with RPAPL 1304, based upon an employee affidavit who affirmed that

the notices was sent to both the subject property and the borrower's primary residence, by both regular first class and certified mail, return receipt requested.■

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U.S. Supreme Court Holds New York Statute Regulates Speech By Imposing Surcharge on Use of Credit Card

On March 29, 2017, in *Expressions Hair Design v. Schneiderman*, the Supreme Court held that Section 518 of New York's General Business Law regulates speech by prohibiting the imposition of a surcharge for the use of a credit card. The suit was brought by five New York businesses and their owners ("Petitioners"), who were seeking impose such surcharges in order to recoup the transaction fees that credit card companies charge for each credit card transaction.

The District Court ruled in favor of Petitioners, who argued that Section 518 violated the First Amendment by regulating the way in which petitioners communicated their prices. The District Court found, among other

things, that Section 518 drew a line "between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," and therefore was a regulation of speech and violated the First Amendment under the commercial speech doctrine.

The Second Circuit vacated the District Court's judgment, finding that Section 518 did not violate the First Amendment because "price regulation alone regulates conduct, not speech." The Second Circuit found that it was unclear as to whether Section 518 prohibited a pricing scheme that posted separate cash and credit prices.

On appeal, the Supreme Court held that Section 518 in fact bars the type

of pricing regime that Petitioners wished to employ – *i.e.*, "\$10, with a \$0.30 surcharge for credit card users." Having found this, the Court then concluded that because Section 518 regulated the communication of prices rather than prices themselves, it regulated speech. The Second Circuit, however, did not conduct a further inquiry as to whether Section 518 "survived First Amendment scrutiny" – *i.e.*, whether Section 518 is in fact a valid commercial speech regulation, and whether it can be upheld as a valid disclosure requirement. Because the Supreme Court is a "court of review, not of first review," the case was remanded to the Second Circuit to analyze section 518 as a speech regulation.■

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