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How To Beat the Lenders

Four winning defenses to residential foreclosure actions in New Jersey

By Jeffrey A. Zenn and David Rubenstein

When a homeowner defaults on a mortgage and the lender decides to foreclose, the lender must come forward with the proper documentation. Recent New Jersey decisions allow attorneys and their clients to stave off foreclosure, and even get the case dismissed, by taking advantage of strict adherence to the law. Here are four winning defenses to any residential foreclosure.

The lender must establish standing by being the holder of the mortgage

In order to show standing, "the plaintiff must have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." *New Jersey Citizen Action v. Riviera Motel Corp*., 296 N.J. Super. 402, 409-410 (App. Div. 1997). In the foreclosure context, the plaintiff must demonstrate that he is the holder of the mortgage and note at the time the complaint is filed. Failure to prove this fact leads to dismissal of the case.

In the recent decision of *Bank of New York v. Raftogianis*, 418 N.J. Super. 323 (Ch. Div. 2010), a homeowner obtained a home from American Home Acceptance in 2004. After the homeowner defaulted on the loan, plaintiff Bank of New York filed a complaint for foreclosure in 2009. However, Bank of New York did not possess an interest in the mortgage at the time the complaint was filed. Rather, not until nine days later did American Home Acceptance formally assign its interest in the mortgage to the plaintiff. The court found this chain of title insufficient to establish standing because the plaintiff was not the holder of the mortgage at the time the complaint was filed. Since the date of filing the complaint has a large impact on subsequent foreclosure procedures, the court reasoned that it could not ignore the plaintiff's unequivocal failure to establish legal standing at the time the complaint was filed. Thus, the plaintiff's case was dismissed.

The lender must own/control the note

As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt. *Gotlib v. Gotlib*, 399 N.J. Super. 295, 312-313 (App. Div. 2008). In the absence of a showing of such ownership or control, the plaintiff lacks standing to proceed with the foreclosure action and the complaint must be dismissed. *Wells Fargo Bank, N.A. v. Ford*, 418 N.J. Super. 592 (App. Div. 2011).

Under New Jersey law, the enforcement of a promissory note that is secured by a mortgage is governed by N.J.S.A. 12A:3-301, which provides that it can

Zenn is a partner with Sokol, Behot & Fiorenzo in Hackensack, where he concentrates in the areas of real property, banking and corporate matters and transactions. Rubenstein is an associate with the firm, concentrating his practice in the area of commercial litigation.

only be enforced by:

- the holder of the instrument;
- a nonholder in possession of the instrument who has the rights of the holder; or
- a person not in possession of the instrument who is entitled to enforce the instrument pursuant to N.J.S.A.12A:3-309 or subsection d of N.J.S.A. 12A:3-418.

If a party is unable to satisfy any of these criteria, then that party cannot maintain a foreclosure action. In *Deutsche Bank Nat'l Trust Co. v. Mitchell,* 422 N.J. Super. 214 (App. Div. 2011), Deutsche Bank did not have an assignment of, nor did it demonstrate that it possessed, the note at the time the complaint was filed. The Appellate Division held that Deutsche Bank lacked authority to enforce the note under N.J.S.A. 12A:3-301 because: (1) it was not the holder of the note because the note was never endorsed to it; (2) it was not a "non-holder in possession of the instrument who has the rights of the holder" since it could not demonstrate possession at the time it filed the complaint; and (3) it was not within the categories of persons not in possession of a note who may enforce it, such as where the note has been lost, destroyed or stolen.

In *Aurora Loan Services, LLC v. Toledo*, 2011 WL 4916380 (Oct. 18, 2011), the Appellate Division held that Rule 4:64(2)(c), which states that an affidavit in support of a judgment in a mortgage foreclosure must be based on personal review of business records of the plaintiff or the plaintiff's mortgage loan servicer, was not satisfied. In this case, the lender's affidavit did not comply with the rule. It was signed by a person who identified herself as an officer of Mortgage Electronic Registration Systems as nominee for Lehman Brothers, it was notarized in Nebraska and it did not include a certification regarding the signer's authority to execute the assignment or the circumstances of the assignment. The Appellate Division held that the purported assignment of the mortgage and note is not self-authenticating and, accordingly, summary judgment in favor of the plaintiff was reversed.

The trustee must prove its authorization to sue on the mortgage

In many residential mortgage foreclosures, the caption of the complaint will list the plaintiff as a trustee on behalf of a trust. This is because the packaging and sale of mortgage loans to investors required these loans to be held in trust; therefore, a company was hired as trustee on behalf of the actual owner of the debt. The trustee's authority to sue on behalf of the owner of the debt must be derived from a written agreement. Inability to locate the written agreement is commonplace after so many mortgages have been assigned and packaged by the lenders for delivery elsewhere. If the lender is unable to provide a copy of this agreement, then the trustee cannot establish its authority to file the complaint and the case must be dismissed.

The recent unpublished chancery decision of *U.S. Bank Nat'l Ass'n, et al. v. Spencer*, 2011 N.J. Super. Unpub. LEXIS 746 (March 22, 2011), provides a great example. In that decision, the defendant homeowner obtained a loan and delivered a mortgage and note for $340,000 to the lender FGC Commercial Mortgage Finance d/b/a Fremont Mortgage in 2005. The mortgage and note were assigned several times until U.S. Bank as trustee for J.P. Morgan Acquisition Corp. 2006-FRE2 became the ultimate holder of the mortgage and note. After the homeowner defaulted on the loan, plaintiff U.S. Bank filed a foreclosure action as trustee on behalf of J.P. Morgan. Although both sides moved for summary judgment, the court found in favor of the homeowner because U.S Bank failed to prove its authority to bring the case. The court held that U.S. Bank provided "no documentation or support for its position it is the trustee of J.P. Morgan, and therefore has not established its right to sue on behalf of J.P. Morgan." As a result of this failure to establish its role as trustee, U.S. Bank lacked legal standing to proceed, and the case was dismissed in favor of the homeowner.

The lender must comply with all provisions of the Fair Foreclosure Act

The New Jersey Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 et seq., provides strict guidelines for foreclosing lenders in order to resolve nonperforming loans. A lender's substantial compliance with the FFA is not enough; strict compliance is required. *EMC Mortgage Corp. v. Chaudhri*, 400 N.J. Super. 126, 137 (App. Div. 2008). Lenders are not permitted to deviate in any way from the requirements of the FFA because, as articulated by the legislative intent of the statute, homeowners should be given "every opportunity to pay their home mortgages" and to "keep their homes." N.J.S.A. 2A:50-54.

The first key step in compliance with the FFA is for the lender to issue a written notice of intention to foreclose (NOI) at least 30 days in advance of any foreclosure activity. N.J.S.A. 2A:50-56. The FFA provides that, in order to ensure compliance with the statute, the NOI must contain all 11 elements of information for the debtor required in N.J.S.A. 2A:50-56(c). In particular, Section (11) of N.J.S.A. 2A:50-56(c) requires that the NOI clearly and conspicuously state the "name and address of the lender." Failure to adhere to this requirement results in dismissal of the complaint.

Bank of New York Mellon, et al. v. Elghossain, 419 N.J. Super. 336 (Ch. Div. 2010), describes this very situation. In that case, a homeowner obtained a loan from New Millennium Bank in 2004. The mortgage and note were then assigned several times until they were eventually assigned to the plaintiff Bank of New York. After the homeowner failed to make payments on the loan, the loan's servicer, BAC Home Loans, served a NOI upon the homeowner. However, the NOI failed to include the name and address of the lender and current holder, Bank of New York. Because the NOI failed to conform to the strict requirements of the FFA, the court dismissed the complaint. It should also be noted that the court considered allowing Bank of New York to re-serve the NOI, but refused to do so because "[m]erely re-serving the NOI would eviscerate the statute's plain meaning and effectively reward plaintiff for its neglect, regardless of how benign it may appear."

More recently, in *Bank of New York v. Laks,* 422 N.J. Super. 201 (App. Div. 2011), the Appellate Division held that a NOI must include the lender's name and contact information, not just that of

the mortgage servicer. Importantly, the Appellate Division found that a debtor who receives a notice that does not refer to the lender and subsequently receives a foreclosure complaint will be justifiably confused. Moreover, in dismissing the complaint without prejudice, the court said that harm to the homeowner does not have to be established, merely, noncompliance with the FFA. In the *Laks* case, the notice identified Countrywide Home Loans as acting on behalf of the noteholder, though the noteholder was not named and Countrywide's contact information was provided. Here, as in *Elghossain*, the remedy was dismissal without prejudice rather than just reservice of the notice, because the statute entitles the borrower to a conforming notice *before*, not during, a foreclosure proceeding, and the plaintiff is required to plead compliance with the notice at the outset of the suit.

These four winning defenses are a great weapon to have in an attorney's arsenal when confronted with a residential foreclosure action. The next time a client approaches you under the burden of a foreclosure action, use the lender's lack of diligence to your advantage in order to defend the case. ■