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New Jersey Appellate Division Holds Bank Has Standing to Foreclose Even If Allonge to Note Was Not Affixed When Executed

By Joy Harmon Sperling and Sarah Sakson Langstedt*

The New Jersey Appellate Division recently ruled that the plaintiff in a commercial foreclosure action had established a prima facie *case for foreclosure even though the allonge to the note was not physically attached when the allonge was initially executed. The authors of this article discuss the decision.*

In an opinion that should assist lenders in establishing standing to foreclose, the New Jersey Appellate Division ruled that the plaintiff in a commercial foreclosure action had established a *prima facie* case for foreclosure even though the allonge to the note was not physically attached when the allonge was initially executed. In *U.S. Bank National Association v. Morris Bayonne Associates I, LLC,*[1] an unpublished decision, the court upheld the trial court's granting of summary and final judgment for foreclosure in favor of U.S. Bank after determining that U.S. Bank had adequately proven its standing to foreclose.

THE FACTS

The facts in the case were straightforward. In 2007, three LLCs entered into a loan agreement and executed a promissory note and a mortgage on commercial property in favor of Countrywide Real Estate Finance, Inc. Two individuals guaranteed the note. The LLCs also executed an assignment of rents and leases and a security agreement and fixture filing to secure the loan. The note, mortgage, and all loan documents were assigned first from Countrywide to LaSalle Bank, National Association, and then to U.S. Bank. The mortgage and assignments were properly recorded.

When the loan documents were assigned to U.S. Bank, the allonge indorsing the note was not attached to the note. In anticipation of foreclosing on the loan, due to the borrowers' defaults, the special servicer for U.S. Bank requested permission from U.S. Bank to attach the allonge to the note. This request was

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[1] No. A-2279-13 (App. Div. Sept. 9, 2015).

made four years after the loan was assigned, which request was granted by U.S. Bank. Eight days later, in September 2012, U.S. Bank commenced the foreclosure action.

Shortly after filing its action, U.S. Bank filed a motion for summary judgment. In support of the motion, U.S. Bank submitted certifications and affidavits from two employees of the special servicer for U.S. Bank. In opposing the motion, defendants argued that U.S. Bank had not established its ownership of the note and raised issues as to the affidavits and certifications submitted. However, defendants did not contest their execution of the loan documents, their default, or that foreclosure was an available remedy after default.[2]

THE TRIAL COURT'S DECISION

The trial court allowed defendants to depose the employees of the servicer and adjourned the motion. One of the employees was unavailable as he was overseas for an extended period, but defendants did not request additional time to depose him. After completing the deposition of the one employee, defendants again opposed the motion for summary judgment, contending that there were genuine issues of material fact as to the standing of U.S. Bank. In rejecting the opposition, and granting U.S. Bank's motion, the trial court found there were no disputed issues of material fact that would preclude summary judgment and ruled that U.S. Bank had established a *prima facie* case for foreclosure. Thereafter, final judgment was entered in favor of U.S. Bank, and defendants filed an appeal.

THE APPEAL

In their appeal, defendants again argued that there was a genuine issue of material fact regarding U.S. Bank's ownership of the note. Specifically, defendants claimed that, because the allonge was not originally attached to the note, the foreclosing entity did not have standing to foreclose.[3] They further alleged that the deposition testimony of the servicer's employee conflicted with his affidavits, and questioned his personal knowledge.

As to defendants' arguments and contentions regarding the proofs submitted

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[2] A few months before the filing of the foreclosure complaint, U.S. Bank, the special servicer, and defendants entered into a pre-negotiation agreement. In the pre-negotiation agreement, defendants admitted their default and U.S. Bank's status as the holder of the loan.

[3] At oral argument before the Appellate Division, defendants conceded that an allonge need not be attached to the note as long as it is properly authenticated.

by U.S. Bank through the special servicer's employees, the Appellate Division rejected those claims. As to defendants' arguments regarding the production of only one employee for a deposition, the court found that U.S. Bank was entitled to produce the one employee, especially considering the other employee was overseas. The court noted that defendants had not requested more time to depose the other employee and did not ask the trial court to find that the production of the employee with less knowledge was in bad faith.

As to defendants' contentions regarding the alleged inconsistencies between the testimony and affidavits of the deposed employee, the court noted that defendants had not refuted the facts regarding the transfer of the loan with any of their own evidence. Moreover, the court did not find the inconsistencies sufficient to find an abuse of discretion on the part of the trial judge in relying on the affidavits.

The Appellate Division also addressed the issues raised concerning the admission of business records. Regarding defendants' assertion that the servicer's employees did not have sufficient personal knowledge, the court held that employees of the mortgage loan servicer could attest to the business records kept in the regular course of their business. In so doing, the court, relying on the rules of evidence and prior case law, noted that: "There is no requirement that the foundation witness certifying that a record is a business record must possess *any personal knowledge* of the act or event recorded."[4] The court found that the servicer's employees' knowledge of the computer system that maintained the servicer's files was adequate to authenticate the business records.

Importantly, with regard to standing, the Appellate Division agreed with the trial court that U.S. Bank was the holder of the note, as defined by Article III of New Jersey's Uniform Commercial Code. As the court observed, the allonge clearly identified the note, confirmed the prior holders, confirmed U.S. Bank as the new holder and, therefore, ownership of the note by the plaintiff was not in question. The court opined that defendants could not point to any binding authority to establish that the attachment of the allonge to the note prior to the filing of the complaint (as compared to at the time the allonge was executed) is insufficient to show that the note was not properly assigned or indorsed.

The court also found that, because the mortgage and related loan documents had been assigned to U.S. Bank prior to the filing of the foreclosure complaint, U.S. Bank had standing, in accordance with New Jersey case law and the Uniform Commercial Code.

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[4] Citations omitted.

CONCLUSION

The decision in *Morris Bayonne Associates* recognizes the realities of how loans are transferred and that, when a foreclosing entity provides sufficient proof of standing, objections by borrowers, which have no support in the documents, should be rejected. In this case, although the allonge was not initially attached to the note, the proofs showed that U.S. Bank had been properly assigned the loan and had the right to foreclose. Although nothing in the decision indicates that the holding is limited to commercial foreclosures, lenders will undoubtedly hope that it is applied to residential foreclosure actions as well.