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NY Appeals Court Confirms that Holding a Consolidated Note Confers Standing to Foreclose

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On January 8, 2019, in a split decision, (3-2), the Appellate Division, First Judicial Department of the New York State Supreme Court held in *Wells Fargo Bank N.A. v. Ho-Shing[1]* that where the foreclosing plaintiff was the holder of a consolidated note and had obtained an order granting it summary judgment, a borrower could not reverse that order based on allegations that (a) no proof had been submitted documenting the assignment of the initial note to the plaintiff and (b) one of the underlying mortgages was improperly assigned after the consolidation.

Due to the level of attention given to this case by the two dissenting Justices, and the possibility of further appeal to New York's highest court[2], this decision has significant implications considering the widespread use of consolidated notes and consolidated mortgages in New York State.

Below are the facts and an analysis of the decision.

I. The Original Note was Superseded by the Consolidated Note

On November 12, 2005, defendant Lawson Ho-Shing ("**Lawson**") and a co-defendant, Audrey Ho-Shing, executed a promissory note (the "**Original Note**") and mortgage in favor Fremont Investment & Loan ("**Fremont**") in the amount of $432,000.00.

On February 20, 2008, both defendants executed a note and mortgage in favor of Wells Fargo (the "**Plaintiff**") in the amount of $43,338.00. On that same date, they also executed a Consolidation, Extension and Modification Agreement (the "**CEMA**") consolidating both loans into a single loan in the amount of $471,415.00. Justice Peter Tom, writing for the majority stated that:

The CEMA explained that the two notes, identified in Exhibit A to the agreement, were combined and that the parties' rights and obligations were combined into one mortgage and one "loan obligation."

Defendants also executed a consolidated note [(the "**Consolidated Note**")] and a consolidated mortgage that identified Wells Fargo as the payee and mortgagee, respectively. The consolidated note was attached to the CEMA, which provided that it "would supersede all terms, covenants, and provisions of the original Notes." Similarly, the consolidated mortgage constituted a "single lien" on the property and "would supersede all terms, covenants, and provisions of the original Mortgages."

As discussed below, the majority essentially concluded that based on these facts alone, since Plaintiff was the holder of the Consolidated Note, it had standing to foreclose the consolidated mortgage.

II. The Fremont Bankruptcy and Subsequent Assignment

As part of its analysis, the dissent focuses on certain facts which arose *after* the consolidation. Justice Peter Moulton, writing the dissent, stated as follows:

On June 18, 2008, Fremont General Corporation (and its subsidiaries) filed for bankruptcy. . . . Fremont [General Corporation] became Fremont Reorganizing Corporation on January 5, 2009, and thereafter became an inactive corporation. On October 18, 2010, Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for Fremont Investment & Loan," assigned the 2005 Fremont *mortgage* to Wells Fargo.

Emphasis added.

It was noted that Plaintiff did not dispute that the original lender, Fremont, was part of the Bankruptcy. The 32 month lag between the actual date of the assignment of the Fremont loan to Wells Fargo (February 20, 2008) and the date of the MERS assignment of mortgage (October 18, 2010) is unexplained in the opinion although the majority states that the mortgage assignment "was clearly a ministerial act and had no bearing on the earlier valid transfer of the note."

III. The Foreclosure

Defendants defaulted on making payments on the Consolidated Note and consolidated mortgage after May 1, 2010. Plaintiff commenced foreclosure in Bronx County Supreme Court on June 20, 2013 and Defendants answered the foreclosure complaint, through counsel, asserting the affirmative defense of lack of standing to foreclose. In August 2015, Plaintiff moved for summary judgment, which was granted without any opposition from Defendants. According to the dissent, Defendants may not have opposed that motion because their attorney was in Bankruptcy at that time.

In September 2016, Plaintiff served a motion for judgment of foreclosure and sale, which was supported by an affidavit of an officer of Plaintiff. In response, Defendant Lawson, acting *pro so*, filed a motion to strike that affidavit and afterwards filed a motion to vacate the order which had granted Plaintiff summary judgment, although that second motion was made pursuant to CPLR 5015(a)(3) based on allegations of "fraud, misrepresentation and misconduct."

The lower court denied both motions. Defendant Lawson, again, acting *pro so*, appealed.

IV. The Majority Turns to the Court of Appeals

In order to understand the majority's decision, it is necessary to revisit the New York State Court of Appeals' June 2015 holding in *Aurora Loan Servs., LLC v. Taylor* which articulated the requirements to show standing to foreclose. There, the Court of Appeals held as follows:

Contrary to the Taylors' assertions, to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to Aurora before the commencement of the foreclosure action—that is what matters.

* * *

Any disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose.

Accordingly, the Taylors' argument that Aurora lacked standing because it did not possess a valid and enforceable mortgage as of the commencement of this action is simply incorrect. The validity of the August 2009 assignment of the mortgage is irrelevant to Aurora's standing.

Id., 25 N.Y.3d 355, 361-62 (2015) (internal citation and quotation marks omitted).

Here, in *Wells Fargo Bank N.A.*, the majority pointed out that the Consolidated Note "supersed[ed] all terms, covenants and provisions of the original [n]otes," and that pursuant to the holding in *Aurora Loan Servs., LLC*, all that was needed was for Wells Fargo to be the holder of the Consolidated Note before commencing suit, which it was. That fact was never refuted.

V. The Majority's Responses to the Dissent's Arguments

The dissenting justices maintained that the Defendant showed a meritorious defense to the foreclosure warranting *vacatur* of the order granting Plaintiff summary judgment because:

(a) Plaintiff could not produce a copy of the Original Note and there was thus a gap in the chain of ownership such that as a result, there could be double liability if the Original Note was transferred to an entity other than Plaintiff;

(b) The CEMA cannot fill the gap and "[t]o hold otherwise would mean that a borrower and subsequent lender could agree to appropriate an original lender's investment merely by executing a CEMA to which the original lender is not a party;" and

(c) Fremont lacked authority to assign the original mortgage to Plaintiff because Fremont was no longer in existence as of the date of the MERS assignment to the plaintiff.

The majority responded to each respective argument as follows:

(a) The CEMA and the Consolidated Note made clear that the Consolidated Note superseded the original notes, that the Consolidated Note is the operative document, and that the Original Note is no longer in existence;

(b) There was no evidence that the Original Note was misappropriated or not actually transferred to Plaintiff and the "dissent's holding would mean that despite a party's being the undisputed holder of a note, and a CEMA

evidencing that prior notes were superseded and no longer in effect, as well as an undisputed default by the borrower, the borrower could impede a clear right to foreclose by raising speculative questions without proof about inconsequential notes;" and

(c) Only the Consolidated Note, as opposed to the mortgage, is relevant to the standing analysis and here (i) the Original Note was superseded and thus no longer in existence at the time of the Fremont Bankruptcy and (ii) the assignment of the mortgage was merely a ministerial act that validated the prior transfer of the Original Note.

VI. Further Analysis

The majority's reasoning in interpreting and noting the importance of the word "supersede" in the Consolidated Note is consistent with other established definitions and interpretations of that word. For example, Black's Law Dictionary defines "supersede" as "to annul, make void, or repeal by taking the place of." Similarly, even in in the context of civil litigation in New York State Courts, it is well known that an amended pleading, by *superseding* the original one, takes its place.

Further, under *Aurora Loan Servs., LLC*, all that Plaintiff needed in order to have standing to foreclose in New York was for it be the holder of the Consolidated Note. In this case, Wells Fargo was the undisputed holder of the Consolidated Note, a fact which was never refuted by the Defendant.

If the Defendant's argument as to lack of standing (due to (a) an alleged failure to prove transfer and ownership of the Original Note and (b) an alleged improper mortgage assignment to Wells Fargo) were to prevail, the application of such principles would be noteworthy due to the potential impact on all real estate lending in New York, including all commercial real estate lending, where the vast majority of transactions proceed via CEMA with some note and mortgage chains going back more than 100 years. Under the dissent's view, foreclosing plaintiffs, despite being the holder of a consolidated note, would have the additional burden of producing (or articulating a chain of custody of) each and every promissory note and assignment of mortgage in the chain in order to show standing to foreclose on a consolidated loan. For now, the Court of Appeals ruling in *Aurora Loan Servs., LLC v. Taylor* continues to govern, and the onerous additional requirements set forth in the dissent in *Wells Fargo Bank N.A. v. Ho-Shing* are currently inapplicable.

Please note that this Advisory may be further updated since this litigation is ongoing.

If you have any questions please feel free to contact Samit G. Patel at (212) 510-2286 or via email at spatel@cullenanddykman.com.

[1] 2019 N.Y. Slip Op. 00080, 2019 WL 123443.

[2] Under Section 5601 of New York's Civil Practice Law and Rules (the "**CPLR**"), an appeal may be taken to the New York State Court of Appeals as of right from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal. Whether a question of law can be established here remains to be seen.

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