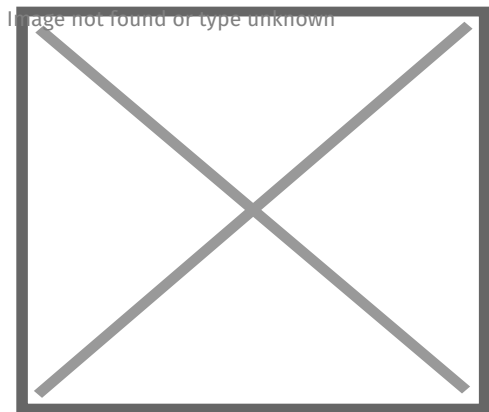


On the Cutting Edge of Evolving Laws in Bank Foreclosures

June 10, 2019



Challenging New Laws that Adversely Affect Banking Clients

Justice Thomas F. Whelan of the New York State Supreme Court, Suffolk County, concluded that Chief Administrative Judge Ann T. Pfau had exceeded her authority in requiring counsel for lenders in residential foreclosures to submit an affirmation personally attesting to the accuracy and completeness of documents filed with the court. The decision, *LaSalle Bank, N.A. v. Pace*, 31 Misc. 3d 627, (Sup. Ct. Suffolk Cty. Feb. 28, 2011), was published in the New York Law Journal's "Decisions of Interest" section on March 9, 2011, and has since been featured in a number of legal publications. see Andrew Keshner, *Court Officials Over-Stepped With Affirmation Rule*, *Judge Says*, NYLJ, March 9, 2011; George Bundy Smith and Thomas J. Hall, *Limitations on Chief Administrative Judge's Rule-Making Authority*, NYLJ April 15, 2011; David D. Siegel, *Rule-Making Power of Office of Court Administration is Contested*, New York State Law Digest, April 2011. Cullen and Dykman represented the Bank in the action.

LaSalle involved a 2008 action to foreclose a \$1.3 million mortgage on the Hampton Bays, New York residence of James and Linda Pace. The Bank moved for an order granting summary judgment and the appointment of a referee in the fall of 2010. The Pace defendants opposed the motion, arguing, *inter alia*, that the Bank's failure to submit the attorney affirmation required by Administrative Order 548-10 required denial of the motion. The Court disagreed. While the Chief Administrator was at liberty to issue rules regulating the efficient and orderly transaction of business in the State's trial courts, the Court explained, she could not, in the absence of an express delegation of authority from the Legislature, impose additional substantive requirements upon litigants. Nor could the Chief Administrator unilaterally impair statutory remedies or abridge rights conferred by statute.

Justice Whelan determined that the Administrative Order and 22 NYCRR 202.12-a(f) (which gave the Chief Administrator continuing authority to require the special affirmations) did precisely that. According to the Court, both "impose[d] additional burdens of proof only upon the plaintiff which [had] the effect of significantly impairing its statutory remedy of a judgment of foreclosure and sale." Finding no express delegation of authority and further finding that the Administrative Order and 22 NYCRR 202.12-a(f) "arguably limit and/or diminish the constitutionally conferred original jurisdiction of [the Supreme Court]", Justice Whelan concluded that neither constituted a permissible exercise of authority on the part of the Chief Administrator.

In granting the Bank's motion for summary judgment, the Court also rejected the Pace defendants' argument that neither the Bank's Affidavit of Merit, nor the underlying Assignment of Mortgage to the Bank, could be considered under CPLR 2309(c) due to the Bank's failure to submit certificates of conformity with its initial moving papers. Noting that the absence of a certificate of conformity for oaths taken in a sister state was a mere irregularity which could be ignored in the absence of a showing of actual prejudice, the Court determined that where, as in the case at bar, the acknowledgments were taken before a notary public, a certificate of conformity was not required.

Practices

- Real Estate and Land Use Litigation
- Bankruptcy and Creditors' Rights

Industries

- Real Estate
- Business Reorganization and Financial Restructuring