Foreclosure Client Alert

Supreme Court of New Jersey relaxes remedy to cure faulty Notices of Intention to Foreclose

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In a decision with important implications for all residential lenders and servicers instituting foreclosure proceedings, the Supreme Court of New Jersey in *US Bank v. Guillaume* held yesterday that the Fair Foreclosure Act ("FFA") requires that a notice of intention to foreclose ("NOI") include the name and address of the actual lender, in addition to contact information for any loan servicer who is charged by the lender with the responsibility to accept mortgage payments and/or negotiate a resolution of the dispute between the lender and the homeowner. The Court further held, however, that a trial court adjudicating a foreclosure action in which the notice of intention does not identify the actual lender need not always dismiss the action without prejudice, but may also order the service of a corrected notice or impose other appropriate remedies. *Guillaume* represents an important change in the law concerning the remedy for violating the NOI requirements, as previous case law has held that the exclusive remedy available to a trial court was dismissal of the foreclosure action without prejudice.

Guillaume involved a situation where the borrowers failed to make their mortgage payments to the lender, US Bank, since April 2008. In May 2008, America's Servicing Company ("ASC") delivered a NOI to the borrowers that, while satisfying many of the other requirements of the FFA, only identified ASC as the entity to contact if they wished to dispute the calculation of the payment due or that a default had occurred. The name and address of the lender, US Bank, did not appear anywhere on the notice.

US Bank subsequently filed a Foreclosure Complaint and despite multiple notices served on the borrowers, the Guillaumes failed to file an answer or otherwise proffer a defense in the foreclosure action. After a default judgment was entered by the court, the Guillaumes sought to vacate the final judgment of foreclosure pursuant to Rule 4:50-1 and dismiss the foreclosure complaint based on, among other things, the plaintiff's failure to provide the lender's name and address in the NOI.

The trial court ultimately denied the Guillaumes' motion, but directed that a corrected NOI be served upon the Guillaumes. The Appellate Division affirmed, holding the Guillaumes could not establish excusable neglect, a meritorious defense or exceptional circumstances as required for relief under Rule 4:50-1.

The Supreme Court, while not excusing the technical violation of the FFA, focused on the equitable discretion held by trial courts in fashioning redress to statutory violations and overruled *Bank of New York v. Laks*, 422 N.J. Super. 201 (App. Div. 2011), which barred courts from imposing remedies other than dismissal without prejudice in the event the NOI does not identify the actual lender. The Court emphasized

that "a trial court fashioning an equitable remedy for a violation of *N.J.S.A.* 2A:50-56(c)(11) should consider the impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default." The Court found that given the Guillaumes' thorough familiarity with the status of their mortgage, the trial court's remedy of a cure constituted a proper exercise of its discretion.

Guillaume is a big victory for lenders and servicers instituting residential foreclosures in New Jersey. Although the Court did not find that a NOI that identifies the servicer and not the actual lender substantially complies with the FFA, the Court's ruling cures the fatal implications of *Laks*. The trend in applying equitable remedies to cure technical deficiencies signifies a significant tip in the judicial scales. As a result, we expect that *Guillaume* will help solve the residential foreclosure log-jam and expedite the resolution of many actions.