"WHOSE … DUTY … IS IT ANYWAY?"
NEW JERSEY FEDERAL COURT HOLDS BANKS, SERVICERS AND PROPERTY PRESERVATION ENTITIES HAVE NON-DELEGABLE DUTY TO PROTECT AGAINST FORESEEABLE INJURY FOR REO PROPERTIES

February 27, 2015 Ryan P. Mulvaney

The three most important things in real estate owned properties is … inspection, inspection, inspection. Indeed, a federal magistrate judge in the United States District Court for the District of New Jersey recently issued a Report and Recommendation[1] in Charlton, et al. v. Wells Fargo Bank, N.A., et al., No. 11-cv-06572, recommending that the presiding district judge deny the motions for summary judgment by the bank, residential mortgage servicer,[2] and property preservation entity because he found that they owed non-delegable duties to prevent injuries in REO homes. The Report and Recommendation was issued as "not for publication." Recently, after a de novo review and over the objections of the property preservation entity, the presiding district judge entered an order adopting the Report and Recommendation in its entirety.

A. Factual Background

The plaintiffs, a husband and wife, alleged that, during their second visit to a REO property in northern New Jersey with their real estate agent, the wife slipped and suffered injuries as a result of a dangerous condition on the property, alleged to be a piece of broken glass. The REO property was vacant; a bank "owned," and a servicer "managed," the property. The servicer entered into a property preservation agreement with a third-party to perform services at the property that included re-keying, securing openings, removing debris, maintaining the lawn, performing janitorial services, winterizing, maintaining the pool, and performing repairs. The property preservation entity hired two subcontractors to perform services at the property on its behalf. Notably, one month before the plaintiffs first visited the property, the local police department responded to a burglary call at the property during which the police concluded that a squatter had been living there and had damaged it.

B. Property Preservation Entity Owes Duty to Business Invitees

In support of its motion for summary judgment, the property preservation entity argued that it did not owe the plaintiffs a duty of care. Id. at p. 10. It also argued that it had neither a relationship with the plaintiffs, an ownership interest in the property, nor any authorization to repair or maintain the property beyond the property preservation agreement, which required only re-keying, securing openings, debris removal, lawn maintenance, janitorial service, winterization, pool maintenance, and repair and rehabilitations. Id.

In denying summary judgment, the court concluded that the property preservation entity owed the plaintiffs a duty to prevent against reasonably foreseeable injuries. Id. The court rejected the argument that its duties were limited to only those outlined in the property preservation agreement. In recounting the various responsibilities for which the property preservation entity was responsible pursuant to the agreement, the court concluded that it violated the requirement to perform janitorial services that required the property to be clean to show prospective buyers like the plaintiffs. Id. at pp. 10-11. In that regard, the court found that the record demonstrated that one of the property preservation entity's subcontractors had performed such services "on several occasions, including a service just a few days before the alleged slip and fall accident." Id. at p. 11.

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[1] Pursuant to Rule 72.1(a)(2) of the Local Civil Rules of the United States District Court for the District of New Jersey, and consistent with Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(B) and (C), a district judge may refer dispositive matters to a magistrate judge for review, report and recommendation.

[2] The bank and servicer are referred to as "the Servicer Defendants."

C. Bank and Servicer Owed Non-Delegable Duties to Business Invitees

First and foremost, the Servicer Defendants argued that the property preservation entity agreed to perform, among other services, janitorial services that included mopping and vacuuming. The Servicer Defendants also argued that the property preservation entity agreed to indemnify, defend and hold them harmless for all claims and liabilities arising out of the property preservation entity's acts or omissions or those of the property preservation entity's subcontractors. In opposition, the property preservation entity argued that it satisfied its contractual duty, and that the Servicer Defendants "misinterpret the indemnification provision" because the provision "does not require" the property preservation entity to indemnify the Servicer Defendants for negligence of the property preservation entity's subcontractors. Id. at p. 13, n.5. The court, however, held that it "already held" that the property preservation entity had a duty to maintain the REO property under the property preservation agreement and a duty to exercise reasonable care to prevent against "reasonably foreseeable injury to persons invited onto the [p]roperty." Id. at p. 13.

The Servicer Defendants also argued that they did not owe a duty because they had no relationship with the plaintiffs and made no representations to them regarding the condition of the property. They argued that the plaintiffs were aware that the property had been under renovation and that it was being sold, like all REO properties, "as-is," and, as such, could not have expected a duty from the Servicer Defendants. Moreover, they argued that the broken glass was a transient condition about which they had no knowledge and that their duty, if any, was limited to warning against only dangerous conditions about which they knew or should have known about. Finally, they argued that, even if they owed a duty, the plaintiff's injury was caused not by the breach of duty but by the superseding intervening cause – the real estate agency's failure to inspect the property and correct the condition.

In rejecting those arguments, the court recognized that, generally, property owners have a non-delegable duty to inspect their property to protect business invitees against reasonably foreseeable injuries due to dangerous conditions. Id. at p. 15. The court also analyzed the factors set forth in Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993) in which the New Jersey Supreme Court expanded the breadth of tort law to non-traditional tortfeasors. Id. at pp. 14, 16 (citing and quoting Hopkins, 132 N.J. at 439 (imposing duty of care on property owner turns on whether duty "satisfies an abiding sense of basic fairness under all of the circumstances in light of the considerations of public policy.")).

In analyzing the first Hopkins factor – "relationship of the parties" – the magistrate judge held that the plaintiffs were in the property to view and potentially purchase it and that, "[b]y marketing the Property for sale and inviting Plaintiffs onto the Property," the Servicer Defendants received an economic benefit. Id. at p. 16. As such, the court found that the plaintiffs should reasonably have expected that the property was safe for viewing. Id.

In analyzing the second Hopkins factor – "nature of the attendant risk" – the court recognized that it must consider the foreseeability that injury may occur because of a dangerous condition. In rejecting the Servicer Defendants' arguments, the court held that, irrespective of whether the broken glass was transient in nature, it was foreseeable that such a condition could exist on a foreclosed property because the record established that, one month before the accident, the local police department discovered someone was living in and had damaged the property. Id. at p. 17. Thus, according to the court, it was reasonably foreseeable that the property, being vacant, was vulnerable to damage and that the damage could have harmed an invitee.

In analyzing the third Hopkins factor – "opportunity and ability to exercise care" – the court recognized and agreed that the Servicer Defendants cannot be expected to constantly visit all of the REO properties. However, that burden "does not provide an absolute bar to an owner's duty to exercise reasonable care." Id. at p. 17. The court suggested, as the plaintiffs suggested, that the Servicer Defendants could have paid for maintenance services. Id. Moreover, on the issue of notice and breach, the court noted that the plaintiffs did not present facts to dispute whether the Servicer Defendants knew about the condition. Id. at p. 19. Thus, triable issues of fact existed regarding whether the Servicer Defendants had adequate notice because the local police discovered a third-party living in and caused damage to the property. Id.

In addressing the last Hopkins factor – public policy concerns – the court recognized that the Servicer Defendants "did not maintain a consistent presence on the Property[ ]" and that "a finding that they owed a duty would result in a daily inspection requirement, which would create an unreasonable economic burden on owners of foreclosed properties." Nevertheless, the court held that homeowners, including "owners" of vacant REO homes, are in the best position to learn of dangerous conditions on their property and cure them. Id. at p. 18.

D. What Does This Mean for Servicers? Inspection, Inspection, Inspection

Although notice arguments and arguments regarding the breadth of the indemnification agreement still exist, the Charlton decision ultimately extends the duty to protect business invitees against reasonably foreseeable injuries due to dangerous conditions to lenders and servicers that are now apparently deemed to "own," in the sense of a typical property owner, REO properties. Although the court recognized that it is nearly, if not entirely, impossible for banks and servicers to routinely inspect each and every REO property on the books, the court's holding that banks and servicers owe non-delegable duties to persons who are touring REO properties for potential purchase makes clear that banks, servicers and their property preservation teams must safeguard REO properties and expeditiously remediate dangerous conditions.

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