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Bankruptcy Briefs

By Michael R. O'Donnell, Michael Crowley, Desiree McDonald and Kevin Hakansson[*]

NEW YORK COURT DENIES INJUNCTION TO STAY FORECLOSURE SALE OF BOSTON'S STATE STREET BUILDING

The New York Supreme Court, Kings County, recently denied a plaintiff's motion for an injunction staying the foreclosure sale of shares of a corporation that indirectly owned the State Street Financial Center (the "Property") in Boston, finding that the foreclosing lender did not act unreasonably under the Uniform Commercial Code ("UCC").[1] The Property is owned by a non-party, and plaintiff Lincoln St. Mezz II, LLC, owns 100 percent of the shares of a corporation that indirectly owns the Property. Plaintiff had been negotiating to refinance the four outstanding loans on the Property. However, plaintiff defaulted on the loan on November 10, 2021, triggering a notice by defendant One Lincoln Mezz 2 LLC, who owned one of the loans, pursuant to Article 9 of the UCC. The notice was for the sale of collateral: The 100 percent equity interest in defendant corporation pursuant to an agreement executed when the defendant purchased the loan. Defendant scheduled a foreclosure sale for December 20, 2021. Plaintiff moved to stay the foreclosure sale, and defendant opposed.

The court noted that, pursuant to New York law, a preliminary injunction could be issued if the party seeking it could demonstrate a probability of success on the merits, the danger of irreparable injury, such that monetary damages would be insufficient, and a balance of the equities. As to the likelihood of success on the merits, plaintiff argued that defendant had failed to satisfy Section 9-627(b) of the UCC, requiring that the "disposition of the collateral" be "made in a commercially reasonable manner." Plaintiff's primary argument

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[1] *Lincoln St. Mezz II, LLC v. One Lincoln Mezz 2 LLC*, 2021 N.Y. Slip Op. 32635(U) (Sup. Ct.).

as to the commercial reasonableness was that the timeline of the foreclosure sale was convoluted and confusing because it was during the holiday season, and that the sale occurring right before the holiday season provides insufficient time for buyers to obtain the necessary financing.

The court noted that under New York law, a disposition of collateral is commercially reasonable if made "in the usual matter on any recognized market . . . at the price current in any recognized market at the time of the disposition . . . or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition."

Regarding plaintiff's first argument, the court found that notices of the sale of the building were publicized on November 11, 2021, well before the holiday season, and that the mere fact the actual sale was a few days before a holiday and might interfere with the holiday season does not mean the sale is commercially unreasonable as a matter of law, and that detailed information about vacation habits, flight availability and reduced work hours would "virtually eliminate most of the year as appropriate for scheduling a sale."

As to irreparable injury, plaintiff argued that one of the loan agreements provided that, where the lender has acted unreasonably, the "borrower's sole remedy shall be limited to commencing an action seeking injunctive relief or declaratory judgment." The court found that plaintiff had provided no evidence that defendant had acted unreasonably, which was a necessary prerequisite to any injunction.

Further, plaintiff argued that the foreclosure sale of the Property would result in loss of the Property which cannot be "replaced with any money damages." To this argument, the court noted that plaintiff did not actually own the Property—rather, it owned all of the shares of a corporation that indirectly owned the Property.

As such, the court found that there was no basis for plaintiff to argue that it had an interest in the Property that cannot be compensated with money damages.

NEW JERSEY FEDERAL COURT DENIES MOTION FOR RECONSIDERATION OF DISMISSAL OF MORTGAGE "MISHANDLING" CLAIMS

The U.S. District Court for the District of New Jersey recently denied a borrower's motion for reconsideration of the dismissal of claims that she made asserting "mishandling" of her mortgage, holding they were barred by the

Rooker-Feldman doctrine because a final judgment of foreclosure had been entered in state court.[2]

Plaintiff Kim Davis ("Davis") executed a mortgage on property in Jackson, New Jersey, and the mortgage was eventually assigned to defendant Bank of America ("BoA"). After Davis defaulted on her mortgage, BoA filed for foreclosure in state court in 2016, with a final judgment of foreclosure entered on May 21, 2018. Davis filed a series of appeals that were denied, and eventually filed this action against BoA in federal court, asserting various causes of action alleging the "mishandling" of her mortgage.

The court agreed with BoA's argument that Davis's claims should be dismissed for a number of reasons, including the Rooker-Feldman doctrine, which prohibits actions when "(1) the federal plaintiff lost in state court, (2) the plaintiff complain[s] of injuries caused by [the] state-court judgments, (3) those judgments were rendered before the federal suit was filed, and (4) the plaintiff is inviting the district court to review and reject the state judgment."

In her motion for reconsideration, Davis argued that Federal Rules 60(a) and (b) supported granting reconsideration. Rule 60(a) provides that a "court may correct a clerical mistake or mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." The court found that Davis' argument under this rule was unavailing, as it centered on the substance of the court's opinion and order, and not on a scrivening or clerical error, making it inappropriate for relief under Rule 60(a).

Rule 60(b) provides relief from a final judgment for a number of enumerated reasons, including mistake and fraud, as well as a catchall provision that allows for reconsideration for "any other reason that justifies relief." The court rejected Davis's mistake and fraud contentions, noting that her arguments for reconsideration merely "regurgitated" the same facts presented in her motion to dismiss papers. The court further noted that relief under the catchall provision was appropriate only in "extraordinary, special circumstances" that are not present in cases of legal errors that can be addressed by appeal.

The court bluntly stated that Davis had raised nothing more than disagreement with the court's decision as alleged legal error, and said that given the court's earlier decision regarding Rooker-Feldman, that the denial of reconsideration should come as no surprise to Davis.

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[2] *Davis v. Bank of Am.*, 2022 U.S. Dist. LEXIS 40529 (D.N.J. Mar. 7, 2022).

NEVADA SUPREME COURT HOLDS FOUR-YEAR LIMITATIONS PERIOD APPLIES TO PRIOR LENDER CHALLENGING HOA SALE

In a question certified by the U.S. Court of Appeals for the Ninth Circuit, the Nevada Supreme Court recently held via a split decision that a prior lender's action attacking an HOA sale is subject to a four-year limitations period, and that the period does not begin to run as of the date of sale, but instead when "the lienholder receives notice of some affirmative action by the titleholder to repudiate the lien or that is otherwise inconsistent with the lien's continued existence."[3] In the case, the lender had a first deed of trust on the property. In 2011, the HOA foreclosed and sold the property, and the lender did not challenge the sale at that time. The property was subsequently transferred to the defendant and, in 2016, the lender brought a quiet title action. The defendant filed a motion to dismiss arguing that the claim was time-barred because the limitations period began to run upon the sale date, and the district court agreed. The lender appealed, and the Ninth Circuit certified the questions of (i) how long the limitations period is, and (ii) when the period begins to run to the Nevada Supreme Court.

First, the four-judge majority found that a four-year limitations period should apply. The court determined that none of the proposed limitations statutes proposed by the parties were analogous, and that "we conclude that this is exactly the type of situation for which NRS 11.220's catch-all period was built." Accordingly, the lender had four years to bring the claim.

Second, the court found that "the limitations period does not begin to run until the lienholder receives notice of some affirmative action by the titleholder to repudiate the lien or that is otherwise inconsistent with the lien's continued existence."

Moreover, "[t]he HOA foreclosure sale, standing alone, is not sufficient to trigger the period . . . because the foreclosure sale does not necessarily extinguish the lien. . . . To rise to the level that would trigger the limitations period, something more is required."

Three judges concurred in part and dissented in part from the majority's decision. Although they agreed that the four-year period was applicable to any claim to invalidate the sale, they argued that the period should begin at the time of the sale: "If a superpriority lien foreclosure sale does not call the deed of trust sufficiently into question to trigger the statute of limitations, it is hard to imagine what would."

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[3] *U.S. Bank, N.A. v. Thunder Props.*, 2022 Nev. LEXIS 3 (Feb. 3, 2022).

They also argued that, to the extent the lender claimed that the sale itself was valid but did not affect the deed of trust (e.g., "that tender of the superpriority portion of the lien was futile and therefore excused"), that limitations period would follow the standard periods for enforcing deeds of trusts as against borrowers (e.g., six years from the maturity date).

NEW JERSEY APPELLATE DIVISION ALLOWS INTERVENTION IN TAX SALE FORECLOSURE

The New Jersey Appellate Division recently reversed the finding of a lower court, which had denied appellants' attempt to intervene in a foreclosure matter, remanding the matter for the entry of an order permitting intervention.[4]

In the case, plaintiff purchased the tax sale certificate for a property in Vernon, New Jersey in 2017. In June 2019, plaintiff filed to foreclose on the property owner's right to redemption and to obtain title to the property, and received a declaration that the property was abandoned. On September 16, 2019, appellants contracted with defendant, the property owner, to purchase the property for $25,000. One week later, plaintiff served defendant with the notice of foreclosure and the order determining the property was abandoned. On October 30, 2019, appellants and defendant closed on the sale of the property. Later that day, plaintiff informed appellants that plaintiff would not agree to waive the requirement to file a motion to intervene in the foreclosure prior to redeeming as required by *Simon v. Cronecker*.[5]

Appellants moved to intervene in the foreclosure action on November 14, 2019, seeking a court order to compel plaintiff to accept the redemption of the tax lien. Plaintiff opposed the motion, stating that appellants had not followed the procedure established under *Cronecker* and N.J.S.A. 54:5-89.1 because appellants did not seek permission from the court prior to redeeming the tax lien. The trial court denied appellants' motion, finding that appellants had not followed the *Cronecker* procedure because they failed to intervene in the foreclosure case prior to redeeming the tax sale certificate. Therefore, the trial court denied appellants' motion to intervene. appellants appealed.

The appellate court reversed. It noted that in *Cronecker*, the plaintiff had moved to bar redemption a month after the court-ordered redemption date expired, and thereafter, an investor moved to intervene in the foreclosure action. The *Cronecker* court held that before redeeming the tax certificate, the third-party investor had to intervene in the foreclosure action and show more

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[4] *Fig Cap Invs. NJ13, LLC v. 405 Bigelow Ln.*, No. A-2461-20 (App. Div. Mar. 22, 2022).

[5] *Simon v. Cronecker*, 189 N.J. 304 (2007).

than nominal consideration had been offered for the property interest. The appellate court distinguished the instant case, noting that no redemption expiration date had been ordered, and that no authority supported plaintiff's argument that a notice of foreclosure sets a presumptive date for redemption.

Instead, the court noted that N.J.S.A. 54:5-54 allows any interested person to redeem the tax sale certificate at any time before the final date for redemption set by the court, and pointed to the similar factual scenario in *Green Knight Cap., LLC v. Calderon*,[6] in which the appellate division concluded that "when an investor has an interest in the property in foreclosure, is prepared to redeem the tax sale certificate, and files a motion to intervene in the foreclosure action before the entry of an order setting the last date for redemption, the investor is permitted to intervene and redeem the tax certificate." Because the record did not reflect a court order setting a final date for redemption, the appellate division concluded that appellants moved to intervene prior to the redemption deadline.

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[6] *Green Knight Cap., LLC v. Calderon*, 469 N.J. Super. 390 (App. Div. 2021).