



AFN'S Bi-Monthly Litigation Webinar

HOT TOPIC LEGAL UPDATES



Presented by the AFN's Legal Services Committee

PRESENTATION OVERVIEW

- ▣ SPEAKER INTRODUCTIONS
- ▣ INDUSTRY OVERVIEW
- ▣ FORECLOSURE TOPICS
- ▣ BANKRUPTCY TOPICS
- ▣ FC & BK - OTHER LITIGATION RISKS
- ▣ EVICTION TOPICS
- ▣ CONCLUSION WITH QUESTION AND ANSWER PERIOD

SPEAKERS



William M. LeRoy - Moderator

CEO

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Cynthia A. Nierer, Esq. - Panelist

Partner

Rosicki, Rosicki & Associates, P.C.



Dominique M. Varner, Esq. - Panelist

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Hughes, Watters & Askanase, L.L.P.



Matthew C. Abad, Esq. - Panelist

Partner

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Michelle Garcia Gilbert, Esq. - Panelist

Attorney

Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A.

INDUSTRY OVERVIEW

- ▣ Within the past year, the mortgage industry has been subjected to increased scrutiny by the media, the legislature and the judiciary.
- ▣ Changes have been seen in courtrooms across the country.
- ▣ Heightened judicial scrutiny is common (particularly on cases where the mortgagor has not appeared) and where an error by the bank and/or the bank's attorney is made (intentional or not) sanctions are being assessed.

FORECLOSURE UPDATES

FORBEARANCE AGREEMENTS:

Deutsche Bank National Trust v. Williams (NY Supreme Court, Kings County)

- ▣ Every forbearance agreement must be filed with the Court and if there is a default by the mortgagor an application must be made to appoint a new referee to recalculate the amount due.

FORECLOSURE UPDATES

ASSIGNMENTS:

Countrywide Home Loans, Inc. v. Taylor (NY Supreme Court, Suffolk County, 843 N.Y.S.2d 495)

- ▣ Assignment included an “effective date”. The Judge held that the language was insufficient to establish the plaintiff’s ownership interest at the time the action was commenced. As such, the assignment needed to be fully executed prior to the commencement of the foreclosure action.

Aurora Loan Services, LLC v. Sattar (NY Supreme Court, Kings County, 17 Misc.3d 1109(A))

- ▣ On an unopposed motion, the judge conducted his own investigation and determined that the assignment into the plaintiff was not of record. The court warned of future sanctions against the attorneys and the named plaintiff for wasting judicial resources by commencing an action in the wrong plaintiff.

FORECLOSURE UPDATES

PLAINTIFF'S AFFIDAVITS:

- ▣ Some judges requiring an officer of plaintiff to sign.
- ▣ Can an attorney in fact or an agent sign? Legally the answer should be yes, provided a power of attorney and/or pooling and servicing agreement accompanies same. But—many judges are requiring a separate affidavit signed by the plaintiff stating that the attorney in fact has authority to set forth facts and amounts due. Also, pooling and servicing agreements are not always available and/or many clients do not want same submitted to court.
- ▣ Gaps at bottom of pages before signatures are being questioned by judges (is the affidavit pre-signed?).
- ▣ Signing on behalf of multiple entities can lead to denial even though both are properly authorized (i.e.: signing an assignment on behalf of Bank A and signing an affidavit on behalf of Bank B). Judges are objecting when this occurs in the same case and recently judges have denied motions where the signor signed on behalf of different banks in different cases.

FORECLOSURE UPDATES

JUDICIAL REVIEW OF ORIGINATION FILE

- ▣ Some judges are seeking to review loan origination files.
- ▣ Some judges are quoting not just case law but newspapers and magazines—critical of the mortgage industry.
- ▣ Courts are trying to verify if the bank was involved in fraud at origination.

FORECLOSURE UPDATES

FORECLOSURE SALES:

Bardi v. Morgan (NY Supreme Court, Kings County)

- ▣ 10 years passed between the entry of the judgment of foreclosure and sale and the foreclosure sale due to litigation, bankruptcy and third party purchaser defaults on prior sales. The court held that a foreclosure sale may not take place more than one year after the date the judgment was entered unless an application is made for an updated judgment.

FORECLOSURE UPDATES

FLORIDA APPELLATE DECISIONS:

- ▣ Partial Mortgage Payments Held In Suspense: where a mortgage is silent, partial excess payments made by a mortgagor may be held by the mortgagee in “suspense” until full payment has accrued, rather than give the mortgagor credit immediately. *Fasanaro v. The First Nat. Bank of Chicago*, 920 So.2d 41 (Fla. 3d DCA 2006)
- ▣ Windstorm Insurance Proceeds Payable to Mortgagee: Second District Court recommends legislation to control provisions allowing mortgagees to apply insurance funds to prepayment of mortgage debt rather than to allow mortgagor to repair the property. *Bean v. Prevatt*, 935 So.2d 557 (Fla. 2d DCA 2006)

FORECLOSURE UPDATES

FLORIDA APPELLATE DECISIONS CONT.:

- ▣ Right to Reinstate Denied After Mortgage Default: where a mortgage makes no provision for reinstatement of the mortgage after default, upon default the mortgagee can require the mortgagor to pay the entire accelerated amount of the mortgage. *Zimmerman v. Olympus Fidelity Trust, LLC*, 936 So.2d 652 (Fla. 4th DCA 2006)
- ▣ Deed In Lieu Subject to Lease Known to Mortgagee: mortgagee that took title by deed in lieu of foreclosure instead of following through with foreclosure sale took property subject to existing lease even though lease was entered into after foreclosure judgment had been entered. *Morris v. Osteen*, 948 So.2d 821 (Fla. 5th DCA 2007)

BANKRUPTCY UPDATES

In Re Fagan, Southern District of NY, 376 B.R. 81

- ▣ Mortgagee brought motion for relief in Chapter 13 case based on alleged failure of debtor to make post petition payments. The court determined that the debtor was current. The mortgagee had filed a prior motion for relief in the same case and had been sanctioned \$700 after the court found that motion to be baseless. This time, the court sanctioned the mortgagee in the amount of \$10,000 plus debtor's attorneys fees holding both the mortgagee and their counsel jointly and severally liable.

BANKRUPTCY UPDATES

In Re Nosek (District Court for the District of Massachusetts, 2006 WL 1867096)

- ▣ Court sanctioned mortgagee in the amount of \$750,000 (\$250,000 for actual damages and \$500,000 punitive damages) for failing to properly apply and credit payments and differentiate between pre and post-petition payments.
- ▣ Case is currently up on appeal.

BANKRUPTCY UPDATES

In Re Osborne (Middle District of Louisiana, 375 B.R. 216)

- ▣ The court sanctioned the creditor's counsel for filing a motion for relief and signing an affidavit of default with incorrect figures and found that the attorney willfully abused the bankruptcy process by filing a motion with incorrect figures.
- ▣ The bank and its attorney were jointly sanctioned for \$5,000 in emotional damages and over \$40,000 in attorney fees.

BANKRUPTCY UPDATES

In re Jones (Eastern District of Louisiana, 2007 WL 2480494)

- ▣ The court sanctioned the mortgagee for assessing post petition charges on a loan in Chapter 13 filing, withholding this fact from the borrower and using trustee payments toward these costs not authorized by the Bankruptcy Court.
- ▣ The court considered a multi million dollar sanction but the mortgagee offered an alternative—whereby it would revise it's practices, have same memorialized in an order of the court, and same would be enforceable in any case pending or subsequently filed in any court in the country.
- ▣ The court issued over \$67,000 in sanctions and actual damages. The case is currently up on appeal.

BANKRUPTCY UPDATES

In re Collins (Bankruptcy Court, Eastern District of Tennessee, 2007 WL 2116416)

- Debtor's plan included a provision that the creditor would notify the trustee and the debtor's attorney of changes in taxes and property insurance. Failure to do so would constitute a waiver to recover escrow charges until the notice was given. Further, the creditor could not assess legal fees, BPO fees, inspection fees, etc. unless same were approved by the Bankruptcy Court. Failure to do so would be considered a material violation of the plan.
- The creditor filed an objection claiming that the plan was not in conformity with the anti-modification provision of 1322(b)(2).
- The court held that the creditor is responsible for applying pre and post-petition payments correctly and the creditor must change its accounting practices accordingly. The Court further held that the notice requirement in the plan was not unreasonable. However, the court did hold that the waiver language was an impermissible modification. So long as the loan documents provided for the assessed fees a plan provision limiting the right to same was an impermissible modification.

BANKRUPTCY UPDATES

In re Sanchez, 372 B.R. 289 (Bkrcty. S.D. Tex. 2007)

- ▣ Court disallowed pre-confirmation and post confirmation contractually authorized attorneys fees, costs and inspection fees without prior disclosure and notice to debtor and/or court order
- ▣ Court disallowed post-confirmation contractually authorized tax advances paid without filing notice and evidence of “Transfer of Claim” per Bankruptcy Rule 3001(e)(2)
- ▣ Holds that offer and acceptance of post-confirmation forbearance agreement without court approval constitutes an impermissible plan modification that fails to comply with Section 1329
- ▣ Significantly, the tax advances and forbearance agreement, as well as some or all of the post petition contractually authorized charges, **occurred after stay termination** pursuant to a court approved Agreed Stay Relief Order.
- ▣ Bottom Line: Pre-petition contractually authorized charges must be included in the Proof of Claim (unresolved whether pre-confirmation charges may also be asserted in the proof of claim) and **NOTWITHSTANDING TERMINATION OF THE AUTOMATIC STAY**, post petition contractually authorized charges require prior notice and/or court approval after filing fee application per Rule 2016(a).

BANKRUPTCY UPDATES

In re Campbell, 361 B.R. 831 (Bkrtcy. S.D.Tex, 2007)

- Proof of Claim filed by servicer contained a pre-petition escrow shortage of \$3,543.78 and also stated that the monthly mortgage payment would increase to cover an anticipated escrow shortage for the year of filing (2006)
- Court held that although the 2006 property taxes had not been assessed on the filing date (4/3/06), the *liability* for such taxes arose on 1/1/06 pursuant to state law, thus the 2006 taxes constituted a *pre-petition* debt and the servicer's attempt to collect that pre-petition debt violated the automatic stay
- Implication is that servicer must obtain stay relief prior to advancing taxes on pre-petition debt or they may not be recoverable post discharge.

BANKRUPTCY UPDATES

In re Padilla --- B.R. ----, 2007 WL 2264714
(Bkrtcy.S.D.Tex.)

- ▣ Judge Isgur disagreed with his colleague Judge Bohm from the *Sanchez* decision that post-petition advances by lender constitutes a stay violation
- ▣ However, he agreed that over secured lenders who are contractually entitled to their fees under 11 U.S.C §506(b) are required under BRCP 2016(a) to file formal application for compensation to collect contractually allowed attorney's fees assessed before confirmation
- ▣ After confirmation, the plan governs and may allow for contractually permitted interest without requiring court approval (§506 does not apply post confirmation) but BRCP 2016(a) still applies so court can determine if fees are reasonable

FORECLOSURE & BANKRUPTCY OTHER LITIGATION RISKS

Purchases of Servicing Rights/Portfolios

- ▣ Entity Name
- ▣ Document Execution: Who will sign? In what Capacity?
- ▣ In what name will new entity take properties?
- ▣ Proper Accounting of Payments/Escrow
- ▣ Which files have been referred to legal? To which attorney?

EVICTION UPDATES

EVICTIONS AND CODE VIOLATIONS:

- ▣ Judges are thinking outside of the box in their attempts to deal with neighborhood blight. Some judges are delaying evictions where they find that the bank is “involved” with other properties in the area that have been assessed with code violations. Warrants are not being issued until the violations as to the other properties are resolved.
- ▣ The bank does not need to own the other properties. So long as the bank commenced a foreclosure action, certain judges are holding the banks responsible for the premises whether or not the foreclosure has been completed.

EVICTIION UPDATES

Bankers Trust Company of California, N.A. v. Antone Martin, et al.
(State of New York, Buffalo City Housing Court)

- ▣ The bank foreclosed on the subject premises and proceeded with a post foreclosure eviction action. The occupants did not appear in the eviction and the bank requested a judgment of possession and warrant of eviction. The judge granted same but stayed execution until that time that the bank resolved all code violation fines associated with other premises within the court's jurisdiction.
- ▣ It is important to note, the subject premises was not one of the premises assessed fines. Of the 9 properties cited by the court, the bank only owned 3. The bank was considered an equitable owner as to the others based on the fact that they had commenced, but not completed, foreclosure actions as to same.
- ▣ The judge went on to discuss the effect incomplete foreclosure actions have on neighborhood blight. The judge further stated as to the bank's failure to resolve code violations "...When banks who profit billions of dollars every year refuse to even appear in court to address these issues, they court may deny them the right to utilize the Housing Part to their benefit."

EVICTIION UPDATES

Cleveland Municipal Court's Housing Division

- ▣ The court is very active in trying to stop and prevent vandalism and neighborhood blight. Same is known for taking aggressive action against owners of neglected properties.
- ▣ Placard Program: Bailiff's are directed to post a placard on the property detailing the contact information of the owner, the lender if the property is in foreclosure and the housing specialist assigned to the case.
- ▣ Clean Hands Requirement: The Housing Court will not allow an eviction case to proceed if the plaintiff has outstanding criminal warrants in Housing Court (including those from criminal code violation cases). Due to the large number of warrants as against banks and lending institutions the Housing Court has a special docket where these evictions are referred. The pending eviction action can be dismissed if the warrants are not resolved.
- ▣ Trials in Absentia: If a corporation is served with notice of criminal charges but fails to appear, they may be tried in absentia. A not guilty plea is entered on the corporation's behalf and the trial proceeds. If found guilty, the corporation can be sentenced in absentia as well.

CONCLUSION QUESTION & ANSWER PERIOD

If you have any further questions that were not addressed in this presentation, or want to contact one of our speakers, please email Matt Bartel, Executive Director of AFN, at mbartel@e-afn.org.

Thank you for your participation in this webinar. Please complete the brief survey which you will be directed to at the conclusion of this presentation.