State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, April 30, 2015 (arguments begin at noon in White Plains)

No. 83 Aurora Loan Services, LLC v Taylor

Aurora Loan Services brought this action in May 2010 to foreclose a mortgage on property owned by Monique and Leonard Taylor in Mount Vernon, alleging they defaulted on their loan payments. The Taylors moved for summary judgment dismissing the complaint, arguing that Aurora lacked standing. Aurora cross-moved for summary judgment and, in support, submitted an affidavit from the legal liaison of its sub-servicer stating that "the original Note has been in the custody of [Aurora] and in its present condition since May 20, 2010," days before Aurora commenced the action.

Supreme Court granted Aurora's cross motion, without opinion, and appointed a referee to compute the amount the Taylors owed on the note. The court subsequently confirmed the referee's report and issued a judgment of foreclosure and sale.

The Appellate Division, Second Department upheld the order granting summary judgment to Aurora. It said the plaintiff "established ... its standing as the holder of the note and mortgage by demonstrating that the note was physically delivered to it prior to the commencement of this action. Specifically, an affidavit submitted by the plaintiff established that it obtained physical possession of the original note ... on May 20, 2010, four days before the action was commenced.... It can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff by Deutsche Bank Trust Company Americas, and since the exact delivery date was provided, there is no further detail necessary for the plaintiff to establish standing. The [Taylors] offered no evidence to contradict those factual averments...." However, it rejected the report of the referee, who adopted Aurora's calculation of the amount due without a hearing, and remitted the matter for further proceedings.

The dissenter argued that Aurora "did not submit sufficient evidence to demonstrate that it had standing to commence the instant action.... A bare statement from the plaintiff's servicing agent that the original note was in the possession of the plaintiff as of commencement of the action is not sufficient to establish standing as a matter of law, if no 'factual details' are given with respect to the physical delivery of the note." "'The affidavit from the plaintiff's [sub-] servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action'...," she said, quoting HSBC Bank USA v Hernandez (92 AD3d 843).

For appellant Taylors: Jeffrey Herzberg, Hauppauge (631) 265-2133
For respondent Aurora Loan: Martin C. Bryce, Jr., Philadelphia, PA (215) 665-8500

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No. 84 Flushing Savings Bank, FSB v Bitar

In 2011, Flushing Savings Bank obtained a foreclosure judgment against Pierre Bitar after he defaulted on a commercial mortgage on property in Brooklyn. The Bank purchased the mortgaged premises at public auction for $125,000. According to the referee's report of sale, Bitar owed the Bank $793,725 at the time of the auction. The Bank moved for a $318,725 deficiency judgment against Bitar under RPAPL 1371, which permits a mortgage lender in a foreclosure action to seek a judgment against the borrower for the debt owed "less the market value as determined by the court or the sale price of the property whichever shall be higher." In support of its motion, the Bank submitted an affidavit from a certified appraiser who determined the fair market value of the mortgaged property was $475,000. The appraiser said he personally inspected the property and considered comparable sales, condition of the neighborhood, market trends and other criteria in determining fair market value.

Supreme Court denied the Bank's motion for a deficiency judgment, saying it failed to provide prima facie proof establishing the value of the property. The Bank "has failed to submit any appraisal, certified or uncertified. Rather, plaintiff relies exclusively upon its appraiser's conclusory four-paragraph affidavit which does not contain any specific information regarding how he reached his fair market value determination." The appraiser provided no information about the condition of the building and neighborhood, or about the comparable sales and market trends he reviewed, the court said. "In short, the only specific details set forth in the appraiser's affidavit regarding the premises are its address and the fair market value figure."

The Appellate Division, Second Department affirmed, finding the appraiser's opinion "conclusory." It said he "did not describe the subject premises or the results of his inspection and failed to append any of the evidence of comparable sales and market data upon which he relied in arriving at his opinion. Nor did the [Bank] submit an actual appraisal report. The Supreme Court was entitled to reject the opinion of the plaintiff's appraiser as without probative value in light of the lack of evidentiary foundation set forth in his affidavit...."

The Bank argues the lower courts violated RPAPL 1371(2) by denying its motion for a deficiency judgment without making a finding of fair market value. "The unrebutted affidavit of the appraiser was sufficient to establish the fair market value of the property...," it says. "Moreover, because of the statutory mandate to determine fair market value, even if the Appraiser's Affidavit was an insufficient basis on which to determine fair market value, the Supreme Court was required to direct a hearing be conducted or direct the submission of additional proofs so that the court could determine the Property's fair market value. The failure to do so was an improvident exercise of discretion and should not have been sustained...."

Bitar has not participated in appeals. The state Attorney General, as amicus curiae, argues that, where a lender fails to satisfy its initial obligation to make a prima facie showing of fair market value, "a trial court has the discretion to deny the movant the opportunity to cure that flagrant defect in order to induce compliance with the statute."

For appellant Flushing Savings Bank: Laurel R. Kretzing, Garden City (516) 393-8258
For Attorney General, amicus curiae: Asst. Solicitor General Mark H. Shawhan (212) 416-6325

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To be argued Thursday, April 30, 2015 (arguments begin at noon in White Plains)

No. 85 ACE Securities Corp. v DB Structured Products, Inc.

DB Structured Products, Inc. (DBSP) purchased 8,800 residential mortgages, which were pooled, placed in a trust, and securitized through the sale of more than $500 million in certificates to investors in 2006. In a Mortgage Loan Purchase Agreement (MLPA), executed on March 28, 2006, DBSP made representations and warranties regarding the quality of the mortgage loans. The MLPA and a Pooling and Servicing Agreement (PSA) require that DBSP be notified of a breach of any of its warranties and gives it 60 days to cure the breach. If the breach cannot be cured, DBSP is required to repurchase the affected loan or substitute a qualified loan within 90 days of receiving notice. The agreements provide that the trustee -- HSBC Bank USA, National Association -- may not sue or demand that DBSP repurchase a defective loan until the cure period expires.

Two certificate holders (investors in the trust) filed this breach of contract action against DBSP on March 28, 2012. HSBC, as trustee, was later substituted as the plaintiff. In September 2012, the trustee filed a complaint alleging that an investigation by an independent firm found breaches of DBSP's warranties for all but one of the 697 mortgage loans it reviewed, including overstatement of borrower's incomes and understatement of their existing debts. It said DBSP refused to cure the breaches or repurchase any of the defective loans. DBSP moved to dismiss the suit, arguing the six-year statute of limitations had expired because the claim accrued when the MLPA and PSA were executed in 2006. The trustee argued the claim did not accrue until DBSP breached its repurchase obligations in 2012.

Supreme Court denied DBSP's motion to dismiss, saying "DBSP does not breach the PSA and the claim for the breach does not accrue until DBSP fails to timely cure or repurchase a loan.... Under the PSA, DBSP has no duty to ensure that the Representations are true..., the only contractual wrong that DBSP could commit is failure to abide by" the Repurchase Protocol. The court concluded, "DBSP commits an independent breach of the PSA each time it fails to abide by and fulfill its obligations under the Repurchase Protocol, and 'each breach may begin the running of the statute [of limitations] anew'...."

The Appellate Division, First Department reversed and dismissed the suit as untimely, saying "the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred.... The certificate holders commenced an action on behalf of the trust ... on March 28, 2012, the last day of the limitations period. However, defendant had not received notice of the alleged breach until February 8, 2012. Thus, the 60- and 90-day periods for cure and repurchase had not yet elapsed. The certificate holders' failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity.... In any event, the certificate holders lacked standing to commence the action on behalf of the trust."

For appellant HSBC (as trustee): Paul D. Clement, Washington, DC (202) 234-0090
For respondent DB Structured Products: David J. Woll, Manhattan (212) 455-2000