RESIDENTIAL

Recent Appellate Decisions Support Both Lenders and Borrowers in California

by
ELLIOT G. JOHNSON,
Associate, Organization?
and
IAN A. RAMBARRAN,
Shareholder, Organization

The first half of 2020 has provided two noteworthy opinions—one benefits lenders and the other benefits borrowers. Both opinions note the California Supreme Court has yet to weigh in on the particular issues addressed by those courts. So it is distinctly possible that both outcomes will change in the future; but for now, both lenders and borrowers have something to point to as a victory.

PREEMPTIVE WRONGFUL FORECLOSURE CLAIMS

In *Perez v. Mortg. Elec. Registration Sys.* (9th Cir. 2020) 959 F.3d 334 ("*Perez*"), the Ninth Circuit helped to harmonize the law on the issue of whether a borrower may challenge a lender's authority to foreclose *before* a foreclosure has occurred. While noting that the California Supreme Court had not ruled on the issue, the *Perez* court unequivocally ruled in favor of the lenders and rejected the borrowers' *pre-foreclosure* challenge.

The underlying suit involved two residential properties that were in the pre-foreclosure stage. The borrowers argued that because of alleged defects in the assignments of the deeds of trust, the lenders never received the "right to collect mortgage payments or to initiate foreclosure proceedings." In crafting their arguments, the borrowers relied on *Yvanova v. New Century Mortgage Corp.* ("*Yvanova*") (2016) 62 Cal.4th 919 wherein the California Supreme Court held that borrowers have standing to challenge defective assignments that could be classed as void. Though the holding was expressly limited to *post-foreclosure* actions, the borrowers sought to extend the principle. (*Id.* at 931.) The borrowers found support from the opinion in *Brown v. Deutsche Bank National Trust Co.* ("*Brown*") (2016) 247 Cal.App.4th 275, 281. The *Brown* court explained that *Yvanova* "raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations before the sale."

The *Perez* court was cognizant of the fact the California Supreme Court has not addressed the preemptive challenge issue. However, the *Perez* court noted several California intermediate state appellate courts have held that California's nonjudicial foreclosure scheme does not allow a borrower to bring a pre-foreclosure action to challenge whether the foreclosing entities are authorized to carry out the foreclosure. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App.4th 1149; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 [overruled in part]; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808.)

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The Ninth Circuit also reasoned that "[t]here is no convincing evidence the California Supreme Court would break with that precedent." Accordingly, the Ninth Circuit upheld the lower court dismissal with prejudice, even though the borrowers argued that the assignments of the deeds of trust in question were void.

The holding in *Perez* sends a strong message to borrowers at the federal level and leaves no room for equivocation across the U.S. District Courts. Though the California Supreme Court may take the issue up at a later date, for now, lenders and servicers have consistent favorable law in both the federal and state courts about challenges to their rights prior to foreclosure.

THE DUTY OF CARE FOR LOAN MODIFICATIONS

The Third District Court of Appeal weighed in, again, on the split in judicial districts as to whether a loan servicer has a duty sounding in negligence for mishandling loan modification applications. In *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341 ("*Weimer*"), the court ruled in favor of the borrowers on this point and held that when a servicer reviews a borrower's application for a modification, a special relationship is created between the two parties. Further, that relationship poses a duty of care on the servicer to conduct the loss mitigation process without error; otherwise, the servicer may be sued for negligence.

In their reasoning, the *Weimer* court evaluated factors provided by the California Supreme Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647 ("*Biakanja*"). The *Biankanja* Court analyzed six factors to determine whether a general duty of care exists. The factors include:

The extent to which the transaction was intended to affect the plaintiff,

1. the foreseeability of harm to him,
2. the degree of certainty that the plaintiff suffered injury,
3. the closeness of the connection between the defendant's conduct and the injury suffered,
4. the moral blame attached to the defendant's conduct, and
5. the policy of preventing future harm.

The *Weimer* court evaluated each of those factors and generally concluded a duty of care should be created because the loss mitigation review process was clearly aimed at helping the borrowers keep their homes, and if a mistake happens, the foreseeable harm would be a loss of the home. The court attributed particular weight to what it considers unequal bargaining power between lenders and borrowers in the modification process. The court also emphasized that during the modification process a special relationship exists between the lender and borrower that did not exist at the origination of the loan.

The *Weimer* decision was essentially the same conclusion reached by the court in *Alvarez v. BAC Home Loans servicing, LP* (2014) 228 Cal.App.4th 941 ("*Alvarez*") and built on its prior reasoning in *Rossetta v. CitiMortgage, Inc*. (2017) 18 Cal. App. 5th 628. Interestingly, the *Weiner* and *Rossetta* decisions were departures from the Third District Court of Appeal's very short lived opinion in *Conroy v. Wells Fargo Bank, N.A.* (2017) 13 Cal.App.5th 1012, 1032 (vacated opinion) ("we decline to apply a test intended only for situations where there is no privity of contract.")

The *Weimer* court rejected the opinion of *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, which held that a lender "did not have a common law duty of care to offer, consider, or approve a loan modification." The *Weimer* court also rejected the opinion of its colleagues in *Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal. App.5th 346, review granted,

Sheen v. Wells Fargo Bank, N.A. 2019 Cal. LEXIS 8364. ("*Sheen*"), which rejected the concept of a duty of care when there is purely economic harm. *See Southern California Gas Leak Cases* (2019) 7 Cal.5th 391.

While the *Weimer* court recognized that the court in *Sheen* looked to the recent California Supreme Court authority analyzing the *Biakanja* factors, the *Weimer* court opined the *Sheen* court's analysis fell short. Specifically, the *Weimer* court argued the *Sheen* holding lacked consideration of the special relationship between borrower and lender in the modification context. The *Weimer* court also opined that "our high court excludes from the no-tort-duty-for-economic-damages rule claims for economic damages arising from 'botched' financial transactions meant to benefit the plaintiff." It remains to be seen as to whether that holds true because the California Supreme Court has taken up the issue in its review of the *Sheen* case. *Sheen* is set to be fully briefed by the end of July 2020. However, until something different happens, the borrowers can claim a victory.