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New York's Appellate Division Confirms that, in Foreclosure Actions, Borrower Must First Raise a RPAPL 1304 Defense Before Plaintiff is Require to Disprove It

Under RPAPL 1304, where a loan is a home loan for the borrower's principal residence, the mortgage creditor must serve the borrower with notice of default in a specific form outlined in the statute, via registered or certified mail and first class mail, at least 90 days prior to filing the foreclosure action. On March 9, 2016, however, New York's Appellate Division, Second Department issued a decision in *U.S. Bank National Association v. Robert Carey*, 05710/2015, confirming that the mortgage creditor need not disprove a RPAPL 1304 defense if the borrower does not actually raise this as a defense.

As set forth in the Appellate Division's decision, in January 2007, defendants Robert and Marie Carey executed a note in the amount of $870,000.00, secured by a mortgage on their residence in Glen Cove, New York (Nassau County). In February 2013, plaintiff

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commenced a foreclosure action based upon a default by the defendants on the note and mortgage. Defendants failed to appear or answer the complaint. On April 10, 2014, plaintiff moved for an order of reference and leave to enter default judgment against defendants. Again, defendants did not oppose the motion. On August 11, 2014, the lower court denied the motion with leave to renew within 60 days, on the ground that the plaintiff's allegations regarding RPAPL 1304 compliance were "conclusory in nature and have failed to establish such compliance or provide a reason why such compliance was not required." The lower court also held that, if plaintiff failed to file a motion to renew within 60 days, the action would be deemed abandoned under CPLR 3215(c).

In response to the August 11, 2014 order, plaintiff moved for leave to renew, on the grounds that defendants waived the defense of violation of RPAPL 1304 by failing to appear or answer the complaint. On March 19, 2015, the lower court denied plaintiff's motion as untimely, and dismissed the complaint without prejudice. Plaintiff then appealed both the August 11, 2014 and March 19, 2015 orders.

On appeal, the Second Department reversed, holding that failure to comply with RPAPL 1304 was not jurisdictional, but instead was a defense that can be raised at any time. Because the defendants never raised an RPAPL 1304 defense, the court found that plaintiff was not required to disprove that defense. The Second Department concluded that plaintiff's motion for an order of reference and for leave to enter default judgment should have been granted.

Federal Circuit Reverses District Court for Failure to Construe Claims that Were Disputed by the Parties

On February 29, 2016, the Federal Circuit issued a decision in *Eon Corp. IP Holdings LLC v. Silver Spring*

Networks, Inc., No. 2015-1237, reversing the jury's finding of infringement primarily based upon the Federal Circuit's conclusion that the district court improperly failed to construe two disputed claim terms.

Eon Corp. IP Holdings LLC ("Eon") filed suit against Silver Spring Networks, Inc. ("Silver"), in the United States District Court for the Eastern District of Texas, for infringement of three patents, all of which related to a "two-way interactive communication network system for enabling communications between local subscribers and a base station." During claim construction, Silver proposed definitions for two claim terms that were in all of the claims found to be infringed: "portable" and "mobile." In response, Eon argued that neither of these terms needed construction and could be given their plain and ordinary meaning. The district court accepted Eon's argument, holding that Silver was "asking for nothing the plain and ordinary meaning of the terms cannot do on their face -- distinguish from 'stationary' or 'fixed.'"

During trial, each of the parties' experts presented significantly different opinions on the meaning of "portable" and "mobile." After a five-day trial, a jury found that the asserted claims were valid and infringed. After the jury's verdict, the trial court denied Silver's motion for judgment as a matter of law, and rejected Silver's argument that the evidence failed to support the jury's finding that Silver's accused products met the "portable" and "mobile" limitations.

On appeal, the Federal Circuit reversed, accepting both of Silver's arguments that: (1) the trial court's failure to construe the two disputed claim terms "improperly delegated to the jury the task of determining claim scope"; and (2) "no reasonable jury" could have found that Silver infringed the asserted claims, because the plain and ordinary meaning of the terms do not cover Silver's products.

Regarding claim construction, while the Federal Circuit recognized that "a sound claim construction need not always purge every shred of ambiguity," it held that district courts did have the obligation to resolve disputes about claim scope that are raised by the parties. The Federal Circuit found that, in this case, the parties "actively disputed" the terms "portable" and "mobile," and that the trial court incorrectly left the question of claim scope unanswered by deciding only that these terms should be given their plain and ordinary meaning.

Regarding infringement, the Federal Circuit found that remand to the trial court was unnecessary, because once the claim terms were properly construed, "no reasonable jury" could have found that Silver's accused products infringed the patents. Citing the patent specifications, the Federal Circuit rejected Eon's position at trial that "portable" and "mobile" should be defined as, in essence, anything that was theoretically capable of being moved -- the Federal Circuit found that this construction was not consistent with the "context" of the patents. Here, the Federal Circuit cited the evidence at trial that Silver's accused products (electronic utility meters) are "affixed to the exterior walls of buildings," are "not intended to be moved from building to building," and are "usually left in place for fifteen years."

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