PARKER IBRAHIM & BERG NEWS

Boston | Chicago | New Jersey | New York | Philadelphia | San Antonio

Definition of "Good Faith" in Foreclosure Negotiations Delineated by NY Appeals Court

The Appellate Division of the Supreme Court of New York has upheld a lower court ruling from Kings County in *US Bank N.A. v Sarmiento, 2012-03513*, prohibiting the plaintiff from collecting interest and fees accumulated on a loan for a property in foreclosure and in doing so, further defined for lenders what it means to negotiate in "good faith" under CPLR 3408.

CPLR 3408

In any residential foreclosure action involving a home loan in New York, in which the defendant is a resident of the property subject to foreclosure, the court must hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as the parties agree. CPLR 3408(a) provides that the purpose of the conference is to have the parties reach an amicable settlement of the case, if possible:

[T]he court shall hold a mandatory conference ... for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

CPLR 3408(e) provides the documents that each party must bring to

Recent Press Releases

PIB Law Announces Opening of New Boston Office

Read more.

PIB Law Expands Into the Southwest with Opening of San Antonio Office

Read more.

James M. Behmke Named PIB Law's Managing Partner of New Boston Office

Read more.

Former Senior Wells Fargo Litigator Michael B. Goldberg joins PIB Law as Managing Partner of New San Antonio Office

Read more.

Sanjay Ibrahim Speaks at ACI Events

● **November 20-21, 2014 - 3rd Bank Non-Bank Forum on Mortgage Servicing** the conference:

For the plaintiff, such documents should include, but are not limited to, the payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note. If the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note. For the defendant, such documents should include, but are not limited to, proof of current income such as the two most recent pay stubs, most recent tax return and most recent property tax statements.

Finally, CPLR 3408(f) provides: "Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." (Emphasis added). The statute, however, does not define "good faith".

The Supreme Court's Decision

Defendant Jose Sarmiento held a $580,000.00 mortgage on a Brooklyn property. When he lost his job in May 2008, he contacted his mortgage service provider to request a loan modification. That request was denied due to insufficient income. Sarmiento then defaulted on the loan, but shortly thereafter found another tenant and requested another modification, which was again denied.

The service provider commenced a foreclosure action, which was assigned to the mandatory settlement conference part in September 2009. Between September 2009 and January 2011, the defendant and plaintiff attended 18 settlement conferences. Four attempts to modify Sarmiento's loan under the federal Home Affordable Mortgage Program ("HAMP") were denied by the service provider. Further, Sarmiento rejected two non-HAMP modifications offered by the service provider.

According to the court referee, the plaintiff made a number of missteps during this process, including misplacing documents, miscommunication that caused delays, and asserting that no modification was necessary because the defendant was not at risk of default. The Supreme Court granted defendant's motion for sanctions, finding that plaintiff failed to act in good faith under CPLR 3408(f).

Second Department's Decision

On appeal, the Second Department affirmed the Supreme Court's ruling, and set forth the "proper standard for determining whether a party acted in good faith" under CPLR 3408(f).

The Second Department said that courts must look at the totality of

Compliance in Washington, D.C.

● [January 15-16, 2015](#)
- 16th National Forum on Residential Mortgage Litigation and Regulatory Enforcement in Los Angeles, CA

PIB Law Gives Back

● During August and September, PIB Law employees participated in Stuff the Backpack program for local schools.

● PIB Law's Somerset, NJ office held a blood drive on September 8, and has 18 PIB Law employees donate blood which amounted to 22 units of usable blood for the Blood Bank.

● PIB Law's Social Responsibility Committee hosted a bake sale on October 24 to raise funds for breast cancer research and awareness.

the circumstances to make a good faith determination in mandatory foreclosure settlement negotiations. In rejecting the plaintiff's claim that there must be a showing of gross disregard or conscious indifference to another's rights in order to stake a CPLR 3408(f) claim for failure to negotiate in good faith, the court wrote: "The issue of whether a party failed to negotiate in 'good faith' within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution."

The Second Department noted that while any one of the servicer's "delays and miscommunications" taken as separate incidents might not necessarily constitute bad faith, "the totality of the circumstances supports the Supreme Court's determination that the plaintiff failed to act in good faith, as the plaintiff thwarted any reasonable opportunities to settle the action, thus contravening the purpose and intent of CPLR 3408."

Finally, the Second Department also made clear that borrowers could be held liable for not acting in good faith, e.g., where the borrower "fails to provide requested financial information or provides incomplete or misleading financial information."

Recent Blogs

Supreme Court Preview: Omnicare Decision to Address Section 11 Liability for Opinion Statements
Read more.

Sixth Circuit Takes the Middle Road on Corporate Scienter Required in Securities Fraud Actions
Read more.

Fed Chief Outlines Plans for New Bank Funding Rules
Read more.

OCC Final Rule on Heightened Standards for Large Financial Institutions Issued
Read more.

Court Holds Reinsurance Certificates of Reinsurance U.S. Customs and Border Protection Announced Mobile Passport Control App
Read more.

Trademark Searches: Vetting Your Trademark Before You Spend Heavily Promoting Your Brand

Business owners frequently fail to vet their trademark before using it to build their brand. This is because owners fail to understand the risks of not doing so, or do not want to incur the costs of performing trademark searches. In most cases, however, performing trademark searches up front can provide significant savings in the long run.

The Dangers of Failing to Vet Your Trademark

For example, let's say you choose a trademark for your brand without first conducting a trademark search and you use and promote the brand in a limited market area (e.g., the tri-state area). Within a few years, the brand has gained significant recognition in the tri-state area, thanks to the hundreds of thousands of dollars you have spent in promotion. You now want to expand nationally, and you start selling your product on the West Coast. A few months later, however, you receive a letter from an attorney for a company based in California alleging trademark infringement—and you discover that this company has already been selling similar products, under a similar trademark as yours, for the past 20 years on the West Coast.

The consequences of this scenario are significant. You may be forced to rebrand nationally, or at minimum, on the West Coast and any other markets in which that company has been operating. You may also be required to pay damages. Up-front vetting of your trademark can help you avoid these types of situations.

Even if you decide to vet your trademark before using it, you still must decide what type of vetting process to use. Generally, there are two types of trademark searches: (1) preliminary "screening" searches; and (2) "comprehensive" or "full-availability" searches.

The Preliminary Screening Search

The screening search is a limited scope search that offers less information but is less expensive and time-consuming than a comprehensive search. It generally covers all existing federal trademark registrations and pending applications on file and available on the United States Patent and Trademark Office (USPTO) database as of the date of the search. It also frequently discloses uses reported in a Google (or similar search engine) search.

The preliminary screening search is not all-encompassing. First, the results are generally only for any trademark identical to your trademark. The screening search does not address any federal trademark registrations that have not yet been reported in the USPTO online database, or federal trademark registrations that are similar (but not identical) to your trademark. Second, the screening search does not cover state trademark registrations, or, except for the hits in Google, common law usage of the trademark by third parties whose use of the trademark may predate yours but who have not filed for any state or federal registrations for it. These users, called "senior users" (e.g., user in the example on the West Coast) often have rights even in the absence of a registration that can create obstacles to your own use and registration.

Even if you apply for a federal trademark, the USPTO does not provide any additional protection of significance beyond a preliminary screening search. The USPTO will search existing federal trademark registrations as well as pending applications on file. They will not, however, search state registrations or common law usage of the trademark by potential senior users.

Comprehensive Search

A comprehensive trademark search report, though more time consuming and expensive, covers most of the exclusions of the preliminary search described above, as well as trademarks that are not just identical, but also are phonetically similar to your trademark. The comprehensive search report comes from a prominent independent national search service. It checks: (i) the federal trademark register for existing registrations as well as for applications that predate your own; (ii) all 50 state trademark registries; and (iii) various business, consumer, and domain name sources that may show potential senior users.

Recommendation

On balance, a comprehensive trademark search should be used wherever possible. Given its limitations, a screening search is not a substitute for a comprehensive trademark search, which we would recommend once you have made a tentative commitment to adopt a specific trademark. It can, however, it can be a cost-effective means to help determine if your own proposed use or registration may meet obstacles from the USPTO or certain third party trademark users or federal trademark registrants. Further, screening searches can be particularly useful if you have a lot of trademarks you are considering and want to try narrowing the choices by knocking out trademarks that have easy to identify obstacles to use or registration. But once you have narrowed down to just a few favorite choices, before proceeding with use or registration, we still recommend that you do a comprehensive search on those favorites.

A comprehensive trademark search report also discloses more information such as the particular goods or services that a registered trademark holder offers, which may allow you to distinguish your trademark from other trademarks and more readily identify potential senior users. A comprehensive trademark search has its own limitations, so it is not a risk-free predictor of your own ability to use or register your proposed trademark. But, it is usually a much better predictor than a screening search because it covers more sources, searches for trademarks that are similar and not just identical, and it provides more information about the trademarks it discloses.

The foregoing information is provided only for general reference. It does not constitute legal advice. Legal advice may be only provided based on specific facts. Please consult us before relying on any general information stated herein. We are happy to discuss any questions you may have regarding trademarks.

Our practice areas include:

- Mortgage Banking
- Bankruptcy
- Reinsurance / Insurance
- Repurchase Solutions / Mortgage Fraud
- Consumer Finance
- Fair Lending
- Commercial Litigation
- Corporate Matters
- Regulatory & Supervisory Matters
- General Counsel
- Securities Litigation
- Design Professionals
- Intellectual Property

To read more click here