Dykema

Resources

California Appeals Court Gives Breath to Loan Modification Claims

February 8, 2011

Just when you thought courts were beginning to put an end to spurious mortgage loan modification expectation claims, a California appeals court has offered borrowers a reprieve.

In *Aceves v. U.S. Bank*, NA (Cal. App. 2d Dist. Jan. 27, 2011), the Court of Appeal of the State of California has concluded that a bank's loan modification negotiations may have given rise to enforceable promises, a troubling result. In Aceves the borrower had filed for Chapter 7 bankruptcy when she could no longer afford her monthly payments. The borrower alleged that, in an attempt to save her home, she had intended to convert the bankruptcy to a Chapter 13 proceeding so Aceves could reinstate her loan, pay the arrearages and resume regular loan payments with the assistance of her husband. The bank allegedly promised to work with the borrower on a loan reinstatement and modification if she would forgo further bankruptcy proceedings. Allegedly relying on this promise, the borrower did not convert her bankruptcy case to a Chapter 13 proceeding or oppose the bank's motion to lift the bankruptcy stay. Aceves alleged that, after the stay was lifted, the bank failed to work with the borrower to reinstate and modify the loan, but rather proceeded to sell the property under a non-judicial foreclosure, after verbally offering the borrower new loan terms the day before the foreclosure sale. The court interpreted the bank's promise to work with the borrower on a mortgage reinstatement and loan modification to "indicate that the bank would not foreclose on the Aceve's home without first engaging in negotiations with her to reinstate and modify the loan on mutually agreeable terms."

Upholding the borrower's claim for promissory estoppel, the court concluded that "in reliance on a promise by U.S. Bank to work with her in reinstating and modifying the loan, Aceves did not attempt to save her home under Chapter 13." Finding that the elements for promissory estoppel (a clear and unambiguous promise, reliance by the party to whom the promise was made, reasonable and foreseeable reliance, and injury based on the reliance) were all present in the evidence, the court maintained that: (1) the borrower could have reasonably relied upon the bank's promise to work on a loan reinstatement and modification if she did not seek relief under Chapter 13, (2) the promise was sufficiently concrete to be enforceable, and (3) the borrower's decision to forgo Chapter 13 relief was detrimental because it allowed the bank to foreclose on the property. Since this was not a case where the homeowner paid the funds needed to reinstate the loan before the foreclosure, the court concluded that promissory estoppel does not provide a basis for voiding the deed of sale or otherwise invalidating the foreclosure, but that damages available for a breach of contract claim were the appropriate remedy.

Aceves is not entirely a bad result. The court otherwise held that clerical errors in a notice of default did not affect its validity as long as the mortgagee was not harmed or prejudiced. The notice of default mistakenly identified the original lender, not the current noteholder as the beneficiary under the deed of trust, but correctly directed the borrower to the trustee to arrange payment to stop the foreclosure and contained the trustee's contact information. Concluding that the borrower was not prejudiced by the error, the court held that no relief was warranted on this particular claim.

Should you have any questions about this regulatory change or need additional information, please contact **Richard E. Gottlieb**, Director of the Firm's Financial Industry Group, at 312-627-2196, or **Arthur B. Axelson** the author of this alert and leader of the Firm's regulatory compliance practice, at 202-906-8607.

As part of our service to you, we regularly compile short reports on new and interesting developments in consumer financial services and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Readers should seek specific legal advice before acting with regard to the subjects mentioned here. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments on this newsletter, or any Dykema publication, are always welcome. ©2011 Dykema Gossett PLLC.

Attorneys

Joseph H. Hickey

Theodore W. Seitz

J. Kevin Snyder

Practice Areas

Financial Services Litigation – Consumer

Litigation

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2019 Dykema Gossett PLLC.