McGLINCHEY STAFFORD

McGlinchey Stafford is pleased to bring you the Manufactured Housing Law Update, prepared by the firm's nationally-recognized consumer financial services team. For decades, McGlinchey Stafford has been a leader in the manufactured housing and mortgage lending industries, representing clients in the areas of federal and state law compliance, preemption analysis and advice, nationwide document preparation, licensing support, due diligence, federal and state examination and enforcement action defense, individual and class action litigation defense, and white collar criminal defense.

WELCOME!

December brought another fantastic year to a close. Bring it on, 2017!

In this issue, we have provided you a couple of "bonus" features: a memo with in-depth analysis of the recently released FHFA Duty to Serve Final Rule, and a memo concerning Chattel Loan Default Servicing.

Several federal agencies besides FHFA were busy in December, perhaps trying to make their final administrative mark before the change in administrations. For instance, the EPA issued a final rule on formaldehyde and the VA issued a circular regarding titling for manufactured homes.

Unsurprisingly, states were quiet, with the exception of Ohio's laws regarding flag displays, Michigan's 15 mph speed limit on highways bordering manufactured home parks, New York's vacant and abandoned property nightmare of a statute, and Maryland's contribution to wet venting.

Also of note, a Pennsylvania court found itself in the middle of an episode of *Hoarders.* Read on, fair reader!

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ARBITRATION

CASE LAW

Motion to Rescind

CASE NAME: *Oak Creek Homes, LP v. Moore*
DATE: *11/30/2016*
CITATION: *Court of Appeals of Texas, Eastland. Not Reported in S.W.3d. 2016 WL 6998949*

The Moores purchased a manufactured home and subsequently began to experience problems with the home to the point that it was "arguably uninhabitable." The home was manufactured by Oak Creek, and the Moores financed the home through 21st Mortgage. The Moores sued both parties.

The Moores had signed two arbitration agreements: one with Oak Creek and one with 21st Mortgage. After the Moores filed the suit, 21st Mortgage filed a motion to compel arbitration, and the parties subsequently agreed that the dispute should be resolved in arbitration. Oak Creek had not filed a motion to compel arbitration. On October 16, 2012, the trial court entered an agreed order to compel arbitration.

During arbitration, the Moores claimed a conflict of interest due to the relationship between the arbitrator and counsel for Oak Creek. As a result, the arbitrator withdrew. Subsequently, the Moores filed a motion to rescind the agreed order to arbitrate. On October 27, 2015, the trial court granted the motion to rescind and scheduled the case for trial.

Oak Creek and 21st Mortgage filed a joint notice of appeal in which they sought to appeal the trial court's October 27, 2015 order. They filed their joint notice of appeal on November 16, 2015.

After they filed the joint notice of appeal, Oak Creek, on December 3, 2015, filed its first motion to compel arbitration in the trial court, and 21st Mortgage, on December 7, filed a new motion to compel. Again, after Oak Creek and 21st Mortgage had filed their joint notice of appeal, the trial court denied the motions to compel on December 8. The trial court also granted Appellants' joint motion to stay the lawsuit.

On December 30, 2015, Appellants filed a petition for writ of mandamus in which they claimed that the trial court abused its discretion when it denied their motions to compel. Although, in their November 16, 2015 notice of appeal, the parties sought to appeal only from the October 27, 2015 order in which the trial court rescinded the agreed order to arbitrate, in their briefs, the parties challenged the trial court's December 8, 2015 denial of their motions to compel arbitration, as well as the October 27, 2015 order.

On April 11, 2016, the Moores filed a motion to dismiss Appellants' interlocutory appeal for want of jurisdiction.

Because Appellants failed to timely file a notice of appeal as to the trial court's December 8, 2015 order in which it denied their motions to compel, the appeals court held that it did not have jurisdiction to entertain Appellants' challenges to the trial court's December 8, 2015 order.

In addition, the Court held that because Oak Creek did not file a motion to compel arbitration until after the trial court entered its October 27, 2015 order, the Court did not have jurisdiction to review the October 27, 2015 order as it pertained to Oak Creek.

Further, the trial court heard and ruled on the Moores' 2015 motion to rescind the agreed order to arbitrate, not 21st Mortgage's 2012 motion to compel arbitration. The two motions were not heard together, nor did 21st Mortgage urge the trial court to rule on its motion. The specific relief that Appellants requested in their responses to the Moores' motion was for the trial court to deny the Moores' motion to rescind the agreed order. Therefore, the Court did not have jurisdiction to review the trial court's October 27, 2015 order.

Furthermore, Appellants' petition for writ of mandamus did not challenge the October 27, 2015 order. Appellants challenged only the denial of their December 2015 motions to compel.

Accordingly, the Court dismissed this appeal for want of jurisdiction.

COMMUNITIES

CASE LAW

Wages – Fair Labor Standards Act

CASE NAME: *BARBARA HOMER and MARIO DURAZO, Plaintiffs, v. MYRAID GROUP, LLC and THEODORE NICHOLAS, Defendants*
DATE: *11/29/2016*
CITATION: *United States District Court, M.D. Florida. Slip Copy. 2016 WL 6996114*

Plaintiffs filed a two-count Complaint against their former employer, Myraid Group, LLC, owner of the Lazy J RV and Mobile Home Park, and their direct supervisor and managing member of Myraid, Theodore Nicholas. Plaintiffs claimed unpaid minimum wages and overtime in violation of the Fair Labor Standards Act (FLSA) and unpaid minimum wages in violation of the Florida Minimum Wage Act (FMWA). Plaintiffs claimed defendants were an enterprise covered by the FLSA with two or more employees handling goods in interstate commerce, earning more than $500,000 in gross sales annually.

Defendants moved to dismiss the Complaint for lack of subject-matter jurisdiction, arguing that plaintiffs could not demonstrate that defendants engaged in the production of goods for commerce or that any regular and recurrent interstate activities occurred.

Nicholas also sought dismissal for failure to state a claim upon which relief can be granted because he could not be liable in his individual capacity.

The court noted that the issue of whether a defendant was an enterprise engaged in commerce or in the production of goods for commerce implicates both the merits of an FLSA claim and the jurisdictional question, and found that to engage in a Rule 12(b)(1) analysis would be premature since the parties had not yet commenced discovery, and plaintiffs had not yet been given an opportunity to assess the accuracy and completeness of Myraid's financial and employee information. Based upon the allegations in the Complaint, the Court was satisfied that plaintiffs had met their burden to establish subject-matter jurisdiction.

As to Nicholas, the Court noted that the FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and an officer or owner who is either involved in the day-to-day operation of a corporate entity or has some direct responsibility for the supervision of the employee can be held jointly and severally liable as an employer under the statute.

Motions to dismiss denied.

CASE LAW

Assessment – Reduction

CASE NAME: *Village Green Hollow, LLC v. Assessor of Town of Mamakating*
DATE: *12/01/2016*
CITATION: *Supreme Court, Appellate Division, Third Department, New York. --- N.Y.S.3d ----. 2016 WL 6998889*

Petitioners, who individually owned various mobile home parks located in the Town of Mamakating, separately commenced tax certiorari proceedings seeking a reduction in the assessed value of their respective properties for tax years 2008 to 2013. Protracted discovery and settlement negotiations followed, but no successful resolution was reached. Petitioners filed notes of issue and certificates of readiness for trial relative to

the proceedings encompassing tax years 2008 to 2011, and a trial date was scheduled for August 20, 2014.

In June 2014, respondents moved to strike the notes of issue based upon petitioners' failure to comply with 22 NYCRR 202.59 and to dismiss each of these proceedings due to petitioners' noncompliance with respondents' respective discovery demands. Although counsel for petitioners appeared at the oral argument on the motions, petitioners failed to file any written submissions in opposition thereto. By order entered December 30, 2014, Supreme Court granted the requested relief, striking the notes of issue and dismissing the subject proceedings. By order entered September 28, 2015, Supreme Court denied petitioners' applications for leave to renew/reargue and granted petitioners' motions to relieve them from their default in failing to file written submissions in opposition to respondents' motions, but otherwise adhered to its prior decision. In other words, Supreme Court essentially reopened the default but denied petitioners' applications upon the merits. Petitioners appealed from so much of Supreme Court's order as denied their motions for leave to renew/reargue and denied their motions to vacate the default, and respondents cross-appealed from so much of Supreme Court's order as granted petitioners' motions to reopen their default.

The appeals court found that petitioners failed to articulate a reasonable excuse for their default in the first instance—instead contending only that they may have proceeded in a somewhat "lackadaisical mode" and have been lulled into "a false sense of security" because of the manner in which these proceedings had "dragged on over the years" and "the expectation that [Supreme] Court would grant one further adjournment" in order to allow them to comply with the outstanding discovery demands. In the absence of a reasonable excuse, Supreme Court abused its discretion in reopening petitioners' default and—in effect—proceeding to consider whether petitioners had proffered a meritorious defense. Stated another way, inasmuch as petitioners did not meet the standard for vacating their prior default, Supreme Court should have denied the requested relief upon that ground alone. That said, because respondents' motions to strike the notes of issue and dismiss the underlying proceedings were properly granted, Supreme Court's order was affirmed.

CASE LAW

Eviction – Attorney misconduct

CASE NAME: *Matter of Knopp*
DATE: *12/02/2016*
CITATION: *Supreme Court of Kansas. --- P.3d ----. 2016 WL 7030406*

This case relates to an attorney disciplinary proceeding.

C.K. was living in a mobile home owned by her grandmother, D.G. D.G. had not lived in the mobile home since 2007. The mobile home sat on a lot in a mobile home park owned by South Meridian Park, LLC. C.K. leased the lot from South Meridian.

South Meridian filed an eviction petition against C.K. The district court entered a default judgment against C.K. and issued a writ restoring South Meridian to possession of the lot on which the mobile home sat. South Meridian changed the locks on the mobile home and posted a notice on the door advising C.K. that she was evicted and that the locks had been changed. Thereafter, C.K. hired the respondent.

Initially, the respondent took the position that his clients only wanted to get the mobile home.

After a 2–week continuance, the respondent changed his position and argued that D.G., the owner of the mobile home, was not a party to the eviction action, the mobile home should remain in the park and that C.K. should be allowed to reside in it until D.G. was properly evicted.

The respondent subsequently filed a conversion claim, which the court found to be frivolous. There was no legal

authority to support the proposition that just because Plaintiff's mobile home was located on Defendants' private property, Plaintiff was entitled to enter on the property whenever she pleased without notice or prior consent of the Defendants. Likewise, there was no legal authority to support the proposition that just because the Defendants required the Plaintiff to get prior consent to enter their property that they were exercising or assuming the right of ownership over the mobile home and its contents.

Also, the damages sought by Plaintiff were neither supported by the facts nor were the recovery of such damages warranted by existing law. Plaintiff's counsel cited no legal authority that would permit his client to recover the fair market value of the mobile home and its contents when that property had not been disposed of and was available to the Plaintiff.

Further, the conversion lawsuit was not brought for any proper purpose. It was not brought by the Plaintiff in order to recover her property. The Plaintiff had a court order in hand granting her access to the mobile home park to recover her property, but she did not have the means available to move her mobile home from the mobile home park. The purpose of this action was an effort by the Plaintiff to force the Defendants to purchase her mobile home and its contents. As a result, the removal of the mobile home from Defendants' mobile home park was unnecessarily delayed and the Defendants not only incurred the loss of lot rent, but also incurred significant legal costs to defend against a frivolous lawsuit.

The court also found that Knopp's conduct was willful. Knopp was negotiating arrangements for his client to remove her property from the Defendants' mobile home park at the same time he was preparing a lawsuit accusing the Defendants of denying his client access to this same property. There is no way that Knopp could have been mistaken about whether or not his client had access to her property when he filed the conversion Petition.

Nor was Knopp's conduct an isolated event. It was part of a pattern of activity that began in the forcible detainer action in which Knopp filed a pleading with the Court that was intentionally deceptive, asserting that C.K. had paid the back rent in full within the three day period of the notice to quit, and accusing the Defendant's attorney of committing a fraud on the Court. However, at no time was the landlord ever in receipt of the full amount of the rent.

Ordered that Ted E. Knopp be disciplined by a 90–day suspension from the practice of law, with imposition of the suspension stayed pending successful completion of 6 months of probation.

CASE LAW

Sale of park – Financing

CASE NAME: *CONNIE KUNZ, Plaintiff-Appellee, v. ROBERT KUNZ, Defendant-Appellant*
DATE: *12/21/2016*
CITATION: *Court of Appeals of Iowa. Slip Copy. 2016 WL 7403730*

Brothers Richard and Robert Kunz jointly owned a business called Happy Homes, Inc., which sold factory-built homes, and 9.7 acres of real estate upon which Happy Homes was located. In 2007, Richard died, and his interest in Happy Homes went to his wife, Connie. In 2008, Connie and Robert began discussing the sale of the business. Connie, Robert, Dorothy, and their respective attorneys all signed a document entitled "Settlement Memorandum," which, among other things, provided that Robert would purchase Connie's shares of stock in Happy Homes, Inc. for the sum of $250,000.00, subject to Robert being able to arrange financing for this purchase.

Robert subsequently advised Connie he was unsuccessful in obtaining a loan and would not proceed with the purchase. Connie filed a breach-of-contract suit, which

she subsequently dismissed without prejudice. Robert filed suit for partition and liquidation of Happy Homes. The assets of Happy Homes were sold at auction and purchased by Richard. The proceeds from the sale were placed in a trust account, outstanding loans were paid off, as were attorney fees and other items, and $88,225.88 was distributed each to Connie and Robert.

Connie reinitiated her suit for breach of the settlement memorandum, seeking the difference between what she received from liquidation of the company and the purchase price set forth in the settlement memorandum.

Although Robert's financial statement with his bank indicated his net worth was over $2,720,000, Robert testified he went to his bank and sought financing to pay Connie, offering only the assets of Happy Homes as collateral. He did not offer his personal family assets as collateral. He was also denied a loan by a distant relative, who was a banker. He did not fill out a loan application at either bank. Robert acknowledged he did not go to other banks in the area seeking financing. Nor did he use $168,000 cash on hand to get a loan.

Scott Piper at State Central Bank testified he denied Robert's request for a loan because Robert wanted the loan secured by Happy Homes' real estate and "the mobile homes that were left," and Piper was "concerned" the depreciated inventory would not be sufficient collateral. Piper also testified Robert could have offered to use his personal finances to secure a loan but did not.

The jury returned special interrogatories finding there was a contract, Robert had breached the contract, and Connie should be awarded $80,267.49. Robert appealed.

The appeals court concluded that whether Robert was able to "arrange financing" or made a good faith effort to "arrange financing" was a question for the jury, and the district court should have instructed the jury on the issue. In the absence of an instruction on the issue, the jury was not able to resolve the fact question.

The Court also noted that Robert's personal finances would be probative of whether he made a good faith effort to obtain financing.

Reversed and remanded.

CASE LAW

Eviction – Constructive eviction

CASE NAME: *Community Park Investments, Inc. v. Mahoney*
DATE: *12/22/2016*
CITATION: *Court of Appeals of Indiana. Slip Copy. 2016 WL 7426716*

Mahoney and Glancy executed a Mobile Home Sales Contract, a Promissory Note & Personal Guarantee, and a Standard Lease/Rental Agreement in connection with their purchase of a mobile home and rental of a home site.

CPI filed a Notice of Eviction against Mahoney and Glancy. Mahoney and Glancy filed a Counter–Claim seeking "my down payment on home and rent" and a judgment for $6,000.

The court issued an Order of Eviction, ordered Mahoney and Glancy to remove themselves from the premises and scheduled a damages hearing.

Jacob Pasternac, the owner of CPI, testified, with respect to the monthly lease payment of $550, that $300 of that amount was attributable to lot rent and the remaining $250 was attributable to interest on the promissory note. Pasternac asked for $20,186, which consisted of lot rent of $300 per month for March through July totaling $1,500, interest payments of $250 per month for April through July totaling $1,000, late payments of $90 per month for five months under the lease totaling $450, court costs of $131 and $70, sheriff service fees of $35, the amount due under the promissory note of $16,000, and $1,000 to pay for attorney fees.

The court found that a constructive eviction occurred, and that CPI's claim for $20,186.00 was unfounded. The court also found that Mahoney and Glancy had minimal use of the property during the months of March, through June 2015, that the $1900.00 deposit which was paid was to be returned to them, and that it found for Mahoney and Glancy on their counter-claim and awarded $1900.00 to them. The court found that Mahoney and Glancy could not actually see the conditions of the home when they agreed to the purchase due to CPI's belongings cluttering the entire interior, that upon moving in Mahoney and Glancy took photographs depicting the condition of the home, that Glancy lost his job in May, that CPI agreed to install a new bath and shower or shower in the bathroom within ninety days and the installation never occurred, and that CPI told Mahoney and Glancy they would be paid for any work in the park but did not in fact ever pay them.

CPI appealed, arguing that, to successfully assert the defense of constructive eviction, a lessee must quit the premises and that Mahoney and Glancy stayed in the mobile home until the court entered an order of eviction, and that the court's judgment against it of $1,900 would essentially mean that Mahoney and Glancy were able to live in the mobile home for five months for free.

The appeals court noted that constructive eviction occurs when an interference with possession is so serious that it deprives the lessee of the beneficial enjoyment of the leased premises and deferred to the trial court's factual determination that four months was a reasonable amount of time to remain in the premises under these circumstances.

However, the Court observed that Mahoney and Glancy Could not avoid their financial obligations to CPI for the period of time they were in possession of the mobile home and remanded for reconsideration of the damages to be awarded Mahoney and Glancy, balancing the amounts they paid in deposit and rent with the time period they resided in the mobile home.

ADOPTED RULE

Maryland

Wet venting

Effective 1/2/2017, this rule amends Md. Code Regs. 18.4.2, Limitations on Wet Venting, under Mobile Home and Travel Trailer Park Plumbing Requirements, to provide that wet vented drain piping shall only serve trailer sites. Drainage from any buildings or other facilities on the site shall not be connected to drain piping from trailer sites that is wet vented.

The rule amends Md. Code Regs. 18.4.9, to change the section heading, "Wet Vented Branch Drain Lines" to "Wet Venting."

The rule also adds that the drainage system of a utility or other building may not discharge into a wet-vented line. A house sewer may not discharge into a wet-vented line.

A house sewer or part of a house sewer may not function as a wet-vent.

LEGISLATION

Michigan

Speed limit

2015 MI H 4423. Enacted 1/4/2017. Effective immediately.

This bill amends Mich. Comp. Laws § 257.627 to add that it is lawful for the operator of a vehicle to operate that vehicle on a highway at a speed not exceeding 15 miles per hour on a highway segment within the boundaries of a mobile home park.

LEGISLATION

Ohio

Flag display

2015 OH H 18. Enacted 12/19/2016. Effective 91st day after act is filed with Secretary of State.

This bill amend Ohio Rev. Code Ann. § 4781.40 to add that no park operator shall include any restriction in a rental agreement against, or otherwise prohibit on a tenant's or owner's rental property, any of the following:

(a) The display of the flag of the United States or the national league of families POW/MIA flag if the flag is displayed in accordance with any of the following:

(i) The patriotic customs set forth in 4 U.S.C. § 5-10, and 36 U.S.C. § 902, governing the display and use of the flag;

(ii) Federal law, state law, or any local ordinance or resolution;

(iii) A proclamation of the president of the United States or the governor of the state.

(b) The display of the state flag as defined in section 5.01 of the Revised Code if the flag is displayed in accordance with state law, any local ordinance or resolution, or proclamation by the governor of the state;

(c) The display of a service flag approved by the United States secretary of defense for display in a window of the residence of a member of the immediate family of an individual serving in the armed forces of the United States. A service flag includes a blue star banner, a gold star banner, and any other flag the secretary of defense designates as a service flag.

The bill provides that a tenant who requests to display the flag of the United States or the national league of families POW/MIA flag at the rental property through the use of a flag pole shall contact the park operator with reasonable notice before installation of the flag pole.

A tenant who requests to display the flag of the United States or the national league of families POW/MIA flag at the rental property through the use of a bracket to be permanently affixed to the manufactured home, shall contact the park operator with reasonable notice before installation of the bracket.

A tenant who owns the manufactured home but leases the lot and who requests to display the flag of the United States or the national league of families POW/MIA flag at the rental property through the use of a bracket to be permanently affixed to the manufactured home, shall contact the park operator with reasonable notice before installation of the bracket.

A park operator who does not receive the notifications required is not liable for any damages, fines, or costs associated with any issues arising from the placement of the flag pole or the bracket by the tenant.

Any display of the flag of the United States or the national league of families POW/MIA flag, shall use a flag or flag pole of an appropriate size, consistent with the size and character of the manufactured homes within the manufactured home park.

Nothing in this division exempts a tenant from a provision in a lease agreement that requires a tenant, at the termination of a lease, to return the premises in the same condition as they were in when the tenant took possession.

DEFAULT SERVICING

CASE LAW

Wrongful possession – Sanctions

CASE NAME: *21st Mortgage Corporation v. Hines*
DATE: *12/08/2016*
CITATION: *Court of Appeals of Texas, Beaumont. Not Reported in S.W.3d. 2016 WL 7177697*

21st Mortgage filed suit against Wayne Rose, Robert Rose, and Beverly Rose (Hines), alleging that Wayne Rose defaulted in paying a note for a manufactured home. 21st Mortgage alleged that while Robert and Hines were not obligors under the retail installment contract, they were in wrongful possession of the home.

Hines answered, claiming that she lived in the home as a guest, that she had no documented right of entry, possession, ownership, or occupation of the premises and had never claimed any rights to the home.

Before the trial court conducted a hearing, 21st Mortgage filed a notice of non-suit of its claims against Hines and Robert. Hines filed a motion for sanctions against 21st Mortgage for filing a groundless lawsuit against her in bad faith and for the purpose of harassment.

The trial court entered an order granting Hines's motion for sanctions and ordered that Hines recover attorney's fees and expenses in the amount of $92,616.04, plus post-judgment interest and attorney's fees and expenses for post-judgment proceedings. 21st Mortgage appealed.

The appeals court found that no evidence existed establishing that any pleadings or motions filed by 21st Mortgage were filed in bad faith or for the purpose of harassment. Further, to the extent that the trial court found that 21st Mortgage violated Chapter 10 of the Civil Practice and Remedies Code because its employees submitted affidavits containing allegedly groundless or false statements, the trial court abused its discretion by not correctly applying the law.

Likewise, the Court concluded that there was no evidence that 21st Mortgage presented any pleading or motion for any improper purpose.

The Court also found that, because 21st Mortgage was represented by counsel, the trial court could not have properly assessed a monetary sanction against 21st Mortgage for groundless legal contentions. Additionally, the fact that a claim may prove to be unsuccessful does not mean a party should be sanctioned. The Court's review of the record showed no evidence that 21st Mortgage's conduct significantly interfered with the trial court's core functions or impugned the trial court's dignity or integrity. Nor did Hines present any evidence showing a bad faith abuse of the judicial process. Based on this record, the Court concluded that to the extent the trial court awarded sanctions based on its inherent power, it abused its discretion.

The Court concluded that the evidence did not support the trial court's imposition of sanctions against 21st Mortgage under any of the legal bases specified in its findings of fact and conclusions of law, reversed the trial court's order granting sanctions and rendered judgment that Hines take nothing from 21st Mortgage.

CASE LAW

Repossession sale – Commercially reasonable

CASE NAME: *WM Capital Partners, LLC v. Thornton*
DATE: *12/29/2016*
CITATION: *Court of Appeals of Tennessee, AT NASHVILLE. Slip Copy. 2016 WL 7477738*

Tennessee Commerce Bank made several loans to Bowling Green Freight. Bowling Green Freight granted the Bank a security interest in, among other things, equipment. Mr. and Mrs. Thornton, owners of Bowling Green, unconditionally guaranteed the loans.

Bowling Green Freight could no longer make payments and asked the Bank to repossess the collateral, sell it, and apply the proceeds to the loans. When this request was made on June 23, 2011, the value of the collateral exceeded the outstanding balance of the loans. The Bank declined the offer and instead directed Bowling Green Freight to continue to use the collateral. Subsequent requests to repossess the collateral were also declined.

On August 17, 2011, the Bank demanded payment in full of the loans, and in January 2012, the Bank filed suit against Bowling Green Freight and the Thorntons. But, the same day it filed suit, the Bank was placed into a receivership with the FDIC.

While the suit was pending, on August 9, 2012, the FDIC sold three of the loans involved to WM Capital Partners, LLC ("WMCP").

At some point, WMCP finally repossessed the collateral securing all three of the loans. WMCP sold the collateral at auction on July 11, 2013.

The following year, WMCP filed suit seeking a deficiency judgment.

The chancery court granted WMCP's motion for summary judgment and awarded a judgment against Bowling Green Freight and the Thorntons in the amount of $6,507,435.10.

On appeal, the Court found that the requirement for a commercially reasonable disposition found in Tennessee Code Annotated § 47–9–610 applies only once the secured party has possession, either actual or constructive, of the collateral. The Bank had no obligation to agree to the debtor's request to repossess the collateral, and the Bank's actions in refusing the request did not render the subsequent disposition of the collateral commercially unreasonable as a matter of law.

But, WMCP bore the burden of proving that the time between possession (or constructive possession) of the collateral and its ultimate disposition was commercially reasonable. The record did not reveal when WMCP took possession and WMCP failed to offer any proof showing that the time between repossession and disposition was commercially reasonable. Because WMCP failed to meet its burden of production, the trial court should have denied the motion for summary judgment.

ADOPTED RULE

New York

Vacant properties

Effective 12/21/2016, this rule adds 3 NYCRR Part 422, Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property.

Section 422.2 provides definitions of certain terms used on the legislation and in the regulation, including: mortgage; mortgagee; assignee; mortgage maintenance; mortgage origination; mortgage servicing; public official; residential real property; state or federally chartered bank, savings bank, savings and loan association, and credit union; servicer or mortgage loan servicer; and vacant and abandoned.

Section 422.3 explains how entities that may be subject to RPAPL 1308 are to determine whether they qualify for two possible exemptions to the inspection and maintenance requirements under the statute, and how they are to report that information to the Superintendent of Financial Services.

Section 422.4 explains what information entities subject to the statute are to report to the Superintendent once they learn, or should have learned, that a property is vacant and abandoned. The section also provides guidance how entities are supposed to learn, or should learn, that the property is vacant and abandoned.

Section 422.5 identifies additional information that entities subject to the statute are to provide to the Superintendent on a quarterly basis, and to supplement

and update the information provided pursuant to Section 422.4.

Section 422.6 identifies the entities to whom the reporting requirements are applicable. Section 422.7 explains how the requirements of the statute interact with federal law and federal guidelines.

Section 422.8 implements the confidentiality provisions of the statute, explaining how information about vacant and abandoned properties will be treated as confidential and the circumstances under which the information may be released.

Section 422.9 explains how the statute will be enforced.

Under Section 422.3, first inspections of properties with delinquent mortgages must occur by February 1, 2017, and maintenance obligations on vacant and abandoned properties do not go into effect until February 1, 2017. In addition, under Section 422.4, information about vacant and abandoned properties previously reported to the Department must be provided by February 1, 2017.

MEMORANDUM

McGlinchey Stafford

Manufactured Home Chattel Loan Default Servicing

The increase in chattel lending and the possibility of chattel loans by Fannie Mae and Freddie Mac has sparked interest in the unique requirements for servicing defaulted chattel loans. A copy of the McGlinchey Stafford summary of those requirements is attached.

INSTALLATION

CASE LAW

Zoning – Variance

CASE NAME: *Johnson v. Downe Township*
DATE: *12/07/2016*
CITATION: *Superior Court of New Jersey, Appellate Division. Not Reported in A.3d. 2016 WL 7148400*

Plaintiff sought permission to make use of a new mobile home that he had delivered in 2010 to vacant property he owned. Plaintiff previously had a mobile home on the property. That original mobile home was apparently compliant with the township's zoning ordinances in effect at the time. That home was repossessed and removed from the lot sometime after 1990.

During the ensuing decade or more, the property was vacant, except for the underground septic system and above-ground concrete pad that remained in place. In the interim, the township's zoning provisions were amended to require a minimum 980–square foot interior and increased the setback requirements. In addition, septic system requirements also changed.

The local code official initially granted plaintiff a permit for the new mobile home. The permit did not require plaintiff to update his septic system. However, issues arose concerning plaintiff's apparent non-compliance with the updated setback requirements and other ordinance provisions.

A fellow resident who owned property with a mobile home, Kathryn Weisenburg, objected to the issuance of the permit to plaintiff. Plaintiff filed a notice to dismiss Weisenburg's appeal. The township's combined Planning Board and Zoning Board of Adjustment denied plaintiff's notice. Plaintiff filed a complaint appealing the Board's decision. The Law Division, in April 2011, affirmed the Board's decision.

The Board then considered Weisenburg's appeal on its merits and ultimately rejected plaintiff's proposed installation of the trailer home and later denied him variance relief.

The trial court upheld the Board's denial of a variance to plaintiff.

The appeals court agreed with the trial court that Weisenburg was sufficiently "interested" in, and "aggrieved" by, plaintiff's alleged non-compliance with the updated zoning requirements to enable her challenge to the permit. The impact would include the dilution of local standards for the neighborhood and the potential diminution of property values. Weisenburg's challenge was also timely filed with the Board within twenty days of her learning that the permit had been granted to plaintiff.

The Court also found that plaintiff was required to adhere to the requirements of the zoning ordinance adopted since his previous mobile home was removed from the property. The use of the property was abandoned for over a decade until plaintiff had a new mobile home delivered to the site in 2010. All that remained after the home's removal were concrete slabs and a septic system. The slabs were not considered permanent fixtures and the ongoing presence of an underground septic system did not suffice to prevent the abandonment of a parcel.

Further, plaintiff's claimed hardship was essentially of plaintiff's own creation by purchasing a home, without prior township approval.

In addition, plaintiff did not meet his heavy burden of proving that the benefits of deviating from the setback and other bulk requirements "substantially" outweighed the potential detriments of a loss of privacy and quiet enjoyment to nearby neighbors.

Lastly, the Court sustained the trial court's conclusion that plaintiff could not gain relief under principles of equitable estoppel. The situation was not so extraordinary to amount to "very compelling circumstances ... where the interests of justice, morality and common fairness clearly dictate that course."

The Court noted that its affirmance of the trial court's decisions did not preclude plaintiff from pursuing a future action against the municipality for inverse condemnation.

CASE LAW

Zoning – Junkyard

CASE NAME: *Rollins v. Middle Smithfield Township Zoning Hearing Board*
DATE: *12/08/2016*
CITATION: *Commonwealth Court of Pennsylvania. Not Reported in A.3d. 2016 WL 7157238*

Plaintiff objected to the finding that her property was a junkyard, just because it had 2 uninhabitable MH and numerous vehicles, such as trucks, trailers and a bus with flat tires and broken windows, which was filled with other materials, on it. Many of the vehicles had been transported onto the Property by tow truck and flatbed truck and were pushed into place. Other items on the Property included a camper, an electric golf cart, a drum barrel, pails of plaster, storage sheds, a Snapple refrigeration machine, two boats, a tarp-covered hot tub, rusting propane tanks and restaurant equipment, such as a large fryer and vending carts.

The Zoning Officer testified that the manufactured homes on the Property were not occupied, and that one of the homes had a large hole in its side.

Rollins presented evidence showing that she had performed substantial work at the Property at significant cost. She also testified that the Property had running water and working bathroom facilities and that she intended to repair the manufactured homes when her husband could assist her. She offered evidence that

several of the vehicles, including the trailers and bus were properly registered.

Rollins admitted that no one had lived at the Property since 2007, and that the manufactured homes were not habitable, but Rollins and two witnesses testified that Rollins frequently hosted family barbecues there. Rollins further represented that nothing on the Property was junk, because it was useable.

The ZHB upheld the Enforcement Notice, finding that simply intending to rehabilitate structures at some far-off date did not negate the current and ongoing activity of maintaining.

Rollins appealed.

The appeals court agreed with the trial court that the evidence constituted substantial evidence to support the ZHB's decision. The ZHB, as fact finder, was free to assess Rollins' credibility and weigh her testimony in the context of the Township's witnesses' testimony. Because substantial evidence supported that the items and structures on the Property were discarded and/or abandoned, the ZHB did not err in concluding that the Property was being used as a junkyard. Accordingly, the trial court properly denied Rollins' appeal.

Affirmed.

LICENSING

MEMORANDUM

Kentucky

Mortgage servicing

☹

Issued 12/22/2016.

Entities Involved in the Servicing of Loans Secured by Residential Real Property in Kentucky.

The Department will require both “master servicers” and “sub servicers”, who are not otherwise exempt pursuant to KRS 286.8-020, to obtain licensure as a mortgage loan company with the Department if the loans being serviced are secured by residential real property located in Kentucky.

Having considered the applicable law, the Department is of the opinion that a master servicer, is a mortgage loan company, pursuant to KRS 286.8-010(20)(b),because it both holds itself out as being able to service loans and it indirectly services loans through a sub servicer. A sub servicer also is a mortgage loan company pursuant to KRS 286.8- 010(20)(b) because it actually performs the servicing of the loan.

Master servicers and sub servicers with loans secured by residential real property located in the Commonwealth of Kentucky must be licensed with the Department by March 1, 2017, unless the master servicer or sub servicer can document to the Department, in writing, that they are specifically exempt from licensure, in accordance with KRS 286.8-020.

LEGISLATION

Michigan

Installation

☺

2015 MI S 966. Enacted 1/3/2017. Effective 4/4/2017.

This bill updates citations to statutes repealed under skilled trades regulation act in mobile home commission act.

The bill provides that a person licensed under article 7, 8, or 11 of the skilled trades regulation act, MCL 339.5701 to 339.5739, 339.5801 to 339.5819, and 339.6101 to 339.6133, is not required to be licensed as a mobile home installer and repairer in order to perform work on mobile homes for which the person is licensed, unless the work performed also includes the setup, installation, or general repair of mobile homes.

MANUFACTURE

FINAL RULE
EPA
Formaldehyde

81 Fed. Reg. 89674 (12/12/2016).

Effective 2/10/2017, this Final Rule amends 40 CFR Part 770 and the EPA's Formaldehyde Emissions Standards.

EPA's proposed rule included a definition of the term "finished good" that was virtually identical to the definition in TSCA Title VI. EPA has determined that Congressional intent with respect to the regulation of finished goods under TSCA Title VI was to regulate goods that move freely through commerce and that are produced through a manufacturing process at a manufacturing facility, not objects like buildings or other structures that are constructed on site and become a permanent addition to real property. Thus, the production of manufactured housing or prefabricated buildings at a factory is covered by this final rule, while the construction of housing or other real property on site, or the assembly and placement of prefabricated buildings or manufactured housing at a site, is not. More specifically, the production of both manufactured housing and prefabricated buildings is included in the Wood Product Manufacturing subsector, along with the production of composite wood product panels. To ensure that this distinction is clear, the definition of "finished good" incorporated into this final rule specifically excludes buildings and similar structures that are constructed on-site.

Under the authority of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 et seq., HUD regulates the construction of all manufactured homes built in the United States. The HUD standards established pursuant to the 1974 Act cover many aspects of manufactured home construction, including body and frame requirements, thermal protection, plumbing, electrical, and fire safety. (See 24 CFR parts 3280 and 3282). HUD oversees the enforcement of the construction standards through third party inspection agencies and State governments.

EPA and HUD are working together to ensure the appropriate application and implementation of requirements under the Formaldehyde Standards for Composite Wood Products Act of 2010. The HUD standards for manufactured housing include specific formaldehyde emission limits for plywood and particleboard materials installed in manufactured housing. In contrast, TSCA Title VI covers only hardwood plywood, a subset of plywood. In addition, TSCA Title VI also covers medium-density fiberboard, which is not covered by the current HUD standards. The HUD emission limits apply to any plywood or particleboard bonded with a resin system and to any plywood or particleboard coated with a surface finish containing formaldehyde. HUD's current formaldehyde emission limits are 0.2 ppm for plywood and 0.3 ppm for particleboard, as measured by ASTM E1333-96. These emission limits are higher than those established by the 2010 Act, but section 4 of the 2010 Act directs HUD to update its regulations to ensure that the regulations reflect the standards established by section 601 of TSCA.

In addition, the 2010 Act established a definition of "recreational vehicle" that is based on the definition established by HUD that is in effect at 24 CFR § 3282.8 on the date of promulgation of regulations pursuant to TSCA Title VI. EPA acknowledges that HUD issued a proposed rule (81 FR 6806, February 9, 2016) that would, among other things, remove the current definition of "recreational vehicle" from 24 CFR § 3282.8 and add an amended version of this definition in a proposed new CFR section. EPA and HUD believe that it was the intent of Congress that same definition of "recreational vehicle" be used in both this final rule and HUD's manufactured housing regulations. Therefore, EPA and HUD will

continue working together to ensure that the regulatory definition is appropriately harmonized.

In the proposal, EPA requested comment on how best to harmonize EPA's regulatory program under TSCA Title VI with HUD's manufactured homes program. EPA received a handful of comments on this aspect of the proposal. Two commenters recommended a general consistency between the EPA and HUD regulations, although they did not offer specifics. At the suggestion of one of the commenters, EPA has added a sentence to the applicability provisions of the final rule to make it clear that the requirements apply to composite wood products used in manufactured housing.

SECONDARY MARKETING

FINAL RULE

FHFA

Federal Housing Finance Agency Enterprise Duty to Serve Rule

The Housing and Economic Recovery Act of 2008 ("HERA") amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("Safety and Soundness Act") to establish a duty for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "Enterprises") to serve three specified underserved markets – manufactured housing, affordable housing preservation, and rural markets – in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for very low-, low-, and moderate-income families in those markets.

On December 13, 2016, the Federal Housing Finance Agency ("FHFA") issued its Enterprise Duty to Serve Underserved Markets Final Rule, nearly a year after it issued its latest Proposed Rule. The final rule is effective 30 days after the date of publication in Federal Register, which was December 29, 2016. (A copy of McGlinchey Stafford's summary of the Rule is attached.)

Under the Duty to Serve regulation that implements this statutory requirement, each Enterprise must prepare an Underserved Markets Plan ("Plan") describing the specific activities and objectives it will undertake to fulfill its Duty to Serve obligations in each underserved market over a three-year period.

There are four major sequential steps involved in implementing the Duty to Serve regulation: (1) publication of the "Evaluation Guidance" by FHFA; (2) preparation of Plans by the Enterprises; (3) implementation by the Enterprises of the activities and objectives described in their Plans; and (4) FHFA annual evaluation of the Enterprises' performance under their Plans.

On January 11, 2017, the FHFA issued its Evaluation Guidance.

The proposed Evaluation Guidance ("Guidance") describes the procedures the Enterprises must follow in preparing these Plans, and the proposed process by which FHFA will evaluate the Plans annually to produce a rating for each Enterprise's implementation and impact on each underserved market. This Guidance also explains the opportunities the public has to provide input at different stages of the Plan development and the evaluation processes. The Guidance will be in effect for a three-year term corresponding with the Plans' three-year terms, and FHFA may modify the Guidance as appropriate during this time period. The Housing and Economic Recovery Act of 2008 ("HERA") amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("Safety and Soundness Act") to establish a duty for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "Enterprises") to serve three specified underserved markets – manufactured housing, affordable housing

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The public will have 120 days to provide input on the proposed Evaluation Guidance after its posting on the website (ends no later than May 12, 2017). For the first Plan development cycle following the publication of the final rule, the Enterprises will be required to submit their proposed Plans to FHFA within 90 days after the posting of the proposed Evaluation Guidance on FHFA's website for public input (no later than April 12, 2017). The public input period for the first cycle of proposed Plans will be 60 days (ends no later than June 11, 2017).

Each Enterprise may, in its discretion, make revisions to its proposed Plan based on public input. For the first Plan development cycle following publication of the final rule, FHFA will review each Enterprise's proposed Plan, and within 60 days or such additional time as may be necessary from the end of the public input period, provide each Enterprise with FHFA's comments on its proposed Plan (August 11, 2017). The Enterprises will be required to address FHFA's comments on their proposed Plans, as appropriate, through revisions to their proposed Plans pursuant to the timeframe and procedures established by FHFA.

The effective date of an underserved market in a Plan that has received a Non-Objection from FHFA by December 1 of the prior year will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection by December 1 of the prior year, the effective date for that underserved market will be determined by FHFA.

As promised in the Final Rule, on January 11, FHFA issued a "Request for Information." To assist in considering what might be an appropriate role for the Enterprises in the manufactured homes chattel loans market, FHFA

requests input from interested parties on current manufactured homes chattel financing practices and on possible opportunities for the Enterprises — in a safe and sound manner — to improve chattel financing terms and conditions for very low-, low-, and moderate-income families through the Enterprises' purchases of chattel loans. The RFI will conclude in time for the Enterprises to consider the input from the RFI in any chattel pilot initiative that may be included in an Enterprise's draft Plan.

Specifically, FHFA is seeking information on: sources of Chattel Loan Financing, Origination of Chattel Loans, Borrower and Tenant Protections, Credit Enhancements, Standardization, and Risk Sharing and Chattel Loan Servicing.

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TITLING AND PERFECTION

BULLETIN

VA

Conveyance of title

Veterans Benefits Administration Circular 26-16-24, issued 9/9/2016.

Title Requirements for Manufactured or Mobile Home Conveyance.

This Circular provides clarification of the documents required to properly provide clear and marketable title for mobile homes conveyed to the Department of Veterans Affairs (VA) per 38 C.F.R. § 4300 in every state and territory in the United States.

Effective immediately, VA is requiring evidence that holders have complied with requirements for guaranteeing manufactured homes. Foreclosure title packages that do not include the required evidence will be rejected. The evidence required (applicable to all jurisdictions) for manufactured homes is as follows:

a. Copy of the deed or document evidencing transfer of interest and title to the holder at the liquidation sale;

b. Evidence that the manufactured home is permanently affixed and classified as real property under the laws of the state where it is located;

c. Special warranty deed or its legal equivalent from the holder to the Secretary, but only after the manufactured home has been deemed permanently affixed and classified as real property under the laws of the state where it is located;

d. Original or copy of mortgagee's title insurance policy from loan origination (except in Iowa, where a title abstract is required);

e. Owner's title insurance policy issued as of the recording date of the special warranty deed to the Secretary;

f. ALTA Endorsement 7-06 to the owner's title policy insuring the Secretary;

g. Origination deed of trust or mortgage;

h. All assignments of the origination deed of trust or mortgage (if to effect an assignment a recorded document is legally required in the state where the property is located);

i. Evidence of proper notice (e.g., affidavit of publication, Affidavit of Substitute Trustee, notice of sale);

j. Department of Defense Manpower Data Center Status Report pursuant to Servicemembers Civil Relief Act; and

k. Real estate sales validation form (where applicable).

In states where there is not a legal process for converting a manufactured home from personal property into real property, an ALTA Endorsement 7-06 to the Secretary's owner title policy is sufficient evidence that the manufactured home is permanently affixed and classified as real property under the laws of the state where it is located. These locations are:

a. Connecticut

b. District of Columbia

c. Maine

d. Massachusetts

e. New Hampshire

f. Rhode Island

g. Vermont

h. Hawaii

The Circular is rescinded October 1, 2018.

MARC LIFSET is a member in the firm's business law section, where he advises banks and financial institutions regarding consumer financial services issues, licensing, regulatory compliance and legislative matters. Marc has carved a place for himself in the manufactured housing lending arena as the primary drafter and proponent of New York's Manufactured Housing Certificate of Title Act. Marc is chairperson of the Manufactured Housing Institute ("MHI") Finance Lawyers Committee and serves on the Board of Governors of the MHI Financial Services Division. He is the primary draft person of manufactured home titling and perfection legislation in Alaska, Louisiana, Maryland, Missouri, Nebraska, New York, North Dakota and Tennessee. Marc represents manufactured home lenders, community operators and retailers throughout the country and is a frequent lecturer at industry conventions.

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