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!

Perhaps because of the upcoming election, or maybe even because of baseball fever, October was a slower month for developments related to manufactured housing.

Continuing the trend from last month, and, come to think of it, the electoral season in general, poop, i.e. sewage, continues to be a topic of interest. Check out Louisiana and New Hampshire's new rules on the subject.

In what promises to be a continued area of legal development, yet another court, this time the Eleventh Circuit, weighed in on *Spokeo* and standing. Looking into our manufactured home-shaped crystal ball, we predict more courts applying *Spokeo,* and diving a murky application of the doctrine.

Finally, of interest to both those lucky enough to be under the CFPB's supervision, and to those of you who are service providers of those lucky enough to be under the CFPB's supervision, the CFPB issued guidance on Service Providers.

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COMMUNITIES

CASE LAW

Deposit - Refund

CASE NAME: *Ranson v. Cooper*
DATE: *09/19/2016*
CITATION: *Court of Appeal of Louisiana, First Circuit. --- So.3d ---. -2016 WL 5173506 2016-0029 (La.App. 1 Cir. 9/19/16)*

Ranson responded to an advertisement by Cooper for the rental of a mobile home. Cooper initially informed Ranson that the premises had been rented; however, shortly thereafter, Cooper advised that the premises was back on the market due to deficiencies in the finances of the prospective lessors.

Ranson sent a deposit of $850 and, subsequently, at Cooper's request, another $450 to cover half of the rent for one month. Ranson advised Cooper that he would be traveling from Colorado to Louisiana to view the premises in person. The parties made arrangements to meet, however, Cooper did not show up. Ranson found that the electricity was not turned on as promised and there was no kennel for his dogs. Further, the premises was 100 yards from a race car track and a neighboring mobile home was approximately 20 feet from the premises.

Text messages showed that, prior to Ranson's arrival, Cooper offered him the opportunity to view another mobile home he was offering for rent. Ranson ultimately declined both properties.

Cooper never returned the deposit and rental fees to Ranson, which led to Ranson filing suit.

The trial court found that the Cooper was entitled to retain the "advanced deposit" of $850, but granted Ranson an award in the amount of $425, with judicial interest from the date of judicial demand. Cooper appealed.

On appeal, Cooper asserted that an oral lease was contracted between the parties; thus, Ranson breached the lease when he refused to take possession of the premises.

According to the appeals court, a lease may be made orally or in writing; nevertheless, there must be a contract. However, where there is no "meeting of the minds" between the parties, there is no consent, and thus, no enforceable contract. Whether a lease exists is a question of fact and a court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong.

Here, Cooper had the burden of proving the existence of the lease. The record revealed conflicting testimony by the parties regarding a meeting of the minds between the parties as to the existence of a lease. However, text messages between the parties did not reveal any express evidence of a lease. Moreover, in a text message during the period which Cooper alleged that the lease was in existence, he offered for Ranson's consideration another mobile home for $900 per month as an alternative to the premises.

Since the holding of the trial court was not manifestly erroneous, the appeals court affirmed.

CASE LAW

Rent increase - Justification

CASE NAME: *Bon Ayre Land, LLC v. Bon Ayre Community Association*
DATE: *10/10/2016*
CITATION: *Supreme Court of Delaware. --- A.3d ---- 2016 WL 5874838*

Bon Ayre Land, LLC owns a manufactured housing community. In this case, the Homeowners' Association represented four sets of homeowners in the community.

This dispute arose under what is known commonly as the "Rent Justification Act." To raise rent by more than

inflation, the Act sets out conditions a landowner must satisfy. Besides having a clean bill of health in terms of safety violations, the owner must show that "[t]he proposed rent increase is directly related to operating, maintaining or improving the manufactured home community, and justified by 1 or more factors listed under subsection (c) of [§ 7042]." Subsection (c) lists eight factors, including market rent.

After the Homeowners objected to the Landowner's proposed rent increase, the arbitrator granted a rent increase above the inflation rate. The arbitrator read the word "and" out of § 7042 and held that market rent alone may justify a rent increase above inflation, even if the Landowner presented no evidence of the increase being related to "operating, maintaining or improving" the community. The Homeowners' Association appealed.

The Superior Court reversed, holding that the language of the subsection established "a compound condition" requiring both parts to be met. The Landowner appealed.

The appeals court agreed with the Homeowners' Association and Superior Court that § 7042 requires all rent increases above inflation to be "directly related to operating, maintaining or improving the manufactured home community." Because the Landowner failed to provide evidence that the rent increases were directly related to those factors, the Court affirmed the Superior Court's decision.

According to the Court, the Rent Justification Act is effectively a rent control statute. Landowners are able to set whatever initial rent the market can bear when they attract new tenants, but the Act tries to protect homeowners from excessive rent increases that exploit the difficulties for homeowners of moving their mobile homes somewhere else.

If a landowner can show that its costs have gone up or invests in its development, and therefore has "improve[ed]" the community, that opens the door to a rent increase based on § 7042(c)'s factors, including market rent.

The Court also addressed the Superior Court's decision that proving market rent with reference to comparable communities required evidence of actual rents as charged, noting that, if adopted as precedent, this would materially restrict arbitrators under the Rent Justification Act in the evidence they could hear in these cases in a manner that had the potential to raise material doubts about the constitutionality of the Rent Justification Act.

The Act does not provide the arbitrator or parties to the arbitration with the power to use compulsory process to obtain evidence from third parties. Without those tools, landowners and homeowners would be unable to compel third parties to provide actual contracts.

The Court found that the Rent Justification Act does not limit what is relevant to showing market rent to actual lease terms, nor do the Delaware Rules of Evidence.

CASE LAW

Termination of lease – Attorney's fees

CASE NAME: *Paape v. Grefsheim*
DATE: *10/12/2016*
CITATION: *Court of Appeals of Wisconsin. Slip Copy. 2016 WL 5923088*

The Grefsheims own a seasonal mobile home park. The Paapes leased a lot from the Grefsheims, concurrent with the Paapes' purchase of a mobile home on the lot. The one-year lease noted that "[w]ater is turned off for the season on October 15th."

The Grefsheims objected to the Paapes' placement of a storage cabinet and a swing set on their lot and to the Paapes' burn pit and notified the Paapes that the lease would not be renewed.

The Paapes sued. The circuit court enjoined the Grefsheims from refusing to renew the annual lease

unless the Grefsheims could prove one of the conditions for eviction or nonrenewal delineated in Wis. Stat. § 710.15, which governs manufactured and mobile home community regulations. The circuit court further enjoined the Grefsheims from including an amendment in the renewal lease allowing electricity to be turned off for any period of time, unless the home owner specifically agreed. The court also awarded the Paapes $9,365.23 in reasonable attorney's fees under Wis. Stat. § 814.045.

On appeal, the Grefsheims challenged the attorney fee award, arguing the Paapes were limited to the attorney fees available under Wis. Stat. § 814.04, which provides that, in cases in which there is no amount recovered or that do not involve property, attorney's fees shall be $300.

The Paapes contended that Wis. Stat. § 814.045(1) creates an exception to the limited fees available under Wis. Stat. § 814.04(1) where, as here, only injunctive or declaratory relief is ordered. The Court found that this ignored the language exempting from § 814.045 "any action involving the award of attorney's fees that are not governed by s. 814.04(1)."

The Paapes nevertheless contended that the Grefsheims' intent to cut off electricity to the mobile home constituted a constructive eviction in retaliation for the Paapes' stated intention to use the premises throughout the winter months, thus entitling the Paapes to reasonable attorney fees under Wis. Admin. Code § ATCP 134.09(5), which governs residential rental practices and allows for reasonable attorney's fees. Wisconsin Admin. Code § ATCP 134 .09(5) provides:

No landlord shall terminate a tenancy or give notice preventing the automatic renewal of a lease, or constructively evict a tenant by any means including the termination or substantial reduction of heat, water or electricity to the dwelling unit, in retaliation against a tenant … the Court found that, since the Paapes' lease was for the site, and the site was seasonal, it did not constitute a "dwelling unit" under Wis. Admin. Code § ATCP 134.09(5).

Even if the code applied, while the circuit court concluded that turning off the electricity in the winter would constitute a constructive eviction, the court noted that the Grefsheims did not want people staying at the resort when they were not present and found that rather than being retaliatory, the Grefsheims actions were based upon their "realization that Mr. Paape [intended] to use his property during that period of time."

Because the Paapes' action was governed by Wis. Stat. § 814.04(1), the Court reversed that part of the judgment awarding reasonable attorney's fees under § 814.045 and remanded with directions to award $300 attorney's fees consistent with § 814.04(1).

CASE LAW

Bankruptcy – Community foreclosure

CASE NAME: *TD Bank, N.A. v. Biltmore Investments, Ltd*
DATE: *10/13/2016*
CITATION: *United States District Court, W.D. North Carolina, Asheville Division. Slip Copy. 2016 WL 6023652*

Plaintiff bank received an $800,000 Promissory Note executed by defendant, secured by a mobile home park and improvements. A second, $125,000 Promissory Note was secured by an interest in three manufactured homes.

Defendant filed Chapter 11. Subsequently, the bankruptcy court issued an order that, if Biltmore failed to comply, it would constitute an event of default under the Confirmed Plan and all creditors would be immediately entitled to pursue their normal legal non-bankruptcy remedies –including foreclosure – without further notice to Biltmore or further proceedings in the bankruptcy court.

The plaintiff claimed defendant defaulted and there was a public foreclosure sale, resulting in a deficiency of over $178,842.

Plaintiff lodged a claim for the deficiency plus interest and requested possession of collateral. The defendant counter-claimed for a violation of state law under "the North Carolina Unfair Trade and Practices Act." [sic] The District Court found that defendant's arguments were barred by res judicata. The Bankruptcy Court and the Fourth Circuit had reviewed this case, between the same parties, with the same nucleus of operative fact. Additionally, the Henderson County Clerk of Court issued a foreclosure order, barring re-litigation here that defendant did not default.

Defendant counter-claimed, first, that TD Bank failed to mitigate damages, specifically, plaintiff "had a duty to not end the sale impulsively." Second, that there was a supposed verbal contract in which TD Bank agreed not to pursue a deficiency action.

The Court found that, instead of pleading facts with particularity, the defendant's counter-claim was full of conclusions rather than facts. The pleadings and incorporated material did not cross the line from conceivability to plausibility and failed.

TD Bank could not "end the sale." The power-of-sale foreclosure proceeding was handled by a trustee under state foreclosure law. TD Bank was under no obligation to generate higher bids.

Defendant also alleged that it relied upon a verbal agreement that TD Bank would not pursue a deficiency action. Other than the statement that a verbal agreement existed, defendant pled insufficient facts related to when the agreement was made, who at TD Bank made the agreement, and where it occurred. The defendant failed to demonstrate that such a contract even existed let alone become a valid and binding agreement.

Defendant's counter-claim was dismissed.

Plaintiff's Motion for Judgment on the Pleadings was granted. Defendant was ordered to deliver to plaintiff the three manufactured homes named as collateral in plaintiff's Complaint and ordered to pay plaintiff the amount of deficiency as well as any applicable statutory interest.

CASE LAW

Lease – Illegal terms

CASE NAME: *Queens Mobile Home Community Et Al V. JP El Paso I, LLC*
DATE: *10/07/2016*
CITATION: *County Court At Law 5 of El Paso County, TX, 2015-DCV2895*

We previously reported on this case in the June 2016 McGlinchey Stafford Manufactured Housing Law Update.

An informal tenant association and individuals who rented mobile home spaces at the Queens Mobile Home Park claimed that Defendant violated their rights by asking them, under threat of eviction, to sign a new lease and accept community rules that contained what they alleged were illegal terms, including:

Allowing Defendant to enter a tenant's home if the rent is three days late, declare it abandoned and take ownership of it;

Cutting the state mandated notice requirements in half for lease non-renewal;

Prohibiting a family from hanging window curtains of a color other than white; and

Requiring any construction activity to be conducted only between the hours of 12:00 pm and 4:00 pm on Saturday.

The Complaint alleged violations of the Texas Manufactured Home Tenancies Act, Chapter 94 of the Texas Property Code.

As of October 7, 2016, the case was dismissed with prejudice as to all plaintiffs pursuant to a confidential settlement.

ADOPTED RULE
Louisiana
Sanitation – Plumbing installation

Effective 10/20/2016, this was previously adopted as an emergency rule and amends La. Admin. Code Tile 17:I of the Department of Public Safety/State Uniform Construction Code Council, to provide for maintenance and installation of plumbing systems.

The rule adds La. Admin. Code tit. 17, § 1601 et seq., Travel Trailer and Mobile/Manufactured Home Parks to apply specifically to all new travel trailer and mobile/manufactured home parks, and to additions to existing parks, and are to provide minimum standards for sanitation and plumbing installation within these parks, for the accommodations, use and parking of travel trailers and/or mobile/manufactured homes.

The rule provides that travel trailers or mobile/manufactured homes shall not be parked in any park unless there are provided plumbing and sanitation facilities installed and maintained in conformity with the code. Every travel trailer and mobile/manufactured home shall provide a gastight and watertight connection for sewage disposal which shall be connected to an underground sewage collection system discharging into a community sewerage system, a commercial treatment facility, or an individual sewerage system which has been approved by the state health officer.

ADOPTED RULE
New Hampshire
Sewage disposal systems

Effective 10/1/2016, this rule changes the heading of Chapter Env-Wq 1000 SUBDIVISION AND INDIVIDUAL SEWAGE DISPOSAL SYSTEM DESIGN RULES to read as follows: CHAPTER Env-Wq 1000 SUBDIVISIONS; INDIVIDUAL SEWAGE DISPOSAL SYSTEMS

The rule readopts with amendment Env-Wq 1003.04, renumbered as Env-Wq 1003.06, to provide for the information required for subdivision applications.

The amendment requires that this information include the type of proposed development of the subject property, for example residential, commercial, or industrial, and, if residential, whether single-family, duplex, apartment building(s), condominium(s), manufactured housing park, or some combination thereof.

The rule also readopts with amendment Env-Wq 1005.01 through Env-Wq 1005.08, renumbered as Env-Wq 1005.01 through Env-Wq 1005.07, to provide that manufactured housing park sites with on-site wastewater disposal shall be at least 10,000 ft2 multiplied by the factor listed in Table 1005-1.

The rule readopts with amendment Env-Wq 1005.10 through Env-Wq 1005.12, renumbered as Env-Wq 1005.09 through Env-Wq 1005.11.

Formerly, Env-Wq 1005.10 Manufactured Housing Parks, provided:

(a) Subdivision plans for a manufactured housing park shall be submitted in accordance with Env-Wq 1003 if the resulting park will not be served by a municipal sewer.

(b) Lots within manufactured housing parks shall conform to the size requirements of Env-Wq 1005.04(a).

This rule is now Env-Wq 1005.09 Manufactured Housing Parks, and provides:

(a) Subdivision plans for a manufactured housing park shall be submitted in accordance with Env-Wq 1003 if the resulting park will not be served by a municipal sewer.

(b) Lots within manufactured housing parks shall conform to the size requirements of Env-Wq 1005.03(i).

DEFAULT SERVICING

CASE LAW

Bankruptcy – Value of collateral

CASE NAME: *IN RE: MICHAEL ALLEN TUDOR, Debtor*
DATE: *09/29/2016*
CITATION: *United States Bankruptcy Court, S.D. West Virginia, IN CHARLESTON. Slip Copy. 2016 WL 5485183*

The Debtor's indebtedness arose from a Manufactured Home Promissory Note, Retail Installment Contract-Security Agreement, secured by placing a lien on the Certificate of Title of a new 2007 Doublewide Manufactured Home. The original principal amount of the indebtedness was $83,873.48.

Tudor defaulted. His outstanding indebtedness was $71,034.19. He filed a Chapter 13, valuing the Manufactured Home at $10,000, and providing for payment of $10,609.53 to Vanderbilt over the life of the plan. Vanderbilt filed a Proof of Claim listing the secured indebtedness as $70,035.38 and objected to the Plan.

Vanderbilt's Appraiser valued the Manufactured Home at $50,100. Debtor's Appraiser valued the home at $24,850. The Debtor valued the home at $10,000.

The Court noted that, in the Plan, the Debtor was attempting to use the "cram down" provision of § 1325(a)(5)(B).

Tudor's appraiser, Estep, based his valuation on the cost approach method, relying mainly on the NADA database. The Court noted that the cost approach method is a technique whereby a fair valuation for property is calculated by establishing a "replacement value" for the property using a NADA report, and then adjusting the valuation according to the manufactured home's age, location, condition, and components found inside. The cost approach method is well accepted as a means to value mobile homes in West Virginia. Estep arrived at a value of $24,850. Estep personally inspected the home, and found it to be of "fair" quality. He additionally detailed some of the extensive damage that he found, including impaired countertops, damage to the carpet, a wall in the kitchen being "out of plumb," as well as water damage in the bathroom. Estep concluded that the home was constructed from cheap materials, qualifying it for categorization under "fair condition." Estep admitted that he did not input the Manufactured Home's specific trade name in the NADA database worksheet.

The Debtor testified to extensive damage suffered by the home and the Court found his testimony persuasive.

Vanderbilt's appraiser, Banks, based his work on the cost approach method as well. Banks established a "replacement value" for the property using both the NADA database and a NAS worksheet, then adjusted the valuation according to this specific home's age, location, condition, and components found inside the mobile home. He concluded that the home was of good workmanship, in good condition, and included some additional appliances that were not part of the base model. Banks arrived at a valuation of $50,100, but did not account for the fact that some of the appliances in the home were the personal property of Tudor. Banks also noted that he found no indication any walls were out of plumb. Lastly, Banks testified that if he were in the market for a mobile home, that he would pay $50,000 for this particular model. In the Court's estimation, that observation diminished Banks' credibility.

The Court found that the Manufactured Home was properly valued at $32,500, reflecting an adjustment for such factors as Tudor's personal property being present therein, along with certain structural problems that were evident.

CASE LAW

Bankruptcy – Value of collateral

CASE NAME: *IN RE: GLENN M. TILLMAN II, Debtor*
DATE: *09/30/2016*
CITATION: *United States Bankruptcy Court, E.D. North Carolina. Slip Copy. 2016 WL 5763518*

The Debtor owned 0.16 acres of real property within a manufactured home community. The Debtor also owned and resided in a Mobile Home on the Lot.

The Debtor filed Chapter 13, stating that the Lot had a value of $65,000, and the Mobile Home had a value of $35,000.

Hughes sold the Property to the Debtor. To finance the purchase, the Debtor obtained a loan from the Bagleys and a loan from Hughes, executing deeds of trust to secure the notes. The Hughes Deed of Trust was recorded after the Bagley Deed of Trust.

On the Petition Date, the indebtedness due the Bagleys was $106,390.83, and the indebtedness to Hughes was $21,319.65.

The Debtor and Hughes stipulated that the Bagleys had a first priority lien. The Debtor proposed to treat the Bagley Claim as fully secured. The Plan made no specific proposal for treatment of the Hughes Claim.

Hughes asserted he was entitled to relief from the automatic stay to allow foreclosure. The Debtor alleged that the value of the Property was $100,000, less than the amount of the Bagley Claim, and that the Hughes Claim was wholly unsecured, rendering the Hughes Lien void.

The Court noted that N.C. Gen. Stat. § 105-273(13)(d) has three requirements to be met for a manufactured home to be considered real property: (1) It is a residential structure; (2) It has the hitch, wheels, and axles removed; and (3) It is placed upon a permanent foundation either on land owned by the owner of the manufactured home or on land in which the owner of the manufactured home has a leasehold interest.

The parties stipulated that the first two requirements were satisfied, but disagreed as to whether the MH was placed upon a permanent foundation.

The Debtor claimed that he did not either surrender the title or submit an affidavit to the DMV that the home qualified as real property, but the Court held that this was not conclusive evidence that the provisions of N.C. Gen. Stat. § 105-273(13) had not been met.

According to the Court, if a structure meets the applicable building code as enforced by county building inspectors, then a manufactured home properly sits on a foundation and there was no independent evidence that the foundation did not meet the standards required by applicable building codes or that a certificate of occupancy should not have been issued. The home was supported by piers and metal tie-down straps with metal anchors. No evidence was presented that the home could be removed without damage to the land.

The court held that the Mobile Home was on a permanent foundation, the Hughes Lien encumbered both the home and the Lot, and the Hughes Claim could not be bifurcated unless it was wholly unsecured based upon the court's valuation of the Property.

In addition to weighing the appraisals offered on behalf of both the Debtor and Hughes, the Court noted that less than six months earlier, the Debtor had an active pre-

petition listing for the home for $159,900 and an offer to purchase the Property for $140,000.

Based on the comparable sales used by Hughes's appraiser, all of which were within 1.2 miles from the Property, with two of the sales being less than one-tenth of a mile from the Property, the Court held that the appropriate value of the Property as of the Petition Date was $130,000.

The result was that the Hughes Claim was fully secured, because the Debtor had equity in the Property beyond the Bagley Claim and the Hughes Claim.

CASE LAW

Bankruptcy – Value of collateral

CASE NAME: *IN RE: TELLORRIE I. BROWN, Debtor*
DATE: *10/04/2016*
CITATION: *United States Bankruptcy Court, E.D. North Carolina. Slip Copy. 2016 WL 6068111*

The Debtor purchased a manufactured home, making a cash down payment of $30,000 and financing the balance of $43,580. The Note was assigned to 21st Mortgage. The Collateral served as the Debtor's residence and was located upon real property owned by the Debtor's mother.

The Debtor filed chapter 13, valuing the Collateral at $28,600.

21st Mortgage filed a proof of claim for the balance due under the Note, $39,359.91.

The Trustee moved for confirmation of the Plan, with the 21st Mortgage Claim being bifurcated into a secured claim in the amount of $28,600 and an unsecured claim in the amount of $10,759.91.

21st Mortgage requested the court to determine the value of the Collateral and 21st Mortgage's secured status.

Kenneth R. Wiggins testified on behalf of the Debtor and provided a total adjusted value of the Collateral of $26,538. Walter Banks testified on behalf of 21st Mortgage and provided a total adjusted value of $50,151.

The court found that the disparity between the Wiggins NADA Value and the Banks NADA Value was attributable the application of different dimensions for the Collateral. Unlike Wiggins, Banks performed a physical measurement of the Collateral and articulately explained to the court the proper procedure for measuring manufactured homes. The court found the Banks NADA Value to be the more appropriate starting point for determination of the Collateral's value.

The court was also impressed and persuaded by Banks' detailed testimony describing the methodology used in the Banks Appraisal and how each adjustment from the Banks NADA Value was determined.

However, the court agreed with the Debtor that repairs were needed to the Collateral and found that the Costs of Repairs reflected in the Banks Valuation should be tripled from $1,125 to $3,375.

The court also agreed with the Debtor that the rural location negatively affected the Collateral's value and applied a five percent Location Discount. The Location Discount also considered the cost of having workers travel to the Collateral to undertake the repairs.

The court concluded that the Collateral's value was as follows:

Banks Valuation $ 50,200, Less Additional Costs of Repair (2,250), Less Location Discount (2,398): Collateral Value $45,552.

Because the Collateral's value was greater than the amount of 21st Mortgage's Claim, the Claim must be treated as fully secured and confirmation of the Plan was denied.

CASE LAW

Bankruptcy – Surrender

CASE NAME: *In re Failla*
DATE: *10/04/2016*
CITATION: *United States Court of Appeals, Eleventh Circuit. --- F.3d ----. 2016 WL 5750666. 63 Bankr.Ct.Dec. 46*

Citibank, the owner of the mortgage and the promissory note, filed a foreclosure action. The Faillas opposed that foreclosure action.

The Faillas filed for bankruptcy, during which proceedings the Faillas admitted that they owned the house, that the house was collateral for the mortgage, that the mortgage was valid, and that the balance of the mortgage exceeded the value of the house. They also filed a statement of intention to surrender the house. Because the house had a negative value, the trustee "abandoned" it back to the Faillas, The Faillas continued to live in the house while they contested the foreclosure action.

Citibank filed a motion to compel surrender in the bankruptcy court. The bankruptcy court granted Citibank's motion and ordered the Faillas to stop opposing the foreclosure action and explained that if the Faillas did not comply with its order, it may "enter an order vacating [their] discharge." The district court affirmed on appeal and the Faillas appealed again.

The Court noted that subsection (A) of 11 U.S.C. § 521(a)(2) requires the debtor to file a statement of intention about what he plans to do with the collateral for his debts. The statement of intention must declare one of four things: the collateral is exempt, the debtor will surrender the collateral, the debtor will redeem the collateral, or the debtor will reaffirm the debt. After the debtor issues his statement of intention, subsection (B) requires him to perform the option he declared.

The Court found that section 521(a)(2) requires debtors who file a statement of intent to surrender to surrender the property both to the trustee and to the creditor. Even if the trustee abandons the property, the debtors' duty to surrender the property to the creditor remains. The Court further found that because, in this context, "surrender" meant "giving up of a right or claim," debtors who surrender their property can no longer contest a foreclosure action.

During the bankruptcy proceedings, the Faillas declared that they would surrender the property, that the mortgage was valid, and that Citibank had the right to foreclose. The Faillas could not say one thing in bankruptcy court and another thing in state court.

Finally, the Court found that, just as the bankruptcy court may order creditors who violate the automatic stay to take corrective action in non-bankruptcy litigation, the bankruptcy court may order the Debtors to withdraw their affirmative defenses and dismiss their counterclaim in the foreclosure case. The bankruptcy court had the authority to compel the Faillas to fulfill their mandatory duty under section 521(a)(2) not to oppose the foreclosure action in state court.

Affirmed.

CASE LAW

Standing – Spokeo

CASE NAME: *Nicklaw v. Citimortgage, Inc.*
DATE: *10/05/2016*
CITATION: *United States Court of Appeals, Eleventh Circuit. --- F.3d ----. 2016 WL 5845682*

In the September Update, we reported on *Bellino v. JPMorgan Chase Bank, N.A.*, and *Zia v. CitiMortgage, Inc.* In both of those cases, the plaintiffs sued when their mortgagees failed to file a satisfaction of judgment within 30 days of the satisfaction of the respective obligations, in violation of N.Y. Real Prop. Law § 275; N.Y. Real Prop. Acts. Law § 1921. In the former case, the

Court found the plaintiff had standing under *Spokeo*; in the latter, the Court reached the opposite conclusion.

Here, the circumstances were the same and the result was in line with *Bellino*.

Roger Nicklaw satisfied a mortgage owned by CitiMortgage, Inc. New York law required CitiMortgage to file within 30 days a certificate of discharge with the county clerk to record that Nicklaw had satisfied his mortgage. But CitiMortgage failed to record the satisfaction of mortgage until more than 90 days after the date of satisfaction. When Nicklaw discovered that the certificate had been recorded late, he filed a putative class action against CitiMortgage, alleging that CitiMortgage violated New York law by failing to record the certificate of discharge within the statutory period. The district court dismissed Nicklaw's complaint.

On appeal, Nicklaw argued that the intangible harm that occurs when the discharge of a mortgage is not timely recorded constitutes a concrete injury for two reasons. First, the New York legislature intended to create a substantive right to have the certificate of discharge timely recorded. Second, the right to have a satisfaction of mortgage timely recorded has deep roots in American common law. According to the Court, these arguments failed.

The Court found that Nicklaw failed to allege that he sustained a concrete injury. He did not allege that his credit suffered or that he or anyone else knew that the certificate of discharge had not been recorded within the statutory period. By alleging only that CitiMortgage recorded the certificate late and nothing else, Nicklaw failed to establish that he suffered or could suffer any harm that could constitute a concrete injury.

The Court added that the fact that Nicklaw did not allege a sufficient injury in fact under Article III did not mean that New York law does not create a right that, when violated, could form the basis of a cause of action in a court of New York. But Nicklaw chose to sue CitiMortgage in federal court, and the requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation.

CASE LAW

RESPA – Qualified Written Request

CASE NAME: *Diedrich v. Ocwen Loan Servicing, LLC*
DATE: *10/06/2016*
CITATION: *United States Court of Appeals, Seventh Circuit. --- F.3d ----. 2016 WL 5852453*

Ocwen, as servicer of the Diedrichs' mortgage note, began foreclosure proceedings. After the Diedrichs began making payments pursuant to a loan modification agreement, the Diedrichs sent Ocwen a letter in which they requested eight types of standard information about their account, including the names of employees working on their account, the history of payments made from their escrow account including the date, amount and payee, a statement of interest rates applied to their account, and other general inquiries. Neither party disputed that this letter constituted a qualified written request for information under RESPA. Ocwen responded to the request with a form letter that set forth its policies regarding how and when it would respond to requests for information, but it did not directly respond with the information requested. Ocwen subsequently sent another letter stating that it would take another fifteen days, as permitted by RESPA, to review the inquiry. Finally, Ocwen sent the Diedrichs a letter stating that it could not identify a problem with their account and asking the Diedrichs to send another letter identifying which month and report they disputed, the explanation for the dispute, and all evidence showing that payment for the month was received on time or that the information reported was incorrect.

Based on Ocwen's failure to respond to their request for information, the Diedrichs filed a complaint alleging violations of Wisconsin laws regarding mortgage loans

and RESPA. The magistrate judge granted Ocwen's motion to dismiss the claim under Wisconsin statute, § 138.052(7s)(a) and 12 U.S.C. § 2605(e)(1). That left in play RESPA § 2605(e)(2) and Wisconsin statutes § 224.77(1), and § 138.052(7).

RESPA § 2605(e)(2) requires a lender to respond to a qualified written request for information from a borrower within a particular time frame and in a particular manner. Wisconsin statute § 224.77(1) essentially points back to the alleged RESPA violation by prohibiting mortgage bankers and brokers from violating any federal statute that regulates their practice. The magistrate judge granted Ocwen's motion for summary judgment on all counts, finding that, although Ocwen's responses to the written inquiries were insufficient and therefore violated the RESPA requirements, the Diedrichs "failed to come forth with any evidence that would connect their alleged [injury] to Ocwen's failure to respond to their qualified written request for information." The Diedrichs appealed.

According to the appeals court, the remedy portion of 12 U.S.C. § 2605 indicates that the statute was intended to redress actual damages caused by the failure of the loan servicer to provide information to the borrower.

The Court found that the plaintiffs alleged that they suffered damage to their credit and were forced to pay Ocwen greater payments and a higher interest rate. These were allegations of concrete injuries and as such were sufficient to allege standing.

Even taking all of the Diedrichs' facts as true, however, the Court found that they did not allege any causal connection between the injury they alleged, including the claim for emotional damages, and Ocwen's failure to respond to the qualified written request for information, as opposed to the foreclosure on their loan, the loan modification process, or the litigation in general.

Affirmed.

LENDING

BULLETIN

CFPB

Service providers

Compliance Bulletin and Policy Guidance; 2016–02, Service Providers. 81 Fed. Reg. 74410 (October 26, 2016).

The Bureau is reissuing its guidance on service providers, formerly titled CFPB Bulletin 2012–03, Service Providers to clarify that the depth and formality of the risk management program for service providers may vary depending upon the service being performed—its size, scope, complexity, importance and potential for consumer harm—and the performance of the service provider in carrying out its activities in compliance with Federal consumer financial laws and regulations. This amendment is needed to clarify that supervised entities have flexibility and to allow appropriate risk management.

The CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships. The CFPB will apply these expectations consistently, regardless of whether it is a supervised bank or nonbank that has the relationship with a service provider.

The Bureau expects that the depth and formality of the entity's risk management program for service providers may vary depending upon the service being performed—its size, scope, complexity, importance and potential for consumer harm—and the performance of the service provider in carrying out its activities in compliance with Federal consumer financial laws and regulations. While due diligence does not provide a shield against liability for actions by the service provider, it could help reduce the risk that the service provider will commit violations for which the supervised bank or nonbank may be liable.

To limit the potential for statutory or regulatory violations and related consumer harm, supervised banks and nonbanks should take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers. These steps should include, but are not limited to:

• Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;

• Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;

• Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;

• Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law; and

• Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.

LICENSING

ADOPTED RULE

Delaware

Mortgage loan brokers – Display of license

Effective 10/13/2016, this rule deletes 5-2101 Del. Admin. Code § 3, regarding Mortgage Loan Brokers Operating Regulation, which had required the display of a license.

The rule makes similar amendments to delete the requirement to display a license in 5-2201 Del. Admin. Code (Licensed Lenders Operating Regulation), 5-2701 Del. Admin. Code (Cashing of Checks, Drafts or Money Orders Operating Regulation) and 5-2901 Del. Admin. Code (Financing the Sale of Motor Vehicles Operating Regulation).

ADOPTED RULE

Montana

"Regularly engage"

Effective 10/15/2016, this rule amends Mont. Admin. R. 2.59.1738, and adopts Mont. Admin R. 2.59.1754.

The rule adopts new Mont. Admin. R. 2.59.1754 to clarify the definition of "regularly engage" to mean:

(1) A person who advertises in any manner is holding themselves out to the public as being able to act as a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer in Montana. By so doing, the person expects to engage in the business of a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer in Montana within the meaning of 32-9-103(39), MCA.

(2) If a person licensed through the NMLS as a mortgage loan originator, mortgage broker, mortgage lender, mortgage servicer, or similar person in another state acts as a mortgage loan originator, mortgage broker, mortgage lender, or mortgage servicer in Montana, they are regularly engaging in business in Montana within the meaning of 32-9-103(39), MCA.

The department is adding this new rule to clarify the license exemption for mortgage loan originators, mortgage brokers, mortgage lenders, and mortgage servicers conducting business in Montana. The term "regularly engage" applies to persons who engage in the business of a mortgage broker, lender, servicer, or mortgage loan originator on more than five residential

mortgage loans in a calendar year or expect to engage in business on more than five residential mortgage loans in a calendar year.

The New Rule is being added to address the situation in which an entity is licensed as a mortgage loan originator, mortgage broker, mortgage lender, mortgage servicer, or similar person in another state and engages in a mortgage-related transaction in Montana. It cannot be argued that a person licensed in another state is not regularly engaged in business. Clearly, they are. Therefore, the person cannot avail themselves of the exemption for persons who are not regularly engaged in business. The language "or similar person" is intended to cover the fact that states have different terminology for what Montana calls mortgage loan originators, mortgage brokers, mortgage lenders, and mortgage servicers. In some states mortgage loan originators are called mortgage bankers, and mortgage lenders are called residential first mortgage lenders or residential second mortgage lenders. There are many individual state variations in terminology. The rule is intended to cover any person who performs the acts covered by the Montana definitions of mortgage loan originator, mortgage broker, mortgage lender, and mortgage servicer.

Mont. Admin. R. 2.59.1738, Renewal Fees, has been amended to add the word “entity” with reference to the renewal application fees for Mortgage Servicer licensees for consistency in the names of mortgage license types.

The amendments also extend the 50% reduction in the renewal fees charged to mortgage licensees for 2017. Formerly, the reduction sunset on March 17, 2016, now March 17, 2017.

SALES AND WARRANTIES

CASE LAW

Product liability – Statute of Limitations

CASE NAME: *Jacks v. Vanderbilt Mortgage and Finance, Inc.*
DATE: *10/03/2016*
CITATION: *United States District Court, W.D. Oklahoma. Slip Copy. 2016 WL 5720835*

This is the third action brought by plaintiff in connection with a manufactured home constructed by CMH Manufacturing, Inc. and sold by CMH Homes, Inc. The first action was filed against CMH Homes, CMH Manufacturing, and VMF, alleging negligence, manufacturer's products liability, breach of implied warranty of habitability and rescission. The Court dismissed he claims against VMF without prejudice for untimely service.

The second action was filed against CMH Homes, CMH Manufacturing, and VMF, alleging the same causes of action. The Court dismissed VMF based upon plaintiff's failure to timely serve it with the summons and complaint.

The third, and instant, action was filed by plaintiff against VMF alleging the same causes of action. VMF moved for a judgment on the pleadings because: (1) plaintiff's claims were time-barred, and (2) the FTC Holder Rule does not permit plaintiff to impose liability on VMF for claims that plaintiff may have against the manufacturer.

Plaintiff alleged the time for bringing claims for negligence and products liability involving an improvement made to real property was governed by Okla. Stat. tit. 12, § 109. However, the Court noted that § 109 is not a statute of limitations; it is a statute of repose and sets an outer boundary in time beyond which no cause of action may arise for conduct that would otherwise have been actionable.

Here, plaintiff's negligence and products liability causes of action had accrued and, thus, the two year statute of limitations applied to these causes of action rather than the statute of repose set forth in § 109.

In Oklahoma, the statute of limitations for breach of implied warranty on a sale of goods is five years. Additionally, the statute of limitations on a breach of warranty claim begins to run at the time the allegedly insufficient goods are delivered and a breach occurs.

Plaintiff's breach of implied warranty of habitability cause of action accrued in January, 2010 when the home was delivered and installed and expired five years later in January, 2015, approximately one and a half years before the instant action was filed.

Further, in Oklahoma, the statute of limitations for rescission is five years. Accordingly, the Court found that plaintiff's rescission cause of action also accrued in January, 2010 and expired in January, 2015.

Finally, Okla. Stat. tit. 12, § 2004(I) has been interpreted to mean that an action is deemed dismissed on the 181st day after the filing of the petition, rather than the date of the order of dismissal, if the plaintiff had not shown good cause why service was not made. In the first action, plaintiff was given the opportunity to show cause why the claims against VMF should not be dismissed for failure to timely serve VMF. Plaintiff did not respond to the Court's May 5, 2015 Order, and the Court dismissed plaintiff's claims against VMF without prejudice. Because plaintiff did not show good cause why service was not made, the Court found that the first action was deemed dismissed as to VMF on June 20, 2013, the 181st day after the filing of the petition.

Accordingly, the Court granted VMF's Motion for Judgment on the Pleadings and dismissed the action.

TITLING AND PERFECTION

CASE LAW

No title - Rescission

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CASE NAME: *JERRY T. HURT, APPELLANT v. RAYMOND D. SPEARS, APPELLEE*
DATE: *09/30/2016*
CITATION: *Court of Appeals of Kentucky. Not Reported in S.W.3d. 2016 WL 5485579*

Spears sold Hurt a mobile home in an "as-is" condition. The contract acknowledged that Spears did not possess title documentation, and could not guarantee title could be obtained, but Spears would provide a Bill of Sale in lieu of the title.

Hurt paid the balance in full but Spears never provided the Bill of Sale.

Hurt learned that the mobile home was titled to Agnes Powell. Powell had sold the land on which the mobile home had been located, but not the mobile home itself, to Jimmy Lillard. The mobile home was in a state of disrepair and had a market value of zero. Lillard sold it to Spears for one dollar. Lillard made affirmative representations to Spears that he possessed legal title to the mobile home. Spears expended approximately $6,400 repairing the mobile home before offering it up for sale.

Hurt sued Spears for breach of contract, fraud, and violations of the Kentucky Consumer Protection Act.

The trial court found that: the mobile home had zero value at the time of the Lillard-to-Spears conveyance; Spears expended a significant amount of money to repair the home; and Hurt agreed to the purchase of the mobile home in an as-is condition, knowing Spears did not have title to it.

The trial court also issued the following conclusions of law: 1) the improvements performed by Spears were

greater than the market value of the home, therefore the interest of Powell was divested in favor of Spears; 2) Powell was entitled to damages in the amount of the market value of the home at the time Lillard took possession, which was zero; 3) because Spears had title to the mobile home, the contract between himself and Hurt was binding; and 4) Lillard owed no damages to any other party, nor was he entitled to damages from any other party.

Hurt was awarded all rights, title and interest in the home. All claims by Hurt against Spears were dismissed with prejudice. All claims against Spears by Lillard and Powell were dismissed with prejudice. The trial court also granted Spears' motion for attorney fees, finding him to be “clearly the prevailing party within this action.” The trial court also ordered the home sold to cover the award of attorney fees to Spears, with any surplus to Hurt. Hurt appealed.

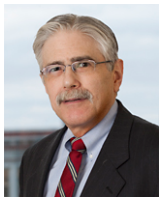
The appeals court found that the trial court applied the common law doctrine of accession to conclude that Spears had acquired title to the trailer. However, it is only when the property is converted into something specifically different in the inherent and characteristic qualities that a bona fide purchaser may obtain title to property under this doctrine. Here, Spears converted an uninhabitable mobile home trailer into a habitable mobile home trailer. These repairs did not create something specifically different in the inherent and characteristic properties of the mobile home.

Lillard, as a knowing possessor of the property in which he had void title, could pass nothing other than void title to Spears. Spears, having no legitimate ownership interest in the property, could not contract to pass legitimate ownership onto Hurt.

Both parties operated under the incorrect impression that Spears had an alienable ownership interest in the mobile home. This mutual mistake rendered the contract invalid. Hurt was entitled to rescission of the invalid contract.

Further, in light of these conclusions, the trial court's finding that Spears was the prevailing party in the action below was without legal or evidentiary support and therefore also erroneous.

The trial court’s judgment was vacated and the matter remanded.



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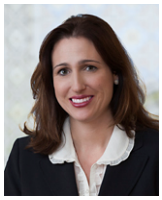

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