

Appellate Division Rules That A Lost Note Does Not Preclude The Right To Enforcement

December 4, 2018 | by Alex Lee

On November 16, 2018, the Appellate Division in the matter of *Investors Bank v. Javier Torres*, A-3029-16T4, affirmed a decision granting final judgment with respect to the issue of foreclosure on a mortgage which secured a note that was lost. Here, the Court was presented with the question of whether a party could enforce a note when it had been properly assigned the note, but never had actual possession of the note.

In this matter, Investors Bank's assignor CitiMortgage had acquired the note and mortgage in a merger with the originating lender. Citi later assigned the mortgage to the plaintiff, but the note was lost prior to the assignment, and the original note could not be located. Defendant primarily challenged the trial court's decision granting foreclosure based on the argument that the Plaintiff never owned or controlled the underlying debt, because Plaintiff was never in actual possession of the instrument as required by statutory language. Thus, Defendant argued that since plaintiff did not possess the note at the time it was lost, a literal plain language reading of the statutory language prohibited the plaintiff from enforcing the note.

Nevertheless, the Appellate Division in an opinion by Judge Moynihan, ruled that as a matter of statutory interpretation, N.J.S.A. 12A:3-309(a), did not preclude enforcement by the assignee of a mortgage and the transferee of a lost note. While the Court recognized other jurisdictions adopting a similar interpretation to that presented by Defendant, the Court came to its decision finding that the UCC had later been amended to eliminate the possession requirement, even though New Jersey had not yet adopted the amendment. The Court also noted that this approach was in line with the widely recognized common law principles of assignment long recognized by courts, as well as in harmony with other New Jersey UCC provisions.

The Court further found that as a matter of policy, that “permitting the transfer of a lost note promotes the UCC’s purpose of expanding commercial practices of contract-parties such as Citi and plaintiff, which intended the transfer of rights to enforce the lost note along with the assignment of defendant’s mortgage.” The Court also found that the reading was consistent with equitable principles that guard against unjust enrichment. To adopt Defendant’s argument would allow the Defendant to stay in the mortgaged premises and to ignore his obligations to pay principal, interest, taxes, and insurance premiums while adding to a debt that exceeded \$900,000.

The Court also rejected Defendant’s argument that the lost-note affidavit was inadmissible as it was not properly authenticated, finding that it was in fact prima facie genuine, and could also qualify as a business record. Finally, the Court also rejected Defendant’s argument that there were any genuine issues of fact for trial, as the allegedly disputed facts were insubstantial, and Defendant had failed to offer any evidence that the note had not been lost, and did not challenge that plaintiff had possessed the recorded assignment of mortgage, or argue that the note had been transferred or that the mortgage assigned to any party other than plaintiff.