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08/11/2014

Lender Allowed To Foreclose But Punished By Court For Violating Consumer Fraud Act

by: [Peter J. Gallagher](#)

A New Jersey trial court issued an interesting opinion last week, allowing a lender to foreclose but imposing significant limitations on the lender because the court concluded that the lender had violated the Consumer Fraud Act.

In [Freedom Mortgage Corporation v. Mamie E. Major](#), borrower wanted to refinance the mortgage on her home to lower the 5 5/8 interest rate and take out additional money to help pay for her grandson's college tuition. Defendant was 70 years old, earned approximately \$30,000 per year and owed \$341,500 on her existing mortgage. At the time of the refinance her home had a market value of \$365,000, but she eventually abandoned her plan to obtain more equity from the home and instead refinanced just to lower the interest rate.

Her existing home loan was an FHA-insured loan and was current, so Freedom Mortgage Company treated the refinance as an FHA "Streamline loan," which required little or no new or extra documentation and did not require a new appraisal. According to Freedom, FHA guidelines allowed it to rely on the underwriting performed by the prior lender. Nonetheless, before approving the refinance, Freedom used a "net benefit" test to determine whether it was justified, and concluded that it was because both the interest rate and the monthly payment would be lower under the new loan.

At the closing, borrower signed a HUD-1A Settlement Statement that showed a new loan of \$354,005, which included the payoff of the prior loan, the payoff of open tax balances, and \$11,479.65 in settlement charges, payable to Freedom, for, among other things, a loan discount fee, commitment fee, application fee, and courier fee.

After making six payments on the new loan, borrower defaulted. Freedom filed a foreclosure complaint, which borrower answered. Freedom then moved to strike the answer and proceed with the foreclosure as uncontested. The court granted this motion, but found that there was a factual issue as to whether Freedom violated the New Jersey Consumer Fraud Act ("CFA") in connection with the refinance. After trial on this issue, the court concluded that Freedom had, in fact, violated the CFA.

The court found that, based on the borrower's age, her income, and her "future income prospects," it should have been "obvious" to Freedom that her "annual income did not support the monthly mortgage payment itself." Accordingly, the court concluded that the loan was granted "to engender fees for the lender and not for the benefit of the borrower." On this point, the court noted that borrower's monthly payment under the new loan was reduced by only \$63, while the costs of the refinance were more than \$11,000, therefore it would take more than five years for borrower to realize any benefit from the refinance.

Based on these conclusions, the court held that while Freedom had demonstrated its right to foreclose, in connection with its foreclosure, it: had to forfeit the \$11,479.65 in fees it charged to



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PETE ON REAL ESTATE LAW

I am a commercial litigator residing in the real estate group at our firm. This blog reflects my work in both fields, which sometimes, but don't always, overlap. My goal for this blog, as both a professional lawyer and a self-professed law geek, is to not only raise a brow with legal issues -- real estate related and otherwise -- but also to whet your appetite with some unusual and interesting topics.

KATE ON DEVELOPMENT AND REDEVELOPMENT

Redevelopment, land use, and real estate shape the character, culture, and value of our community. I concentrate my practice in these areas, providing redevelopment, land use, and real estate advice, as well as counseling clients on related issues like financial incentives, affordable housing, the Highlands Act, and condominium law because thoughtful and strategic development is so crucial to the success of the broader community. Our blog will highlight new developments and recent trends in the real estate and redevelopment world. Feel free to post comments or contact me should you need any additional information!

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borrower in connection with the refinance; had to limit its foreclosure judgment to the payoff amount of the original loan; had to forfeit interest earned since the date of default; was liable to borrower for treble damages, calculated as \$34,438.95 (three times the fees charged by Freedom in connection with the refinance) less the \$11,479.65 the court ordered Freedom to forfeit; had to delay filing for entry of judgment to allow borrower to sell her home or refinance with a new lender; and had to pay defendant's counsel fees of \$26,165.

While the court's decision in this case was obviously influenced by the unique and unsympathetic underlying facts, and its decision may ultimately be appealed and either reversed or amended, it nonetheless serves as important reminder to lenders -- particularly residential lenders, and particularly in New Jersey - that courts will closely scrutinize their actions when pursuing foreclosure.

Posted by [Peter J. Gallagher](#) on 08/11/2014 at 10:12 AM in [Foreclosure](#), [Litigation](#), [Transactions](#) | [Permalink](#)

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