

BURR ALERT

Georgia District Court Offers New Authority on Issue of "Full Authority" Under O.C.G.A. § 44-14-162.2

By Ashby K. Fox and Monika V. Scott

In the latest chapter of the Georgia courts' attempts to interpret Georgia's foreclosure notice statute, O.C.G.A § 44-14-162.2, the U.S. District Court for the Northern District of Georgia issued an opinion on February 25, 2014 granting the plaintiffs' motion for leave to file an amended complaint to assert that the foreclosure notice that they received was deficient because it did not include "the name, address and telephone number of the individual or entity who shall have the full authority to negotiate, amend, and modify all terms of the mortgage." Chae Yi You and Chur K. Bak v. JP Morgan Chase Bank, N.A. and Federal National Mortgage Association, No. 1:12-CV-202-JEC-AJB, slip op. (N.D. Ga. February 25, 2014). Specifically, the Court found that the plaintiffs' amended complaint stated a plausible claim for relief for wrongful foreclosure by alleging that the foreclosure notice was invalid because, although the foreclosure notice identified the servicer of plaintiffs' loan, it failed to identify Federal National Mortgage Association ("Fannie Mae"), who plaintiffs alleged was the entity with the "full authority to negotiate, amend, and modify" the plaintiffs' loan by virtue of its servicing guidelines. You at 6.

In You, the plaintiffs asserted a claim for wrongful foreclosure in their original complaint, alleging that the foreclosure notice was deficient because it failed to identify the "secured creditor" of the loan. You at 2. The defendants, Fannie Mae and JP Morgan Chase Bank, N.A. ("Chase"), moved to dismiss the complaint. In ruling on the motion, the District Court certified several questions to the Georgia Supreme Court, including the question of whether O.C.G.A § 44-14-162.2 requires that the secured creditor be identified in the foreclosure notice. You at 2. The Georgia Supreme Court answered this question in the negative, concluding that O.C.G.A § 44-14-162.2 requires only that the foreclosure notice identify the individual or entity with the "full authority to negotiate, amend and modify" the loan and does not require that the "secured creditor" be identified in the foreclosure notice. See You v. JP Morgan Chase, 293 Ga. 67, 743 S.E.2d 428 (May 20, 2013). However, the Supreme Court did not address the question of whether the servicer of a loan can have "full authority to negotiate, amend, and modify" the loan when it is bound by servicing guidelines.

The plaintiffs in You responded to the Georgia Supreme Court's opinion with a motion for leave to amend their complaint pursuant to Federal Rule 15(a). Although they conceded that their claims that the foreclosure notice was deficient for failing to identify the "secured creditor" were no longer viable, the plaintiffs sought to amend their complaint to allege that the foreclosure notice was deficient because it did not identify the individual or entity with the "full authority" to negotiate "all terms of the mortgage." You at 3. Specifically, the plaintiffs argued that the foreclosure notice, which identified Chase as the entity with "full authority," did not comply with O.C.G.A § 44-14-162.2 because Chase's authority to modify the mortgage was limited by Fannie Mae's servicing guidelines

and regulations. You at 4-5. The District Court agreed with the plaintiffs that their amended complaint stated a plausible claim for wrongful foreclosure under Georgia law, and granted the plaintiffs' motion for leave to amend. You at 6.

In so holding, the District Court rejected the defendants' argument that the proposed amendment was futile because the "substantial compliance" doctrine required dismissal of the amended claims. See TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 446, 691 S.E.2d 300, 303 (2010) (finding that providing a creditor's counsel's contact information substantially complied with the statutory foreclosure notice requirements even though the attorney himself did not have full authority to modify the loan because the debtor was "apprised of the appropriate contact information for [the lender] if [the debtor] wished to pursue a modification of the security deed"); Stowers v. Branch Banking & Trust Co., 317 Ga. App. 893, 895, 731 S.E.2d 367, 369 (2012) (following TKW and finding that substantial compliance with O.C.G.A. § 44-14-162.2 was sufficient where the notice identified only the lender's attorney, who was neither the secured creditor nor the entity with full authority to modify the loan, because the attorney "was authorized to receive communications from debtor, to convey them to the bank, and to convey the bank's position to the debtor"). The District Court instead held that the "the Georgia Supreme Court was clear that the notice must identify the entity with 'full authority' to modify 'all terms of the mortgage' [Cit.] If Chase lacked the requisite authority, as alleged in the amended complaint, then the foreclosure was arguably wrongful under Georgia law." You at 5.

The District Court's opinion in You raises additional questions about the application of the "substantial compliance" doctrine for foreclosure notices sent pursuant to O.C.G.A. § 44-14-162.2. However, TKW and its progeny remain good law in Georgia. Furthermore, at least one other District Court in Georgia has followed the substantial compliance doctrine and rejected claims similar to those before the Northern District in You. See Puissant v. Bank of America Home Loan Servicing, LLP, et al., No. 5:12-CV-388, 2013 U.S. Dist. LEXIS 171396, *17 (M.D. Ga. December 5, 2013) (relying on TKW and Stowers and granting motion to dismiss where plaintiff alleged that "the notice of foreclosure sent by the loan servicer failed to satisfy the requirements of O.C.G.A. § 44-14-162.2 because it incorrectly named the servicer as the entity with the 'full authority to negotiate, amend and modify all terms of the mortgage'" and "Fannie Mae was the entity with the requisite authority and that, as the servicer of Fannie Mae's loans, [the servicer] only had limited authority to negotiate, amend, or modify the terms of those loans."). Thus, the District Court's opinion in You has added to the uncertainty of foreclosure notice requirements under O.C.G.A. § 44-14-162.2 and the duties of loan servicers and investors in the non-judicial foreclosure process.

If you have any questions or need further information, please contact:

Ashby K. Fox in Atlanta at (404) 685-4279 or afox@burr.com

Monika V. Scott in Atlanta at (404) 685-4279 or amscott@burr.com

or your Burr & Forman attorney with whom you regularly work.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.