

## **COURT ENFORCES MODIFICATION SETTLEMENT MADE THROUGH MEDIATION PROGRAM**

The Supreme Court of New Jersey reversed the decision of the Appellate Court, and held that **a settlement that a borrower and a lender reached during mediation pursuant to the Residential Mortgage Foreclosure Mediation Program was enforceable because the borrower fulfilled all contingent terms making the agreement permanent.**

A copy of the opinion is available at: [Link to Opinion.](#)

The borrower obtained a home mortgage loan from the lender (“bank”). In 2006, the borrower defaulted on her loan. The bank filed a foreclosure complaint in chancery court. In August 2007, the bank obtained a final judgment in the foreclosure action.

In 2010, the parties participated in the Residential Mortgage Foreclosure Mediation Program. The mediation resulted in a settlement that included a permanent modification of the loan.

The parties used a judicially approved Foreclosure Mediation Settlement Memorandum form to memorialize the agreement. The preamble states: “The parties agree that the foreclosure action is resolved upon the following terms, conditions, and covenants.”

The bank’s attorney handwrote the modification agreement’s terms in the memorandum’s blank section, including that “[i]f all trial payments are made [bank] will make modification permanent, but if any payment is missed, [bank] will continue with foreclosure.” The memorandum also states that “[t]he parties agree that when executed this mediation settlement memorandum shall be final, binding and enforceable upon all parties.” The borrower’s and the bank’s attorney signed the agreement.

Thereafter, the bank sent the borrower three proposals differing from the permanent modification. The bank claimed the proposals were provisional. The borrower continued making payments under the May 2010 agreement, and declined the bank’s newer proposals. In response, the bank referred the loan to foreclosure because the borrower did not sign a proposed May 2012 modification agreement. The borrower then filed a motion pro se asking the court to enforce the permanent modification.

The trial court again referred the parties to mediation, but the parties did not settle their differences. The trial court ultimately denied the borrower's request to enforce the permanent modification finding "the 2010 mediation agreement was provisional and not enforceable as a final settlement agreement." Thereafter, the bank bought the borrower's home in a sheriff's sale.

The Appellate Division affirmed finding that there was no meeting of the minds and the May 2010 agreement was "a temporary agreement to be replaced by a permanent mortgage modification signed by the parties."

This appeal to the New Jersey Supreme Court followed.

The Court initially noted that the primary issue is whether the bank and the borrower "entered into a permanent or provisional loan modification agreement in May 2010." Thus, the Court reviewed the ruling de novo because it concerned the meaning or validity of a contract. *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 302 (2016).

However, the Court noted that the dispute also implicates the Residential Mortgage Foreclosure Mediation Program.

As you may recall, the New Jersey Judiciary created the mediation program in response to the 2007-2008 housing market crash and foreclosure crisis. The program mandates mediation when homeowners who reside in their homes contest foreclosure actions. The program is designed "to bring homeowners and lenders to amicably mediated resolution" and not to "foster endless rounds of mediation or litigation." This is consistent with New Jersey's public policy that also favors settling disputes through mediation. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 253-54 (2013). The Court noted that the program will only meet its goals if courts enforce mediation settlements. The Court looked to contract law to interpret the settlement agreement, noting that a valid settlement agreement requires an offer and acceptance. The agreement's terms must be sufficiently definite so it is possible to ascertain each party's performance with reasonable certainty. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992). The New Jersey Supreme Court noted that the agreement here is "sufficiently definite and detailed to indicate, with reasonable certainty, that the parties intended a permanent loan modification." The Court found it significant that the bank's attorney drafted the key terms because that means

the Court construes any ambiguity against the bank. See *In re Estate of Miller*, 90 N.J. 210, 221 (1982). The Court's task then "is to enforce the contract according to its terms, giving those terms their plain and ordinary meaning." *Kiefer v. Best Buy*, 205 N.J. 213, 223 (2011). Moreover, the Court will not rewrite the contract for the parties better than the one they drafted.

The agreement created a trial to permanent modification plan contingent on signed modification documents, an initial down payment, and making all the trial payments. The borrower fulfilled these terms.

Thus, the Court held that the agreement "has all of the indicia of a permanent and binding agreement." According to the Court, to save her home, the borrower made payments in reliance on a reasonable interpretation of the agreement.

The bank argued that "it reserved to itself the right to reduce the length of the loan, to require higher monthly payments, and to set an increased amortization rate." However, the New Jersey Supreme Court observed that the agreement does not state that after 12 months the bank could demand that borrower agree to a new loan modification with different terms, including shorter maturity date, higher monthly payments, and increased amortization rates.

The Court also found that the agreement does not compel the borrower to accept any new proposed loan modification agreement. The Court buttressed this conclusion with a policy rationale recognizing that the same foreclosure crisis that overwhelmed the borrower also caused unsophisticated homeowners to enter into unfavorable agreements for the extension of credit to save their homes. *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 582 (2011).

The Supreme Court next turned to whether the parties amended the May 2010 agreement via a novation. The Court found no novation of the May 2010 agreement occurred because both parties did not intend to extinguish the old contract, as required.

Specifically, although the borrower made increased monthly payments after receiving the new proposed modifications, the Court noted she did not sign any new proposed loan modification agreement. Further, the Court noted that the borrower never "voluntarily abandoned" the May 2010 agreement. Although the borrower subsequently participated in mediation, likely to

avoid losing her home in the Court's view, she did not sign any documents necessary to "execute a contract superseding" the May 2010 agreement. Instead, before the sheriff's sale, the borrower's newly retained counsel renewed the borrower's efforts to enforce the agreement.

In sum, the Court found that the bank and the borrower entered into the agreement through the mediation program. According to the Court, the agreement became permanent when the borrower performed her part of the bargain. Moreover, when dealing with vulnerable homeowners facing foreclosure "chancery courts are courts of equity and therefore must take pains to ensure that such homeowners receive the protection of the law from lending institutions and servicing agents who may seek unfair advantage." The trial court therefore erred when it denied the borrower's motion to enforce the agreement.

The New Jersey Supreme Court thus reversed the judgment of the Appellate Division and remanded the matter to the trial court for proceedings consistent with its opinion. On remand, if the borrower cannot obtain specific performance because the trial court determines that a bone fide purchaser bought her home, then the Court held that borrower is entitled to any damages she sustained for breach of contract.