FLORIDA FORECLOSURE REVERSED NO PROOF OF COMPLIANCE WITH HUD REGULATION

On December 2, 2016, Florida's Fifth District Court of Appeal filed an opinion overturning a foreclosure sale on grounds that the foreclosing bank failed to meet with the borrower in person prior to filing suit, as required by HUD regulations. See Palma v. JPMorgan Chase Bank, N.A., et. al., Case No. 5D15-3358 (Fla. 5th DCA Dec. 2, 2016). The promissory note at issue in Palma contained a clause expressly incorporating HUD regulations into the terms of the loan, including 24 C.F.R. § 203.604(b) which requires, among other things, that "the mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three monthly installments due on the mortgage are unpaid. . . ." While the bank alleged generally that it complied with all conditions precedent to foreclosure, as the bank was permitted to do under Fla. R. Civ. P. 1.120(c), the borrower answered the complaint by specifically denying that the bank complied with the face-to-face interview requirement. At trial, the bank did not present evidence of its compliance with 24 C.F.R. § 203.604(b), or any of the enumerated exceptions thereto. The borrower moved to dismiss at the end of the bank's case in chief, but the trial court ruled that the borrower's specific denial was an affirmative defense requiring proof from the borrower. The borrower promptly recalled the bank's representative who testified that she did not have information on whether the required interview was offered or refused. The borrower then testified that she would have participated in the face-to-face interview, but that the bank never offered her that opportunity. Although the borrower renewed her motion for involuntary dismissal, the trial court found in favor of the bank and entered a foreclosure judgment.

The borrower appealed to the Fifth District Court of Appeal, which had recently held that a borrower bears the burden of demonstrating that HUD regulations apply to a loan before a 24 C.F.R. § 203.604(b) argument can be considered. See Diaz v. Wells Fargo Bank, N.A., 189 So. 3d 279, 284 (Fla. 5th DCA Apr. 8, 2016). In the instant case, however, the appellate court had no difficulty finding the HUD regulations applied, as they were specifically incorporated into the loan documents by reference. The appellate court held that a specific denial of a condition precedent is not an affirmative defense and that the bank, as plaintiff, bears the burden of proving that a specifically denied condition was satisfied or excused. The appellate court reversed the judgment and remanded the case finding that the bank had not provided any evidence that it engaged in a face-to-face interview before filing the complaint or that any of the enumerated exceptions to 24 C.F.R. § 203.604(b) applied.

There are multiple lessons to take from Palma at different stages of the mortgage servicing process. To name a few, it is good practice for banks, servicers and foreclosure counsel, alike, to: (i) carefully review the note and mortgage to identify any regulations that might modify the obligations of the parties at the time of boarding and the time of default; (ii) determine whether all applicable regulations and contractual conditions are satisfied or otherwise excused before notices are sent to the borrower and especially before a complaint is filed; and (iii) to inform the bank or servicer's litigation specialists and witness of any contested conditions precedent well before trial so that the servicer can assess whether to escalate the matter or proceed to trial.