MOVING TO RESET FORECLOSURE SALE DURING LOSS MITIGATION DID NOT VIOLATE RESPA OR FDCPA

The U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a borrower's claim, holding that a mortgage servicer's motion to reschedule a previously set foreclosure sale after it approved the borrower for a trial loan modification plan did not violate the federal Real Estate Settlement Procedures Act because the motion to reschedule did not move for an order of sale.

A copy of the decision in *Landau v. RoundPoint Mortgage Servicing Corp.* is available at: Link to Opinion.

A borrower defaulted on her mortgage loan and her lender filed a foreclosure action. The lender obtained final summary judgment in its favor and set a foreclosure sale date. The sale date was continued several times to allow the borrower to apply for a loan modification.

The servicer approved a trial modification plan that required six monthly payments, but instead of cancelling the foreclosure sale outright, moved to reschedule the sale due to the ongoing loss mitigation efforts. The borrower responding by filing a motion to cancel the sale noting that she had made the first of the six required payments on her loan modification plan. The foreclosure court granted the borrower's motion and cancelled the sale.

Subsequently, the borrower sent the servicer a notice of error under 12 C.F.R. § 1024.35 of Regulation X alleging that the servicer had violated section 1024.41(g) by only moving to reschedule the sale because it did not take all "reasonable steps" to cancel the sale.

Before receiving a response from the servicer, the borrower filed a complaint against the servicer in the trial court alleging that it violated RESPA, 12 U.S.C. § 2601, et seq., and the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., by moving to reschedule the foreclosure sale after the servicer had approved her for a loan modification trial plan. The borrower based her FDCPA claim on the same conduct that she alleged violated RESPA and Regulation X.

The servicer moved to dismiss arguing that it did not violate RESPA because the foreclosure sale date was set before the servicer approved the loan modification trial plan. Thus, when it moved to reschedule the existing sale date the servicer did not "move for foreclosure judgment or sale, or conduct a foreclosure sale," in violation of section 1024.41(g).

The trial court granted the motion to dismiss because RESPA and Regulation X "did not prohibit a request for a foreclosure sale to be rescheduled while the borrower is engaged in a modification plan where the foreclosure judgment and order of sale were entered before the commencement of the modification plan." The trial court also dismissed the FDCPA claim because it was based on the alleged RESPA violation.

This appeal followed.

Initially, the Eleventh Circuit noted that **RESPA prohibits a mortgage servicer from moving for a "foreclosure judgment or order of sale, or conduct[ing] a foreclosure sale" when a borrower "submits a complete loss-mitigation application at least 37 days before a scheduled foreclosure sale."**

The issue here then is whether filing a motion to reschedule an existing foreclosure sale that was set before the borrower submitted a completed loss-mitigation application is a motion for "order of sale." The Eleventh Circuit concluded that it does not because the regulation "does not, by its terms, prohibit a servicer from moving to reset an already-scheduled foreclosure sale."

As Regulation X does not define the phrase "order of sale," the Eleventh Circuit examined its common usage for its meaning. It found that "order" generally means "a command, direction, or instruction." The word "of" is "a function word indicating a possessive relationship." And "sale" in this context is "the transfer of property or title for a price."

Together these definitions mean **the phrase "order of sale" indicates "a legal document issued by a court that commands or directs property to be sold so that a transfer of ownership of title to the property will occur for a price." Thus, "a motion to simply reschedule a foreclosure sale that was previously set in accordance with an already-existing order of sale" is not "the same thing as a motion for order of sale itself." Instead, the motion is merely a "housekeeping-type motion that does no more than seek permission to change the date of sale that the court has previously ordered."**

The Eleventh Circuit observed that section 1024.41(g) supports its interpretation because it only prohibits three things: "motions for foreclosure judgment, motions for orders of sale, and foreclosure sales themselves." Motions seeking a foreclosure judgment and a foreclosure sale are plainly "substantive and dispositive motions." As such, a motion for an order of sale is also "a substantive and dispositive motion." **The motion to reschedule the existing sale date was not a substantive**

or dispositive motion any more than "a motion that seeks to reschedule a hearing on a motion to dismiss."

The Eleventh Circuit also concluded that the borrower's interpretation was "inconsistent with the consumer-protection purposes of RESPA. A servicer that already obtained a foreclosure order would risk foregoing its ability to foreclose by engaging in loss-mitigation efforts if moving to reschedule a foreclosure sale that was already set violated RESPA. Thus, "servicers would be heavily disincentivized against offering loss-mitigation options to delinquent borrowers and helping them complete loss-mitigation applications—any time a foreclosure sale had already been scheduled."

Finally, the Eleventh Circuit considered the borrower's argument that the Consumer Financial Protection Bureau's interpretation of Regulation X supports the borrower's interpretation of section 1024.41(g). The Eleventh Circuit rejected this argument for several reasons. First, it did not have to follow the CFPB's interpretation because "the regulatory language unambiguously answers the question at Issue."

Additionally, the CFPB commentary is consistent with the outcome here for two reasons. First, the CFPB commentary suggests that Regulation X only prohibits filing dispositive motions, not administrative motions to reschedule an existing date. Second, the servicer here sought to suspend the foreclosure sale which is consistent with the CFPB commentary that "it is appropriate to suspend a foreclosure sale when a borrower is performing under an agreement on a loss mitigation option." See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,833 (emphasis added). That is precisely what happened here. The servicer suspended the sale and the sale did not occur.

Thus, the Eleventh Circuit affirmed the trial court's dismissal of this action.