

Third Circuit Upholds Mortgage Foreclosure Over Borrower's Negligence Claims Against Lender

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Every recession spurs a new wave of lender liability claims in defense of foreclosure actions, and the Great Recession was no different. In September, 2008, a Princeton, New Jersey homeowner obtained a \$1.5 million construction loan from Bank of America to finance a home renovation. The construction loan agreement conditioned disbursements during construction on successful inspections of the project, but expressly disclaimed any obligation of the lender's part to supervise the construction or conduct the inspections for the benefit of the borrower. In 2012, after the borrower had failed to complete the project by its stated completion date of March 2010, and failed to correct his defaults, lender sued for foreclosure. The borrower responded with 25 affirmative defenses and 13 counterclaims, all of which were based on allegations that lender negligently and improperly inspected the construction project as a condition of loan disbursements.

Specifically, borrower alleged that since he lacked experience with construction projects or lending, despite contrary language in the loan agreement, he was induced by lender to believe that its agents were assuming responsibility to oversee and monitor the construction project by making disbursement tied to its inspections and that lender's procedures existed to ensure the timely completion of the project at or under cost. Borrower further alleged that because lender failed to adequately monitor the project and refused to provide him with relevant inspection reports and because lender's representatives told him that construction progress was "fine" and "looked good", lender had created a special relationship with him which gave rise to a duty of care, a duty which lender subsequently breached. As a result, borrower charged that lender was complicit in the events giving rise to the alleged default. The lower court was not swayed by these arguments, especially in light of the fact that borrower did not dispute the core elements of a mortgage

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foreclosure case, i.e., existence of the debt, validity of the mortgage and default under the note. The court dismissed the counterclaims and subsequently granted lender a judgment of foreclosure. The borrower appealed.

On March 20, 2017, the United States Court of Appeals for the Third Circuit affirmed the lower court. In *Bank of America, N.A. v. Westheimer*, 2017 WL 1048054, the court found that borrower showed no special circumstances creating a fiduciary duty on lender's part because the loan agreement assigned to borrower a duty to hire contractors, disclaimed quality assurances and contained an integration clause, and further because lender did not encourage borrower to rely on its advise or conceal its self-interest. In reaching its decision, the court summarized New Jersey law on this issue: "[A]bsent an egregious breach of good faith, there is 'no duty on the part of lenders to disclose information they may have concerning the financial viability of the transactions the borrowers were about to enter.' And in light of the clear language of the Agreement to the contrary, [borrower] cannot meaningfully show that BoA owed a duty to conduct the inspections for *his* benefit or that he reasonably relied on them for that purpose."

The *Westheimer* case does not make new law in New Jersey. It does confirm that under New Jersey law, creditor-debtor relationships rarely give rise to a fiduciary duty.