

LENDING AND RESTRUCTURING ALERT SUMMER 2007

Lender Found to Bear Burden of Mortgage Fraud by Identity Theft

Just as stories continue to proliferate on ever-increasing instances of mortgage fraud (see, e.g., www.mortgagefraud.org) comes a notable twist from the state courts in New York. In this instance, the burden of the identity theft underlying the fraud was placed on the lender.

The case. A seemingly routine foreclosure action brought by a home mortgage lender against the alleged mortgagor and record owner of the New York residence.

The allegations. The lender moved for summary judgment and the appointment of a referee. The defendant, however, contended that he was the victim of identity theft, never sought or received any services or funds from the lender, never signed the subject note or mortgage nor authorized anyone to do so on his behalf. Apparently convinced of the identity theft, the lender did not dispute these contentions. Instead, the lender claimed the foreclosure was in the nature of a quiet title action required to clear title and since the defendant had no legal interest in the mortgaged premises the lender had the right to exercise all of its rights against the same. In response, defendant pointed out that whoever signed the mortgage apparently never received title in his actual name, never then possessed any property right in the residence and thus could not have granted any property rights, including the right to foreclose, to anyone. In short, it was argued that the lender could not foreclose on a mortgage that in theory was never granted nor existed.

The decision. Summary judgment was granted in favor of the defendant and the foreclosure action was dismissed. First, the New York state court determined that it was likely the “true owner” existed somewhere and absent joinder of that necessary party the action could not continue. Citing to an earlier decision, the court reiterated that a foreclosure judgment on a fraudulent mortgage would have no legal effect. However, the court did not stop there and used the opportunity to instruct that it was incumbent upon a lender to review the identifications presented to it and identify any inconsistencies within or among the documents provided during the application process.

Conclusion. Identity theft has mushroomed over the past decade. It has been referred to as “a financial plague afflicting millions of victims and costing billions of dollars in losses to consumers, business and financial institutions.” According to the New York courts, the ultimate burden for detecting this crime during the lending process may rest with the lender.