

## **DEFEATING COUNTERCLAIMS ALLEGING MEDIATION MISCONDUCT IN CONNECTICUT.**

Geoffrey Milne, Managing Partner of Connecticut Litigation, [Geoffrey.Milne@mccalla.com](mailto:Geoffrey.Milne@mccalla.com)

The Connecticut Supreme Court issued a significant opinion in 2019, United States Bank Nat'l Ass'n, Trustee v. Blowers,<sup>1</sup> addressing the "making, validity and enforcement" test, which involves defenses and counterclaims in a foreclosure action. The issue narrowly framed for the Supreme Court was whether a trial court order striking special defenses and counterclaims that challenged conduct both before and after the filing of the foreclosure satisfied the test. The borrower sought mediation but was unable to reach a loan modification. The borrower then filed special defenses of unclean hands and equitable estoppel, based on activities occurring during and after the mediation process. The counterclaims alleged negligence and violations of CUTPA. The opinion sets forth the following background: In early 2010, the defendant fell behind on his mortgage payments due to decreased business revenue resulting from the "Great Recession." Shortly thereafter, the plaintiff, through its servicing agent, reached out to the defendant and offered him a rate reduction that would result in a monthly mortgage payment of \$1950. After the defendant successfully completed a three-month trial modification period, the plaintiff informed the defendant that the reduced monthly amount previously offered was too low. Thereafter, over an approximately two-year period, the plaintiff similarly offered at least four additional modifications after accepting trial payments from the defendant. Each successive modification offer increased the defendant's monthly payment.

In April 2012, the defendant contacted the state's Department of Banking, which intervened on the defendant's behalf, "resulting in an immediate modification being received." Within months, however, the plaintiff notified the defendant that his monthly payment was increasing nearly 20 percent from that modified payment. The defendant was unable to afford the increased payments but continued to make the monthly payment set by the April modification until October 2012, when the plaintiff rejected them as "partial" payments.

Although the plaintiff offered a modification at one point, it could not be finalized because the financial information on which it rested was more than four months out of date by the time it was presented to the defendant.

The defendant alleged that the foregoing pre-foreclosure and post-foreclosure misconduct not only frustrated his ability to obtain a proper modification but also caused thousands of dollars in additional accrued interest, attorney's fees, escrow advances, and other costs to be added to the debt being claimed by the plaintiff in the foreclosure action. In his negligence counterclaim, the defendant

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<sup>1</sup> United States Bank Nat'l Ass'n, Tr. v. Blowers, 332 Conn. 656 (2019).



50 Weston Street  
Hartford, CT 06120  
T. (860) 240-9140  
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further alleged that the unnecessary and negligent prolonging of this process had ruined his credit score, which adversely impacted his business and personal affairs, and had caused him to incur significant expenses for legal representation and other professional services. The defendant claimed that the plaintiff should be equitably estopped from collecting the damages it caused by its own misconduct and that the plaintiff's attempt to foreclose should be barred by the doctrine of unclean hands. He further sought compensatory and punitive damages, injunctive relief, and attorney's fees under his counterclaims.

The trial court struck the counterclaims, on the basis that they did not meet the making, validity and enforcement test, largely because the misconduct alleged occurred after the execution of the loan documents, but acknowledged that a foreclosure filed after a modification was reached could satisfy the nexus of the enforcement of the note. The special defenses were also stricken. The trial court ruled that because the special defenses did not allege that a modification was reached after the foreclosure was filed, that the defenses failed to satisfy the test. After the entry of a foreclosure judgment, the borrower filed an appeal.

The Appellate Court affirmed the trial court's judgment striking the defenses and counterclaims. The Connecticut Supreme Court granted certification to address the propriety of the making, validity and enforcement test, the proper "scope" of enforcement under that test if it does apply to foreclosure actions, and the sufficiency of the allegation that the parties had entered into a binding modification. The Supreme Court reversed the Appellate Court, making clear that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action, may form the basis for a defense to a foreclosure. In a footnote, the Connecticut Supreme Court raised the notion that the only remedy available by statute for misconduct during the mediation process was to file a motion for sanctions. The mediation scheme acknowledges "an expectation" that the parties will participate in the mediation process "in good faith, but without unreasonable and unnecessary delays" in an effort to reach an agreement to avoid foreclosure or to expedite or facilitate the foreclosure with reasonable speed and efficiency. General Statutes § 49-31k (7). It authorizes the court to impose sanctions on any party or counsel for engaging in "intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program" and provides that available sanctions "shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines." General Statutes § 49-31n (c) (2). Regrettably, counsel for the lender did not brief this argument at trial or in the Appellate Court, so it was not addressed by the Connecticut Supreme Court. There is case law in Connecticut supporting the notion that there is no right of action for misconduct occurring in a foreclosure mediation. See In Re Residential Capital, LLC, 2015 Bankr. Lexis 721.



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Lenders faced with defenses and counterclaims in a foreclosure which stem from alleged mediation misconduct are well advised to use the statutory provision and case law above to defeat such claims.