

## A New Chapter Ahead

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### You Must Record to Really Hear the Tune!



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What are the effects of an unrecorded loan modification (and failure to pay the applicable mortgage recording tax) on a lender's claim in a foreclosure action? In the recent case of *U.S. Bank Trust National Association v. Joseph Mordente et al*, the Suffolk County Supreme Court examined two issues on this point: whether an unrecorded loan modification (and failure to pay the applicable mortgage recording tax) (i) renders the loan modification void and (ii) is admissible in evidence to establish borrower's default.

In June, 2003, Joseph Mordente and Daniela Mordente (collectively, "Borrower") executed a consolidated note in favor of Wells Fargo (the "First Note"), secured by a mortgage (the "Mortgage") on real property in Yaphank, New York. In May, 2016, Borrower modified the First Note pursuant to a modification agreement in favor of Selene Financing LP, as attorney in fact for Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, solely as trustee for BCAT 2015-13ATT ("Selene"). Borrower modified the First Note again in April 2019 and in a third modification agreement on May 2, 2022 (the "Third Modification Agreement"), each in favor of Selene. The Mortgage and the first two modification agreements were recorded. The Third Modification Agreement was not recorded.

Selene moved for summary judgment. In moving for summary judgment in a foreclosure action, the plaintiff must establish a *prima facie* case through non-hearsay production of the mortgage, the unpaid note and evidence of default. [1] In response, Borrower cross-moved for summary judgment and opposed Selene's motion, arguing, amongst other defenses, that the Third Modification Agreement was never recorded and therefore invalid.

The Court rejected Borrower's argument, holding that whether the Third Modification Agreement was recorded is irrelevant to the rights between Selene and Borrower. The consequences of not paying the loan modification taxes (i.e., the mortgage tax) do not render the contract between the parties void, [2] as the taxing statute is procedural and not substantive in its effect.

Rather, the Court stated that the actual issue is whether the unrecorded loan modification is admissible in evidence to establish Borrower's default. Tax Law § 258 states, in part, that "[n]o mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged or recorded or received in evidence in any action or proceeding . . . ." Failure to pay the recording tax means that the Third Modification Agreement cannot be submitted as evidence to establish Borrower's default. Without evidence of default, the Court cannot determine whether Selene established its *prima facie* case.

Accordingly, the Court denied both motions for summary judgment. The case reaffirms settled law that while an unrecorded mortgage upon which mortgage tax has not been paid constitutes a valid grant of a mortgage that is substantively valid and binding, it cannot be enforced or submitted as evidence.

[1] See *Deutsche Bank National Trust Company v. Bowens*, 181 AD3d 871 (2d Dept. 2020); *Plaza Equities, LLC v. Lamberti*, 118 AD3d 687 (2d Dept. 2014).

[2] See *Bank of NY Mellon v. Samuels*, 55 Misc 3d 704 (Sp. Ct. Orange Co. 2017).