CADWALADER

The Leaves Are Changing But Is the Market?

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Wire You Foreclosing?

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Does a lender have the right to foreclose its mortgage if a payoff of such mortgage is made by wire transfer, but the payment does not make it to the lender's account? A recent case[1], heard on appeal by the New York Supreme Court Appellate Division, Second Department (the "Court"), explored this issue, specifically looking to the language of Article 4-A of the Uniform Commercial Code ("UCC"), which governs "funds transfer"[2] or what we commonly refer to as a "wire transfer," to issue its ruling.

The plaintiff in the case, U.S. Bank National Association ("US Bank"), was the holder of a mortgage on certain real property located in Bay Shore, New York (the "Bay Shore Property"). The mortgage was serviced by Ocwen Loan Servicing, LLC ("Ocwen").

Around August 5, 2011, the defendant, Peter Zaccagnino ("Zaccagnino"), purchased the Bay Shore Property. The terms of the purchase and sale included an agreement that US Bank's mortgage on the Bay Shore Property (the "Bay Shore Mortgage") would be satisfied by a wire transfer in the amount of $96,500 to Ocwen on or before August 26, 2011.

Ocwen provided to Zaccagnino and Zaccagnino's attorney, Joseph A. Faria ("Faria"), the account information for Ocwen's bank account, held at Wells Fargo, where the payoff wire transfer was to be sent, along with the loan number of the loan being paid off.

On or about August 5, 2011, Faria provided to TD Bank, wire transfer instructions for the payoff, which included Ocwen's Wells Fargo account number and the loan number for the loan that was being paid off, and TD Bank initiated the wire transfer to Ocwen's Wells Fargo account. The funds arrived at Wells Fargo, but Ocwen never received the funds. US Bank subsequently commenced an action to foreclose on the Bay Shore Mortgage.

Zaccagnino moved for summary judgment, citing the affirmative defense of payment based on the wire transfer made by TD Bank on Faria's instruction, to Ocwen's Wells Fargo account, which the lower court granted.

On appeal, the Court looked to Article 4-A of the UCC to determine whether the lower court's order should be affirmed. The Court found, for the purposes of the UCC, that Faria was the originator[3], TD Bank was the originator's bank, Ocwen was the beneficiary, and Wells Fargo was the beneficiary's bank.

In the case at hand, the parties did not dispute whether the payoff wire transfer was received by Wells Fargo in the amount required for the Bay Shore Mortgage payoff. Rather, the parties disputed whose fault it was that the payment was never credited to Ocwen's Wells Fargo account. US Bank argued that Zaccagnino had not satisfied his obligation to pay off the Bay Shore Mortgage, because even though the funds had been transferred to Wells Fargo, Ocwen never received the funds.

The Court disagreed, affirming the lower court's decision to grant summary judgment in favor of Zaccagnino based on Zaccagnino's affirmative defense of payment. Citing Section 4-A-406 of the UCC, which provides that (subject to exceptions not applicable to the case at hand), "the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order"[4], the court determined that US Bank had been paid when Faria caused TD Bank to make the wire transfer to Ocwen's Wells Fargo account, and Wells Fargo accepted the wire transfer. The "reason" that the wire transfer was "misplaced" was not relevant.

The Court further determined that Zaccagnino's obligation to pay off the Bay Shore Mortgage had been satisfied based on Section 4-A-406(b) of the UCC, which provides that if payment is made to satisfy an obligation, as described in the

preceding paragraph, “the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money. . . .”[5].

When an obligor makes a wire transfer to satisfy an obligation, in accordance with the terms of the UCC, the wire transfer is received by the beneficiary’s bank, and the funds are subsequently “misplaced”, such “misplacement” is not sufficient grounds for the beneficiary to successfully claim that the obligor has failed to satisfy its obligation, regardless of who is at fault for the “misplacement” of the funds. In fact, such circumstance is sufficient for the obligor to successfully claim that it has satisfied said obligation.

According to Article 4-A of the UCC then, once a funds transfer is initiated by an originator, made by the originator’s bank, and accepted by the beneficiary’s bank, the beneficiary is deemed to have been paid, and any related obligation of the originator that was to be satisfied by payment to the beneficiary of such funds by wire transfer, is deemed satisfied, notwithstanding whether the beneficiary’s bank actually credits the beneficiary’s account with such funds.

[1] *U.S. Bank N.A. v. Zaccagnino*, NY Slip Op. 01208 [214 AD3d 754] (2023).

[2] “Funds transfer” means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order. Uniform Commercial Code - § 4A-104(a).

[3] “Originator” means the sender of the first payment order in a funds transfer. Uniform Commercial Code - § 4A-104(c).

[4] Uniform Commercial Code - § 4A-406(a).

[5] Uniform Commercial Code - § 4A-406(b).

Building Safety Act 2022: Key Provisions for Property Owners

October 27, 2023

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The Building Safety Act 2022 (the “Act”) ushered in a comprehensive and rigorous building safety regime, particularly affecting certain residential buildings classified as “higher-risk building”.

In our previous article titled “**Building Safety Act 2022: What Lenders Need to Know**”, we discussed some of the new additional responsibilities, liabilities, and considerations that lenders may need to face to ensure compliance with the new legislation. In this article, we look at some of the new obligations imposed by the Act on property owners and landlords.

Higher-Risk Buildings

A "higher-risk building" (“HRB”) is defined in the Act as a building in England that meets the following criteria:

- is either at least 18 metres in height or at least seven storeys (excluding basements and independent sections meeting certain requirements); and
- contains at least two residential units, where a residential unit is defined as a dwelling or any other unit of living accommodation.

Notably, certain building categories are excluded from the HRB definition, such as care homes, hospitals, secure residential institutions, hotels, and military premises. Mixed-use buildings, however, can still qualify as HRBs under the Act, provided they meet the height and storey criteria. This means that if a building is used partially for residential purposes and partially for excluded purposes (for instance, a hospital and boarding for university students), it then may still be subject to HRB regulations.

The Act has applied to both occupied buildings and those under construction from 1 October 2023. New buildings that fall within the regime and are completed after must be registered before occupation. Property owners must obtain building control approval from the Building Safety Regulator before construction begins. Transitional arrangements may apply to HRBs under construction or not yet started; to qualify, an initial notice must have been given to the local authority (or full plans submitted) by 1 October 2023, and the relevant works must be "sufficiently progressed" by 6 April 2024.

Principal Accountable Person

HRBs must be registered with the Building Safety Regulator by the "principal accountable person" (“PAP”). The PAP is the organization or individual responsible for owning or legally obligated to repair the common parts of the building. In cases where there are multiple accountable persons, the PAP is the one who owns or is legally obliged to repair relevant parts of the building's structure and exterior. Failure by the PAP to comply with the registration deadline could be a criminal offense, carrying the risk of a fine which would continue to increase until the building has been registered, as well as two years' imprisonment for serious breaches.

After registration and occupation of the HRB, the PAP is responsible for various ongoing obligations, including applying for a building assessment certificate, displaying relevant notices and certificates, assessing and reporting on building safety risks, and managing resident requests and complaints. The PAP must also maintain a “golden thread” of information, meaning a digital record of relevant information kept throughout the building's lifetime. This will need to consist of records demonstrating that building regulations were complied with during construction and that the PAP is complying with its requirement to manage and mitigate building safety risks.

Relevance to Commercial Property

While it may be tempting to assume that the Act primarily impacts high-rise residential properties, this assumption is misleading. The Act has far-reaching implications for commercial property for several reasons:

- Some provisions apply to all properties, irrespective of height or use.
- Even where provisions relate to HRBs, mixed-use assets may fall within scope if they meet specific criteria.
- Commercial investments in multi-occupied residential assets, such as build-to-rent and purpose-built student accommodation, are becoming more prevalent.
- The Act also establishes a new standard that many in the industry may want to adopt, regardless of whether they are subject to the Act's provisions.

Closing Thoughts

The Act represents a significant change in building safety regulations, and it is imperative for property owners to comply with the new requirements to avoid potential legal consequences.

Please do not hesitate to reach out if you have further questions or require legal assistance with your compliance efforts.

Recent Transactions

October 27, 2023

Here is a rundown of some of Cadwalader’s recent work on behalf of clients.

- Represented a group of lenders in a $750 million mortgage loan to refinance a 2-resort hotel portfolio.
- Representation of the preferred investor in connection with a $12.5 million preferred equity investment in the owner of a mixed use property located in Brooklyn, New York.
- Representation of the purchaser of a $51.86 million mortgage loan secured by a multifamily property located in Antioch, Tennessee from the holder of the related $17.29 million mezzanine loan.
- Represented Malaysia's The Employee Provident Fund as lead counsel to their refinancing of a £250 million UK property portfolio.
- Represented the mortgage lender in connection with a $41 million pre-development loan for a mixed use development in Naples, Florida.
- Represented the purchaser in the acquisition of a $1.3 billion portfolio of 106 mortgage loans secured by medical office properties located in 33 states across the US.