REAL ESTATE – FORECLOSURE DEFENSE

Epstein's Mother — *Aurora Loan v. Baritz*: Bank Affidavit Does Not Establish Standing

By Cory Morris

Plaintiff's failure to establish standing precluded an award of summary judgment because the plaintiff's employee could not establish that the document of which plaintiff relied was a hearsay exception subject to the Business Exception Rule under CPLR § 4518.

Aurora Loan v. Baritz ("*Baritz*") was a residential foreclosure case defended by our own, Charles Wallshien[1] (aka Charlie), who often would protest (an outspoken advocate) that the foreclosing banks would utilize improper affidavits in bringing a motion for summary judgment. While New York Supreme Court judges routinely grant these motions, Charlie argued that the affidavits utilized to establish standing were inadmissible hearsay because the bank's affiants did not have personal knowledge of the information in the records they relied upon for producing these affidavits.[2] Usually this would involve an employee of one bank swearing to the practices of maintaining the note at another bank. Charlie analogized these bank affidavits submitted to Supreme Courts throughout New York State, comically, to a situation that would occur on the television series "Welcome Back, Kotter," starring Gabe Kaplan.[3]

Cory Morris

"Welcome Back, Kotter" featured a wide array of characters that engaged in comical behaviors, punch lines and one-liners that many of its viewers can instantly recall. Juan Luis Pedro Felipo de Huevos Epstein ("Epstein") is described as a "fiercely proud Puerto Rican Jew" played by Robert Hegyes.[4] When Epstein missed class, he would, at times, offer a note by his mother, rumored to have 10 children, saying that he was sick and, therefore, unavailable. As with the veracity of the Epstein's Mother sick note, Charlie would express doubts concerning the veracity of the bank affidavits utilized in foreclosure actions. As with Gabe Kotter questioning Epstein, Charlie Wallshein, an unrelenting practitioner, questioned whether the banks' affidavits were trustworthy, maintained, produced and kept by someone with knowledge of the process in the ordinary course of business.

So what happened in *Baritz*? On May 27, 2005, the defendant executed a note in the amount of $960,000 in favor of GreenPoint Mortgage Funding, Inc. and a mortgage in favor of Mortgage Electronic Registration Systems, Inc. As often occurs, the mortgage was later assigned here to the plaintiff. In April 2009, the plaintiff bank commenced this action to foreclose on the home, alleging that the defendant defaulted on his loan payments. The defendant asserted the affirmative defense that the plaintiff did not have standing to commence the action.

Not surprisingly, the plaintiff in *Baritz* moved for summary judgment and summary judgment was granted. On appeal, the matter is reversed because "[t]he plaintiff could not rely on the affidavit of its vice president to meet its prima facie burden since the affidavit was improperly submitted for the first time in its reply papers."[5] More importantly, however, the *Baritz* Court held that "the plaintiff failed to establish delivery or assignment of the note to MERS prior to its execution of the assignment." Paraphrasing the words of Charlie Wallshein, Epstein's Mother could not simply explain away the bank's failure to maintain the assignment and/or note in the regular course of business anymore than Epstein could explain away his absence from high school.

Oftentimes, standing is a paramount issue in a foreclosure matter. Once standing is brought into issue by the defendant's answer, the plaintiff must provide proof of standing as part of its prima facie case. "In a foreclosure action, a plaintiff has standing if it is the holder or assignee of the underlying note at the time the action is commenced."[6] Banks provide all sorts of proof in requesting the extraordinary relief of summary judgment in a foreclosure action. Where many practitioners would lament the routine foreclosing of homes on less than adequate proof, Charlie sought to enforce the law in this regard and succeeded, helping pave the path for other foreclosure defense practitioners. Here, Charlie attacked the sworn statement of the bank alleging physical possession of the note when it commenced the action.

Plaintiff banks must provide sufficient evidence in their summary judgment motions. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of

(Continued on page 20)

HEALTH AND HOSPITAL

More Bad News For Data Breach Class Actions

By James G. Fouassier

This is the second of a two part series.

Last month I started to report on *Abdale v. North Shore-Long Island Jewish Health Systems*, in which a group of North Shore-Long Island Jewish Health System (NS-LIJ) patients sought redress for alleged violations of their protected health information when a variety of their medical records and other data were stolen from NS-LIJ.

Turning now to the class action itself, the court first determined whether the CPLR 901 prerequisites for a class action were met, and then applied the factors established in CPLR 902. The five prerequisites of CPLR 901(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

James G. Fouassier

As to "numerosity," lthough the court found that the representative plaintiffs identified all potential class members, the plaintiffs did not allege that all of the putative members sustained damages as a result of the theft of their personal information, a necessary element of the remaining negligence claim. Consequently, the plaintiffs were held not to have properly identified the members of the class.

Regarding any common issues of law and fact, a party "must establish more than that issues exist which are common to the entire class and that they are substantial and significant; the party must show that these common issues predominate over unique circumstances that may pertain to each individual's situation." (citation omitted) In the case at bar, although the plaintiffs established "typicality," since the plaintiffs' claims for negligence arose out of the same course of conduct and are based on the same theory of negligence as the other proposed class members, they did not establish "commonality:"

> [C]ommon issues do not predominate over the issues that are unique to each putative class member. Plaintiffs' sole surviving claim is for common law negligence claim. This claim does not involve a single instance of the theft of data. Rather the alleged data breach occurred in 2010, 2011 and 2012. Each individual plaintiff would necessarily have to establish, *prima facie*, that his or her personal data was stolen from the defendants due to the alleged negligent acts or omissions of the defendants, and that each individual sustained physical or emotional damages, or financial loss, as a result of said theft or misappropriation. Contrary to plaintiffs' assertions, this is not a simply a matter of calculating the amount of damages. Rather, inevitably, each plaintiff's claim would devolve into a myriad of mini trials. This court therefore finds that plaintiffs have not established common questions of law or fact predominate. (citation omitted).

For the same reasons the court found that a class action would not be a remedy that is "superior" to that of individual actions:

> [T]he nature of injuries allegedly sustained by the named plaintiffs are extremely varied and personal in nature, ranging from tax fraud, to credit card fraud, to emotional distress. Plaintiffs claim that members of the proposed class were all victims of credit card fraud, and that they sustained identical damages, is purely speculative. Furthermore, plaintiff's counsel's assertions that the proposed class numbers in the "hundreds of thousands" are purely speculative. This court therefore finds that the plaintiffs have not demonstrated the superiority of a class action." (citation omitted)

As to the issue of adequacy of representation, the court found that the plaintiffs "offer no explanation as to

(Continued on page20)

Aurora Loan v. Baritz: *Bank Affidavit Does Not Establish Standing* *(Continued from page 10)*

law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.[7] Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.[8] "A plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment or physical delivery of the note." Usually, a simple bank affidavit would satisfy the proponent's burden in bringing a summary judgment motion.

Epstein's Mother's affidavit will not, however, satisfy the bank's burden in bringing a summary judgment motion. It is important to note that if the bank started a given action and then there is an affidavit from that same bank, this is fine. The problem with the affidavit experienced in *Baritz* arises when the affidavit of note possession comes from someone other than the original bank. In *Baritz*, it was a Jacklyn Holloway of Nationstar Mortgage, LLC who made such an affidavit. The court held that "admissibility of the records relied upon by Holloway under the business records exception to the hearsay rule… [was inappropriate]…since Holloway did not attest that she was personally familiar with the record-keeping practices and procedures of the plaintiff." Because these allegations based on the business keeping of the bank were inadmissible, the plaintiff bank in *Bartiz* failed to meet its prima facie burden to establish standing; therefore, summary judgment was denied.

This decision is of great import for the foreclosure defense practitioner. Documentation provided by a litigant should be carefully scrutinized for its veracity and whether such documentation is sufficient proof to confer, *inter alia*, standing. While this holds true for all litigation, foreclosure defense practitioners on Long Island should recognize this as a decision on which to rely when challenging the routinely produced "Epstein's Mother" affidavits. Although comical at times, Charlie's legal argument is good law in the Second Department. While the record may be devoid of any reference to Epstein's Mother, this case is a strong reminder that banks cannot simply swear and attest to facts in an effort to streamline the legal process in pursuing foreclosures.

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[1] Charles Wallshein is, among other things, a Suffolk Academy of Law Officer.
[2] See CPLR § 4506.
[3] See Wikipedia, *Welcome Back, Kotter*, Wikipedia, Inc. (last updated October 29, 2016); available at: https://en.wikipedia.org/wiki/Welcome_Back,_Kotter.
[4] *Id.*
[5] *Id.* (citations omitted).
[6] *Aurora Loan v. Baritz*, 2016 NY Slip Op 07154 (App. Div. 2d Dep't. November 2, 2016) (citations omitted); available at: http://www.nycourts.gov/reporter/3dseries/2016/2016_07154.htm.
[7] *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986).
[8] See *id.*
[9] *Aurora Loan v. Baritz*, 2016 NY Slip Op 07154.
[10] *Id.* (citing CPLR § 4518(a))

More Bad News For Data Breach Class Actions *(Continued from page 10)*

why nine class representatives are needed, and have not provided any information with respect to the financial resources of the proposed class representatives."

Since the prerequisites for a class action required by CPLR 901 were not met, there was no need for the court to consider the more subjective criteria of CPLR 902 — the interest of class members in maintaining separate actions and the feasibility of the same; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum, and the difficulties likely to be encountered in the management of a class action.

So, here again, we see another avenue of possible redress arising out of a significant health information data breach being denied to patients who allegedly suffered real and serious damage by virtue of the breach.

I'm sure that the astute reader will conclude, as did I, that several of the plaintiffs' claims may have had merit and may have been sustained if pleaded in the manner required by the court. This at least would have afforded the plaintiffs some remedies in the context of the action as initially filed, if not by way of a class action. I do not see, however, how the barriers of CPLR 901 could have been overcome, given the unique and discrete nature of the damages the individual plaintiffs may have suffered.

Earlier I raised a question regarding the application of Public Health Law section 18(12). In dismissing the relevant cause of action the court interpreted the language of PHL 18(12) to immunize a health care provider from any liability "solely from granting or providing access" to a patient's health information. In the instant case this worked to shield the defendants from liability from disclosure resulting not from their affirmative consent or acquiescence but from their alleged negligence. Is that the intent of the statute?

PHL section 18 limits access in all cases to "qualified persons" and it is the legal process allowing or precluding disclosure to "qualified persons" that is the essence of the section. PHL 18 (1)(g) defines "qualified persons" as:

> "Qualified person" means any properly identified subject; or a guardian appointed under article eighty-one of the mental hygiene law; or a parent of an infant; or a guardian of an infant appointed under article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record under paragraph (c) of subdivision two of this section; or a distributee of any deceased subject for whom no personal representative, as defined in the estates, powers and trusts law, has been appointed; or an attorney representing a qualified person or the subject's estate who holds a power of attorney from the qualified person or the subject's estate explicitly authorizing the holder to execute a written request for patient information under this section.

Conspicuously absent from the list is a thief or data hacker. More importantly, however, that the section is intended to immunize providers from liability *only* when disclosing to "qualified persons" is made clear by a simple reading of subsection (12) *in its entirety:*

> Immunity from liability. No health care provider shall be subjected to civil liability arising solely from granting or providing access to any patient information *in accordance with this section.* (emphasis added).

I fail to see what conclusion may be drawn other than that PHL 18(12) operates as a bar to claims *only* when disclosure is made to "qualified persons" in accordance with all of the requirements of the statute. This one, I think, should have gone to the plaintiffs.

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When Is A Child Left Behind? *(Continued from page 11)*

> registrar of the district in which the birth certificate has been filed…" EPTL Section 4-1.2(a)(2)(A).

So, no matter how much anyone doubts, or questions, or queries whether or not a child is the child of their father for inheritance purposes, if there is a duly executed and filed acknowledgment of paternity, the matter is resolved. No genetic marker test or DNA test can be ordered and the acknowledgment (if 60 days have passed since it was signed) is, for all intents and purposes, embedded and dispositive.

The statutory framework (and relevant case law) also yields the unmistakable conclusion that the legislature drafted the applicable laws as narrowly as possible, to foreclose potential inquiries and challenges into whether or not a child is presumptively their parent's, even in bitter estate litigation contests. Further evidence of this is the presumption in New York law that a father who holds himself out to be the father of a child is the father for support purposes, even if he is found later to be not so biologically.

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