

R E A L E S T A T E

Attorneys May Be Liable for Improper Judgment Execution

BY ALAN NOCHUMSON

Special to the Legal

In a warning shot to attorneys who represent judgment creditors in Pennsylvania, the U.S. District Court for the Eastern District of Pennsylvania in *Grillo v. BA Mortgage LLC* refused to dismiss a Section 1983 claim against a law firm that improperly facilitated the sale of a family home at a sheriff's sale.

In the late 1980s, Mary and Samuel Grillo purchased their house in Bucks County. When the Grillos failed to make timely mortgage payments, BA Mortgage, the mortgage holder at the time, obtained a judgment in foreclosure in the amount of \$153,910.86. Afterward, BA Mortgage issued a writ of execution scheduling the home for sheriff's sale.

Two days before the sale, the Grillos' counsel hand-delivered a certified check to Spear & Hoffman, the law firm representing BA Mortgage, for the amount indicated on the face of the writ. In addition to the check, Spear & Hoffman was provided with a letter demanding cancellation of the sale and satisfaction of the judgment and mortgage. A day later, after receiving no response from the letter sent the previous day, the Grillos' counsel sent another letter to Spear & Hoffman reasserting their demands.

On the day of the sale, Spear & Hoffman hand-delivered the certified check back to the Grillos' counsel, with a letter stating that the check was insufficient to satisfy the judgment and mortgage. In the letter, Spear & Hoffman noted that the judgment amount had

increased as a result of the accrued interest and costs associated with the litigation. According to Spear & Hoffman, the amount to satisfy the judgment and mortgage was \$191,887.46. By the time the Grillos received the letter, the home had already been sold at the sheriff's sale to BA Mortgage.

Subsequently thereafter, the Grillos received an eviction notice from the Federal Home Loan Mortgage Corporation (Fannie Mae), which purchased the home from BA Mortgage after the sheriff's sale. On the same day, the Grillos filed a petition to stay eviction and to set aside the sheriff's sale of the home.

The contentious litigation lasted for several years. At the trial level the petition was denied. On appeal, the Superior Court of Pennsylvania reversed the trial court's decision and granted the petition. After the Supreme Court of Pennsylvania refused to hear BA Mortgage's appeal, the Grillos sent a check for the amount indicated on the face of the writ to Fannie Mae in satisfaction of the judgment and mortgage.

COMMENCEMENT OF ACTION

Several months later, the Grillos filed a complaint in federal court against Spear & Hoffman alleging a violation of 42 U.S.C. Section 1983. Under their theory of the case, Spear & Hoffman violated the Grillos' constitutional right to procedural due process by unilaterally increasing the amount of the writ without obtaining judicial approval or giving the Grillos the opportunity to be heard.

Spear & Hoffman thereafter filed a motion

to dismiss the complaint challenging the validity of the Section 1983 claim. In addition to responding to the motion to dismiss, the Grillos filed a motion for leave to file an amended complaint. In its opposition to that motion, Spear & Hoffman argued that the amended complaint was futile because the Grillos still failed to state a valid claim under Section 1983.

In order to establish a prima facie case under Section 1983, a plaintiff must show that an individual deprived the plaintiff of a constitutional or statutory right; and the individual who deprived the plaintiff of that right acted under color of the law.

The court in *Grillo* rejected Spear & Hoffman's attempt to dismiss the Section 1983. The court believed that the claim was supported by both a long line of cases from the Superior Court of Pennsylvania and by analogy from a 3rd U.S. Circuit Court of Appeals decision on confessed judgments.

PROCEDURAL DUE PROCESS

The court first discussed the state appellate

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court cases finding that unilateral increases in a writ of execution violate the Due Process Clause of the 14th Amendment to the U.S. Constitution.

In *Union National Bank of Pittsburgh v. Ciongoli*, the Superior Court chastised a county foreclosure practice allowing increases to the face amount of a writ in mortgage foreclosure actions. In Allegheny County, a judgment creditor was allowed to unilaterally increase the amount simply by issuing a letter or affidavit to the sheriff. Under local practice, the judgment creditor was then permitted to proceed with the foreclosure sale unless the increased amount was tendered by the judgment debtor.

The Superior Court held that such practice violated the Due Process Clause because the practice was "tantamount to a prejudgment execution." In *Ciongoli*, the Superior Court concluded that the judgment creditor should have been obligated to petition the court to amend the judgment prior to executing on an amount that was not judicially approved.

In *Morgan Guaranty Trust Company v. Mowl*, the Superior Court, citing *Ciongoli*, stated that a judgment creditor's ex parte attempt to increase the writ figure in a foreclosure action was also procedurally and constitutionally impermissible.

The federal court then pointed to the Superior Court's pronouncement in the underlying case. In *Nationsbank Mortgage Corporation v. Grillo*, the Superior Court held that BA Mortgage was prohibited from increasing the amount of the writ without petitioning the court for approval and without giving the Grillos notice of the petition and an opportunity to be heard.

Although the Superior Court decisions were binding on the court, it nevertheless found reasoning employed by the Superior Court in *Ciongoli, Mowl* and *Nationsbank* to be persuasive. The federal court stressed that the decisions were handed down "by a Pennsylvania appellate court intimately familiar with the Pennsylvania Rules of Civil Procedure and the proper mechanisms for granting and executing mortgage foreclosure judgments under Pennsylvania law."

The court in *Grillo* believed that the principles embodied in the Superior Court decisions of *Ciongoli, Mowl* and (*Nationsbank*) had been echoed by the 3rd Circuit in *Jordan v. Fox Rothschild O'Brien & Michel*." In *Jordan*, the 3rd Circuit considered a situation where a law firm was sued under Section 1983 for invoking the aid of officials to execute on a confessed judgment against a judgment debtor by garnishing the debtor's bank account.

The 3rd Circuit held that the law firm would be liable under Section 1983 because the writ was enforced without giving the sheriff the means to secure a pre-deprivation hearing or to obtain prompt post-seizure relief. According to the 3rd Circuit, the due process violation occurred when the law firm refused to enforce the writ by attaching the funds contained in the bank account in the same manner, the federal court in *Jordan* concluded that Spear & Hoffman's claim could be deemed actionable under Section 1983. The federal court pointed out that "Spear & Hoffman unilaterally increased the amount listed on the writ of execution, refused to accept plaintiffs' tender of the principal amount, and caused the sheriff to sell plaintiffs' home, even though Spear & Hoffman never petitioned the court to amend the writ of execution prior to rejecting the plaintiffs' tender."

Moreover, the court noted that the Grillos did not "given a pre-deprivation hearing to assess the execution of the new writ and to effect the sale of their home." Taken together, the court concluded that the amended complaint satisfied the constitutional distinction element of a section 1983 claim."

WRIE ACTION

The federal court next considered whether the Grillos could satisfy the second prong of the Section 1983 test, in that Spear & Hoffman acted under the color of law.

The Grillos argued that "the unconstitutional state action was Spear & Hoffman's attempt of the compulsive power of the sheriff after unilaterally and without increasing the amount of the default amount."

The federal court concluded that their

AREA MORTGAGE RATES

Lender	Fixed Rates		Adjustable Rates		Jumbo Rates*		Comments/Field Yes/No**
	30 yr	15 yr	1 yr	30 yr fixed	30 yr fixed	30 yr fixed	
Amtrust Funding	5.75/0	5.25/0	3.00/0	6.00/0	No		
Home Finance of America	5.75/0	5.25/0	3.25/0	6.00/0	No		
800-358-5626							
AA E Mortgage	5.75/0	5.25/0	N/A	6.00/0	No		
877-793-1400							
Lighthouse Mortgage	5.75/0	5.25/0	N/A	6.00/0	No		
800-784-1331							
Madison First Financial	5.75/0	5.25/0	N/A	6.00/0	No		
877-462-3728							
Madison Mortgage Services	5.75/0	5.25/0	N/Q	6.00/0	No		
888-897-0200							
Price Financial Services	5.75/0	5.38/0	N/A	6.13/0	No		
800-401-9091							
Wilmington Mortgage	5.88/0	5.38/0	N/A	6.13/0	No		
610-558-3099							
Turnstone Mortgages	5.88/0	5.50/0	3.88/0	6.13/0	No		
800-757-7514							
Absolute Mortgage Co.	5.63/5	5.13/5	3.50/0	5.88/25	No		
888-904-6637							
American Family Mtg.	5.00/3.25	4.50/3	2.00/3	5.38/3	No		
610-358-5324							
Century Mortgage Corp.	5.25/3	4.63/3	3.38/2	5.63/3	No		
800-224-7006							

* A "jumbo" or non-conforming mortgage is a loan amount in excess of \$360,000.

** Indicates if a lender offers mortgage loans for commercial properties. Call to discuss rates and terms.

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argument was supported by the 3rd Circuit's holding in *Jordan*. In *Jordan*, the 3rd Circuit held that a judgment creditor, who uses the commonwealth's procedure for executing on a confessed judgment, acts under color of law. The 3rd Court "reasoned that when the sheriff, on the direct request of defendants, served the writ garnishing plaintiff's checking account, defendants caused the state to use legal force."

LESSONS LEARNED

In doing so, the 3rd Circuit rejected an argument made by the defendant law firm that the attorneys who initiated the proceeding were merely acting as officers of the court and not liable under Section 1983. The 3rd Circuit found that the attorneys were acting under color of law in invoking

Pennsylvania's procedures for attaching and seizing property on its client's behalf.

Similar to *Jordan*, the federal court in *Grillo* found that Spear & Hoffman functioned as a state actor when the law firm used Pennsylvania law to cause the home to be sold at a sheriff's sale, which, in turn, necessitated years of litigation to clear title to the residence.

Attorneys who represent judgment creditors should tread lightly after discovering that they may be liable under Section 1983 for failing to follow court rules during the execution process. By failing to do so, they may find themselves embroiled in the middle of messy lawsuits.