Do I have a Duty to Respond to an Overly Broad Qualified Written Request?

March 27, 2020

QWR Responses

Kavanagh v. Specialized LoanServicing, LLC,N.D.Ohio No. 3:17CV892, 2020 U.S. Dist. LEXIS 46255 (Mar. 17, 2020)

In this case, the NorthernDistrict of Ohio granted in part and denied in part the loan servicer's andborrower's competing motions for summary judgment, finding that the servicerwas a debt collector who failed to specifically advise the borrower of whatdocumentation was needed to complete her loss mitigation application asrequired under the Real Estate Settlement Procedures Act (RESPA), while alsofinding that the servicer did not have a duty to respond to the borrower'squalified written request (QWR) as it was overbroad and did not relate to theservicing of her loan.

The BulletPoint: RESPA is a consumer protection statute that regulates theservicing of a mortgage loan. In regards to loss mitigation applications, RESPArequires a servicer to "1) exercise reasonable diligence in obtaining documentsand information needed to complete a borrower's loss mitigation application; 2)review the application and notify the borrower within five days after receivingit that the application is complete or incomplete; 3) if the application isincomplete, advise the borrower of 'the additional documents and informationthe borrower must submit to make the . . . application complete'; and 4) if theapplication is complete, 'evaluate the borrower for all loss mitigation optionsavailable to the borrower.'"

In this case, the courtdetermined that the additional documents a borrower submits in response to aservicer's determination that their loss mitigation application is incompletedo not themselves constitute loss mitigation applications. However, theservicer must still provide notice to the borrower of what specific informationmust be submitted in order to complete their loss mitigation application. Thecourt further clarified that a servicer does not have a duty to respond to aborrower's QWR when the QWR seeks information concerning loan modification or lossmitigation, as such a QWR is a "request to alter the terms of a loan" and isnot related to the servicing of the loan. Likewise, a servicer does not have aduty to respond to a borrower's notice of error that is overbroad. As explainedby the court, "if a servicer cannot reasonably determine from the notice oferror the specific error that the borrower asserts has occurred", the servicerhas no duty to respond.

Under the Fair DebtCollection Practices Act, a servicer is not considered a "debt collector" ifthe borrower's loan is not in default at the time the servicer begins servicingthe loan. However, the court determined that a

borrower's loan is in default ifthey fail to fulfill any promise made under the loan agreement, includingfailing to pay taxes on the property. Stated differently, a servicer isconsidered a debt collector if the borrower fails to pay property taxes even ifthe principal and interest payments owed on the loan are paid in full.

Waiver of Right to Arbitrate

Gembarski v. PartsSource, Inc., 11th Dist. Portage No.2016-P-0077, 2020-Ohio-981

In this appeal, the EleventhAppellate District reversed its earlier judgment, concluding that the defendantdid not waive its right to assert an arbitration defense as it had no suchright until the plaintiff attempted to join non-party members and certify aclass action.

The BulletPoint: In Ohio, a party to a lawsuit does not waive defenses againstnon-parties who are not yet part of the lawsuit. Put another way, the propertime to raise defenses against non-named, hypothetical putative class memberswho are not yet parties is at the class certification stage. As such, adefendant does not waive the right to assert an arbitration defense againstsaid putative class members prior to the plaintiff moving to certify the class.

Summary Judgment Affidavits

Bank of New York Mellon v. Urbanek, 11th Dist. Lake No.2019-L-067, 2020-Ohio-985

In this appeal, the EleventhAppellate District affirmed the trial court's decision to grant the plaintiff'smotion for summary judgment, finding that the plaintiff had standing toinitiate the foreclosure action and was the holder of the note, and that theaffidavit supporting the motion for summary judgment was made upon personalknowledge.

The BulletPoint: In order to properly support a motion for summary judgment in aforeclosure action, a plaintiff must present evidentiary-quality materials viaaffidavit that establishes, among other things, that the plaintiff is a "partyentitled to enforce the Note" and is able to foreclose on the mortgage.Pursuant to Civ.R. 56(E), an affidavit submitted in support of a motion forsummary judgment must be made on personal knowledge. An affiant can satisfythis requirement by stating that the assertions in the affidavit are based uponhis or her personal knowledge. In addition, the court here found that theaffiant was not required to state that she reviewed the "original" note inorder to establish the lender's standing to foreclose. Rather, Civ.R. 56(E)simply requires that sworn or certified copies of all documents referred to inthe affidavit be attached, along with a statement that such copies are "truecopies and reproductions."

Affirmance of Arbitration Award

Delly v. Harbor Freight Tools USAInc., 8thDist. Cuyahoga No. 108489, 2020-Ohio-919

In this appeal, the Eighth Appellate District affirmed the trial court's decision to dismiss the plaintiff's motion to vacate the arbitration award, finding that Ohio law does not recognize a contractual right to judicially review arbitration awards.

The Bullet Point: Under Ohio law, once an arbitration is completed, the court has no jurisdiction except to confirm and enter judgment, vacate, modify, correct, or enforce the judgment. Stated differently, "the court possesses jurisdiction only to review the arbitration award; the court cannot review the merits of the claims underlying the award unless the award is vacated." The court's authority to vacate an arbitration award is limited to the grounds listed in R.C. 2711.10, and parties cannot contractually expand judicial review of arbitration awards beyond the statute. As such, in order for a court to vacate an arbitration award, the complaining party "must set forth allegations demonstrating that (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or corruption on the part of the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear evidence material to the controversy, or any other misconduct prejudicing the party's rights; or (4) the arbitrators exceeded their powers or imperfectly executed those powers in such a way that a mutual, final, and definite award was not rendered."

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