

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

March 27, 2020

QWR Responses

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

In this case, the Northern District of Ohio granted in part and denied in part the loan servicer's and borrower's competing motions for summary judgment, finding that the servicer was a debt collector who failed to specifically advise the borrower of what documentation was needed to complete her loss mitigation application as required under the Real Estate Settlement Procedures Act (RESPA), while also finding that the servicer did not have a duty to respond to the borrower's qualified written request (QWR) as it was overbroad and did not relate to the servicing of her loan.

The Bullet Point: RESPA is a consumer protection statute that regulates the servicing of a mortgage loan. In regards to loss mitigation applications, RESPA requires a servicer to "1) exercise reasonable diligence in obtaining documents and information needed to complete a borrower's loss mitigation application; 2) review the application and notify the borrower within five days after receiving it that the application is complete or incomplete; 3) if the application is incomplete, advise the borrower of 'the additional documents and information the borrower must submit to make the . . . application complete'; and 4) if the application is complete, 'evaluate the borrower for all loss mitigation options available to the borrower.'"

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

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

borrower's loan is in default if they fail to fulfill any promise made under the loan agreement, including failing to pay taxes on the property. Stated differently, a servicer is considered a debt collector if the borrower fails to pay property taxes even if the 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 Eleventh Appellate District reversed its earlier judgment, concluding that the defendant did not waive its right to assert an arbitration defense as it had no such right until the plaintiff attempted to join non-party members and certify a class action.

The Bullet Point: In Ohio, a party to a lawsuit does not waive defenses against non-parties who are not yet part of the lawsuit. Put another way, the proper time to raise defenses against non-named, hypothetical putative class members who are not yet parties is at the class certification stage. As such, a defendant does not waive the right to assert an arbitration defense against said 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 Eleventh Appellate District affirmed the trial court's decision to grant the plaintiff's motion for summary judgment, finding that the plaintiff had standing to initiate the foreclosure action and was the holder of the note, and that the affidavit supporting the motion for summary judgment was made upon personal knowledge.

The Bullet Point: In order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials via affidavit that establishes, among other things, that the plaintiff is a "party entitled 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 for summary judgment must be made on personal knowledge. An affiant can satisfy this requirement by stating that the assertions in the affidavit are based upon his or her personal knowledge. In addition, the court here found that the affiant was not required to state that she reviewed the "original" note in order 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 in the affidavit be attached, along with a statement that such copies are "true copies and reproductions."

Affirmance of Arbitration Award

***Delly v. Harbor Freight Tools USA Inc.*, 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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