

To: New Jersey Law Revision Commission
From: Lauren Haberstroh, Legislative Law Clerk
Date: November 08, 2021
Re: Enforcement of Lost Notes Under N.J.S. 12A:3-309

MEMORANDUM

Project Summary

In *Inv'rs Bank v. Torres*, the New Jersey Supreme Court considered whether a party could, pursuant to N.J.S. 12A:3-309, enforce a lost promissory note using a digital copy of the note if the original was lost before it was assigned to that party.¹ The plain language of N.J.S. 12A:3-309 does not address the rights of an assignee of an instrument when the original version of the instrument was lost before it was assigned.²

Statute Considered

N.J.S. 12A:3-309, which concerns the enforcement of a lost, destroyed, or stolen instrument, provides, in pertinent part, that:

- a. A person not in possession of an instrument is entitled to enforce the instrument *if the person was in possession of the instrument and entitled to enforce it when the loss of possession occurred*, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument . . .
- b. A person seeking enforcement of an instrument made under subsection a. of this section *must prove the terms of the instrument and the person's right to enforce the instrument . . .* The court may not [enforce the instrument] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument . . .³

Background

At issue in *Inv'rs Bank v. Torres* was whether Investors Bank (Investors) had the right to enforce a lost promissory note (Note) against the defendants, when Investors retained only a digital copy of the original note.⁴ The defendants signed the original Note, which promised a payment of \$650,000 to the lender, AMRO Mortgage Group, Inc. (ABN), and mortgaged their residential property to secure it on October 28, 2005.⁵ ABN subsequently merged with CitiMortgage (Citi), which succeeded to ABN's interest in the Note.⁶

¹ *Inv'rs Bank v. Torres*, 243 N.J. 25, 29-30 (2020).

² *Id.* at 45.

³ N.J.S. 12A:3-309 [emphasis added].

⁴ *Inv'rs Bank*, *supra* note 1.

⁵ *Id.* at 31.

⁶ *Id.*

The defendants defaulted on the Note in February 2010.⁷ Citi filed a foreclosure action and subsequently discovered that it no longer possessed the original Note.⁸ Citi voluntarily dismissed the foreclosure action, without prejudice, after the court partially denied its motion for summary judgment due to a dispute over whether Citi acquired and remained in possession of the Note.⁹ A Citi representative executed a Lost Note Affidavit in October a digital copy setting forth its terms.¹⁰ In September 2014, Citi served the defendants a Notice of Default and Intention to Foreclose (NOI) pursuant to N.J.S. 2A:50-56, listing itself as the loan servicer and Investors as the lender.¹¹ Citi conveyed its right to enforce the Note to Investors in November 2014, after which Investors filed a foreclosure action against the defendants in the Chancery Division.¹²

Investors claimed that it had standing pursuant to N.J.S. 12A:3-309 despite its loss of the original Note, and moved for summary judgment.¹³ The defendants contested Investors' motion primarily because Investors did not possess the original Note when it was lost, arguing that Investors was therefore not a holder of the Note under N.J.S. 12A:3-309.¹⁴ The trial court acknowledged the Lost Note Affidavit and Investors' digital copy of the Note.¹⁵ Investors later filed for final judgment with the Office of Foreclosure, which remanded the dispute to the trial court for resolution.¹⁶ The court granted Investors' motion for summary judgment, finding that Investors had proven the terms of the Note through its digital copy, that Citi's assignment established Investors' right to enforce the Note, and that Investors was required to indemnify the defendants "should another party attempt to enforce the lost note."¹⁷ The defendants appealed.¹⁸

The Appellate Division determined that N.J.S. 12A:3-309 vested a person who was both in possession of a note and entitled to enforce it when that note was lost with the ability to transfer that right to an assignee, who must only prove "the terms of the instrument and the person's right to enforce the instrument" to bring an enforcement action.¹⁹ The Appellate Division determined that its interpretation was consistent with the doctrine of unjust enrichment and that to interpret the statute otherwise would "deprive Investors of the benefit of its bargain with CitiMortgage" and allow the defendants to "continue to ignore his obligations to pay principal, interest, taxes, and

⁷ *Inv'rs Bank*, 342 N.J. at 31.

⁸ *Id.* at 32.

⁹ *Id.* at 32.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 32-3.

¹³ *Id.* at 33.

¹⁴ The defendants also argued that the NOI served by Citi was defective because it prematurely designated Investors as the lender two months before Citi assigned the mortgage to Investors. *Id.* The trial court agreed and barred Investors from filing for final judgment for sixty days. *Id.* at 34.

¹⁵ *Id.* at 34.

¹⁶ *Id.*

¹⁷ N.J.S. 12A:3-309b. *Id.*

¹⁸ *Inv'rs Bank*, *supra* note 7 at 34.

¹⁹ *Id.* at 35.

insurance premiums.”²⁰ The Appellate Division affirmed the trial court’s holding and the defendants appealed.²¹

Analysis

The New Jersey Supreme Court reviewed the Legislature’s prior treatment of the assignment of rights arising from contracts.²² The Court noted that N.J.S. 2A:25-1 and N.J.S. 46:9-9, statutes concerning the sale and mortgages of real estate, respectively, support the principle that rights arising by contract are generally assignable.²³ When the Legislature enacted New Jersey’s version of the Uniform Commercial Code (UCC) in 1995, it stated in N.J.S. 12A:1-103(b) that “[u]nless displaced by the particular provisions of the [UCC], the principles of law and equity . . . supplement its provisions.”²⁴ The Court also noted the Legislature’s adoption of the Comment of the UCC drafters emphasized that New Jersey statutes and common-law assignment principles may be used to supplement UCC provisions but not supplant them.²⁵

In addition, the Court also examined the legislative goals of N.J.S. 12A:3-309, New Jersey’s version of U.C.C. § 3-309, to determine whether the statute was inconsistent with the UCC.²⁶ Pursuant to N.J.S. 12A:3-301, an individual who does not possess a note when they attempt to enforce it may still do so if they meet the standard of N.J.S. 12A:3-309.²⁷ U.C.C. § 3-309 was amended in 2002 to clarify that the provision did not bar an assignee from enforcing a note because they did not possess the note when it was lost.²⁸ An assignee who “directly or indirectly acquired ownership” of the note from a person who was entitled to enforce it when loss of possession occurred may currently enforce that note under U.C.C. § 3-309.²⁹ The New Jersey Legislature did not alter N.J.S. 12A:3-309 to conform to the 2002 amendment of U.C.C. § 3-309 and, as a result, the New Jersey statute does not currently address the rights of instrument assignees.³⁰

The Court also examined the plain language of N.J.S. 12A:3-309 to determine whether the statute nullified Investors’ rights as the assignee of the mortgage and lost Note.³¹ The language of N.J.S. 12A:3-309 only governs the rights of a party entitled to enforce a lost note at the time that it was lost.³² The defendants argued that, by declining to amend N.J.S. 12A:3-309 following the 2002 amendment to the UCC, the Legislature intended to reject the proposition that the assignee of a lost note may enforce that note if they obtained it from a person entitled to enforce it at the

²⁰ *Id.*

²¹ *Inv’rs Bank*, 342 N.J. at 35.

²² *Id.* at 37.

²³ *Id.* at 38. *See also* *Aronshon v. Mandara*, 98 N.J. 92 (1984) and *Kimball Int’l v. Northfield Metal Prods.*, 334 N.J. Super. 596 (App. Div. 2000)(demonstrating that case law supports the Court’s conclusion that rights arising from contract are generally assignable).

²⁴ *Inv’rs Bank*, *supra* note 22 at 41.

²⁵ *Id.* N.J.S. 12A:1-103 cmt. 2.

²⁶ *Id.*

²⁷ *Id.* at 42.

²⁸ *Id.*; U.C.C. § 3-309 cmt. 2 (2002).

²⁹ *Id.* at 44.

³⁰ *Id.*

³¹ *Id.* at 44, 47.

³² *Id.* at 45.

time the note was lost.³³ The Court declined to interpret N.J.S. 12A:3-309 based solely on legislative inaction.³⁴ The Court found neither suggestion nor evidence that the Legislature intended N.J.S. 12A:3-309 to displace New Jersey’s statutes and common law regarding assignments.³⁵ The Court said that construing N.J.S. 12A:3-309 in the manner suggested by the defendants would contravene N.J.S. 2A:25-1, N.J.S. 46:9-9, and established case law.³⁶ It also said that doing so would generate “arbitrary, unworkable, and unfair” results in future cases concerning lost notes, the concluded that N.J.S. 12A:3-309 did not nullify Investors’ rights as the assignee of the mortgage and lost Note.³⁷

The Court determined that the trial court correctly granted Investors’ motion for summary judgment.³⁸ The summary judgment record demonstrated that Investors properly complied with N.J.S. 12A:3-309 for three reasons: (1) Citi had the right to enforce the note under N.J.S. 12A:3-309 when it assigned the Note to Investors; (2) the digital copy of the Note proved that Citi’s assignment of the Note was valid; and (3) by requiring Investors to indemnify the defendants against third party liability, the trial court fulfilled the N.J.S. 12A:3-309 requirement of protecting the defendants from the threat of liability to multiple claimants on the Note.³⁹ The assignee of a lost promissory note, pursuant to N.J.S. 12A:3-309, is afforded the same right to enforce the note that the possessor would have had at the time the note was lost if the assignee provides a sufficient Lost Note Affidavit and proof of the lost note’s terms.⁴⁰

Conclusion

The competing interpretations of N.J.S. 12A:3-309 presented by the defendants and multiple amicus curiae parties indicate that the statute may still be difficult for affected parties to correctly interpret and apply.⁴¹

Staff seeks authorization to engage in additional research and outreach to determine whether it would be appropriate to modify N.J.S. 12A:3-309 to reflect the New Jersey Supreme Court’s decision in *Inv’rs Bank v. Torres*.

³³ *Id.* at 46.

³⁴ *Inv’rs Bank*, 342 N.J. at 46.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* 46-7.

³⁸ *Id.* at 49.

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 36-7.

⁴¹ Amicus curiae parties Legal Services of New Jersey and Seton Hall Law Center for Social Justice argued, based on policy concerns and New Jersey’s statutory scheme for negotiable mortgage notes, that N.J.S. 12A:3-309 requires a party to have physically possessed a note before it was lost to assign or enforce it. *Id.* at 37.