SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-001943-23

BOGOTA SAVINGS BANK, a Banking Corporation of the State of New Jersey	)	
Plaintiff-Appellant	)	CIVIL ACTION
v.	)	ON APPEAL FROM:
DAVID G. FEDERICI and VALERIE S. FEDERICI	)	Superior Court of New Jersey
	)	Chancery Division, Bergen County
Defendants-Respondents	)	Docket No. BER-F-9364-23

SAT BELOW:

DARREN T. DI BIASI, J.S.C.

AMENDED
PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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TABLE OF ORDERS/JUDGMENTS

Pursuant to R.2:6-2(a)(2), Plaintiff/Appellant, Bogota Savings Bank, identify the following Orders and Judgments submitted by the Court:

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[1] All of the documents included in this Appendix that were filed in US Bankruptcy Court Case #18-1220(JKS) were before the trial court.

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PRELIMINARY STATEMENT

The issue is whether a mortgage once cancelled can be reinstated upon learning that the loan was not paid off and that the mortgage was cancelled in error.

The trial court held that a mortgage once cancelled cannot be foreclosed and granted Defendants-Respondents' motion to dismiss pursuant Rule 4:6-2(e). Since the mortgage was cancelled the court ruled that Plaintiff-Appellant had no standing to foreclose. The court ignored the established law that a mortgage cancelled by mistake, fraud, or misrepresentation can be reinstated provided no third party, grantee, or mortgagee, have relied upon the cancelled mortgage to their detriment. This is the case at bar.

Additionally, the trial court ignored the equitable arguments made by Plaintiff-Appellant of equitable estoppel, unjust enrichment and unclean hands.

Here, the mortgagor chose to make his personal mortgage payments using corporate funds. Soon after the mortgage was paid off, his business, Floor Town, Inc., filed a Chapter 7 Petition in Bankruptcy. The Trustee in Bankruptcy thereupon filed a separate lawsuit against Plaintiff-Appellant to disgorge the last four years of mortgage payments in the amount of

$105,697.90 made by Defendant-Respondent. Plaintiff-Appellant contested the lawsuit and eventually settled with the Trustee in Bankruptcy for the sum of $60,000. Legal fees and court costs were also incurred by Plaintiff-Appellant to defend the lawsuit.

Plaintiff-Appellant contends that it is entitled to restitution, to reinstatement of its mortgage, and to foreclose the now delinquent mortgage. It contends that Defendant-Respondent is obligated to reimburse Plaintiff-Appellant for the amount of the mortgage payments returned to the Bankruptcy Trustee, together with its legal fees and costs to defend.

The trial court also erred in denying Plaintiff-Appellant's motion to amend its Complaint to state a cause of action for breach of contract. The court erroneously ruled that such amendment would be "futile."

This Court should reverse, order reinstatement of the mortgage, restitution to Plaintiff-Appellant, and remand this case to the Foreclosure Unit for further proceedings.

PROCEDURAL HISTORY

On August 4, 2023, Plaintiff filed a Complaint against David G. Federici and Valerie S. Federici to reinstate and foreclose a prior mortgage which was cancelled by mistake. Pa1. Count II of the Complaint (Pa4) demanded

foreclosure based upon a cross-default provision of the subject mortgage and Count III stated a cause of action for unjust enrichment. Pa6.

On October 13, 2023, Defendants, David G. Federici and Valerie S. Federici, filed a Motion to Dismiss pursuant to R.4:6-2(e). Pa10. A Certification with attachments was filed by Defendant's counsel in support of the Motion. Pa12.

On November 6, 2023, Plaintiff's counsel filed a Certification in opposition to Defendants' Motion to Dismiss. Pa70.

On November 6, 2023, Plaintiff filed a Notice of Cross Motion to amend its Complaint to include Count IV for breach of contract. Pa57.

On December 5, 2023, the Hon. Darren T. DiBiasi entertained oral argument on the motions and reserved decision. (T)2

On January 22, 2024, an Order was entered dismissing Plaintiff's Complaint with prejudice due to lack of "standing." Pa92; Pa97. The court cited only one authority, Atwater v. Underhill, 22 N.J. Eq. 599 (Ch. 1862), to support its decision that Plaintiff lacked standing because once a mortgage is cancelled, it cannot be foreclosed. Pa96. That case is distinguishable and

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2 The oral argument transcript of 12/5/2023 is herein referred to as "T.page#-line#

begs the question: Can a mortgage ever be reinstated after cancellation for any reason, including mistake?

The court also dismissed Plaintiff's Complaint for the following reasons:

(a) "Plaintiff did not join Defendants in the preference litigation even though it was Plaintiff's responsibility to join all parties with a material interest in the controversy" (Pa96);

(b) "Plaintiff also did not seek to vacate the discharge of mortgage or reinstate the note at any time prior to the filing of the preference action, the settlement of the preference action or the filing of this action"(Pa96);

(c) "Plaintiff could have litigated the preference action to conclusion but did not" (Pa97).

On January 22, 2024, an Order was entered denying Plaintiff's Cross-Motion to amend its Complaint to add a cause of action for breach of contract. Pa98.

The court stated Plaintiff's proposed amendment would be "futile." Pa97.

On March 1, 2024, Plaintiff filed a Notice of Appeal challenging both Orders entered by the court below. Pa100.

STATEMENT OF THE FACTS

The facts of this case are fairly simple, straightforward, and virtually undisputed:

On May 11, 2012, respondents, David G. Federici and Valerie S. Federici, husband and wife, (the "Federicis'") obtained a home equity loan from appellant, Bogota Savings Bank, a Banking Corporation of the State of New Jersey, (the "Bank" or "Bogota") in the sum of $134,000.00, with interest at the rate of four and one-eighth (4.125%) per cent per annum, payable in installments of $2,157.10 per month on the first day of each month commencing June 1, 2012 and terminating February 1, 2018. Pa1.

To secure payment of the note, the said Federicis executed to Bogota a mortgage of even date with the note (Pa18), covering the premises commonly known as 315 Momar Drive, Ramsey, NJ, (the "Premises"). Said mortgage was duly recorded in the Clerk's Office of Bergen County on June 4, 2012, in Book V1058 of Mortgages for said County at page 4 (the "2012 mortgage"). Pa18.

Thereafter, monthly loan payments were made to the Bank by Floortown Inc., whose principal owner was the mortgagor, David G. Federici.

Upon receipt of what the Bank believed was the final monthly mortgage

payment, the mortgage was cancelled by the Bank on 1/29/2018. Pa20.

However, a mere three days later, on or about February 2, 2018, Floortown Inc. filed a Chapter 7 Bankruptcy Petition under Case No. 18-12220(JKS).

On or about January 30, 2020, the Trustee in Bankruptcy filed an Adversary Complaint against the Bank, under Case No. 20-01048(JKS). Pa24. The Complaint alleged that four (4) years of monthly mortgage payments made to the Bank by Floortown Inc., in the amount of $105,697 (Pa33-34), at the direction of and on behalf of David G. Federici, were fraudulent and should be avoided. Pa24.

The Bank vigorously defended against the allegations contained in the Adversary Complaint (Pa35) but eventually was constrained to agree to disgorge $60,000 of the mortgage payments by Floortown, Inc. to the Trustee in Bankruptcy by settlement entered into on August 10, 2022. Pa53. As per the Trustee's proposed Distribution Report (Pa71) which was approved by the Bankruptcy Court (Pa75), after the payment of Chapter 7 administrative expenses, there was no money remaining in the estate for unsecured creditors (in fact, even various tax claims held by the States of New Jersey and New York, which were accorded higher payment priority than general unsecured

creditors, received nothing). Pa71-73.

In addition to the aforesaid $60,000 loss, the Bank also incurred counsel fees of $29,584.47 and litigation costs of $9,498.54 to defend the bankruptcy lawsuit. Pa3.

The disgorgement of $60,000 of previously paid mortgage payments created a deficiency balance in the 2012 Note and default under the previously cancelled 2012 Federici mortgage.

In or about January, 2022, the Federicis applied for a $97,000 home equity loan. Since Federici qualified for the loan, the application was approved. T9.14-16. At that time, the preference lawsuit was not yet resolved. On January 24, 2022, the Federicis executed to the Bank a home equity loan Note in the amount of $97,000 of that date to secure that sum, with interest at the rate of three and one-quarter (3.25%) per cent per annum, payable in installments of $1,319.84 per month on the first day of each and every month commencing March 1, 2022 and terminating February 1, 2027. Pa4.

To secure payment of that note, the Federicis executed to the Bank a mortgage of even date with the note (44a) on the Premises. Said mortgage was duly recorded in the Clerk's Office of Bergen County on June 5, 2023, in

Book V5007 of Mortgages for said County at page 64 (Pa42) (the "2022 mortgage").

Said mortgage contains the following cross-default provision:

> **"DEFAULT: The note describes the acts that will constitute a default under this mortgage. Additionally, a default under any other mortgage covering the premises will constitute a default under this mortgage. If any default occurs, you can foreclose this mortgage. That means that you can arrange for the premises to be sold, as provided by law, in order to pay off what I owe you. If the money you receive from the sale is not enough to pay off what I owe you, I still owe you the difference."** Pa44

The clawback by the Bankruptcy Court of $60,000 of previously made loan payments made by Floor Town, Inc., caused a default under the 2012 Note. Under the above cross-default provision (Pa44), a default under the 2012 mortgage constituted a default under the 2022 mortgage.

This default exists to date, and the Federicis remain in possession of the mortgaged security. There has been no sale to a third party or subsequent mortgages to any other lender. T11.9-12.

In keeping with the Single Controversy Doctrine, On August 4, 2023, Appellant filed the instant Complaint (Pa1) seeking (1) reinstatement of the 2012 Federici note and mortgage and foreclosure of the mortgage based on the

$60,000 loan deficiency (Pa3; T5.14-19), (2) foreclosure of the 2022 mortgage (Pa44) under that loan's cross-default provision (Pa44; T5.20-24); and (3) stating a claim for unjust enrichment as a result of the $60,000 windfall being received by the Federicis as a result of the Bankruptcy Court's clawback of the mortgage payments made by Floor Town, Inc., together with counsel fees and costs. Pa6-7; T5.25-6.3.

On October 13, 2023, respondents filed a Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 4:6-2(e) alleging that since the 2012 mortgage was cancelled, there is no mortgage to foreclose. (Pa10)

On November 6, 2023, appellant cross-moved to amend its Complaint. Pa55. In addition to the legitimate causes for reinstatement of the 2012 mortgage and unjust enrichment set forth in its Complaint. the Amended Complaint added a claim for breach of contract under the 2012 Note. Pa59; T5.11-13.

The motion and cross motion were orally argued in the trial court on December 5, 2023.

> The trial court granted Defendants' dismissal motion because the Plaintiff "lacked standing." Pa97. It found that the Plaintiff did not seek to vacate the discharge of mortgage at any time prior to the preference action. Pa96. It further found that "once a

> mortgage loan has been satisfied or paid in full, the mortgage that secures the obligation is no longer a valid lien. . . .If a mortgage has been discharged, evidence of discharge constitutes a valid defense to any subsequent foreclosure action." Pa96.

It further found that Plaintiff should have joined the Defendants in the preference action and that Plaintiff's cross motion to amend the complaint was 'futile'." Pa96.

The trial court found that Plaintiff's request to reinstate the Federici 2012 mortgage was untimely. Pa96. However, there is no statute of limitations issue and no prejudice resulting to the Defendants if the Federici mortgage was reinstated as sought in the complaint. In fact, rather than being prejudiced, Federici was actually unjustly enriched by the claw back of the $60,000 mortgage payments made by Floor Town that should have been made by Federici personally.

The trial court's Order failed to address Plaintiff's claim for reinstatement of the 2012 mortgage as well as its arguments of equitable estoppel, unjust enrichment, and unclean hands.

The court's finding that the "Plaintiff did not join Defendants in the preference litigation even though it was Plaintiff's responsibility to join all parties with a material interest in the controversy" (Pa96) is contrary to

established bankruptcy law. The trial court further erred in refusing to allow Plaintiff to amend its complaint to set forth a claim for breach of contract is "futile". Pa97.

STANDARD OF REVIEW

The standard of review applicable to the instant appeal is that of de novo review which gives no "'special deference' to the 'trial court's interpretation of the law and the legal consequences that flow from established facts.'" Cherokee LCP Land LLC v. City of Linden, 234 N.J. 403, 414-15 (2018).

"Whether a party has standing to pursue a claim is a question of law subject to de novo review." Id., at 414-15. See, also, People for Open Gov't v. Roberts, 397, N.J. Super. 502, 508 (App. Div. 2008) (citing Manalapan Realty, L.P. V. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995)("The issue of standing is a matter of law as to which we exercise de novo review.") No "special deference" is therefore accorded to the "trial court's interpretation of the law and the legal consequences that flow from established facts." Id.

In addition, "Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son LLC, 246 N.J. 157, 171 (2021)(citing Dimitrakopoulos v. Borrus, 237 N.J. 91, 108 (2019)).

Because Appellant's Complaint in the instant case (Pa1) was dismissed by the trial court based on its finding that "Plaintiff does not have standing" (Pa97), and because the case was dismissed under R.4:6-2(e) for failure to state a claim, this appeal should be reviewed under the de novo standard of review.

LAW AND ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS FINDING THAT THE PLAINTIFF-APPELLANT LACKED STANDING.Pa97.

The trial court found that the Plaintiff/Appellant lacked standing essentially because the 2012 mortgage sought to be foreclosed was cancelled and is null and void. Pa96-97.

The trial court further found that the Plaintiff "did not seek to vacate the discharge of mortgage or reinstate the note at any time prior to the filing of the preference action, the settlement of the preference action or the filing of this action." Pa96. The trial court cited no authority to support its apparent conclusion that Plaintiff's claim for reinstatement could not be raised as a

separate count in the foreclosure complaint. Appellant contends that such a conclusion is erroneous and unsupported by law.

Rule 4:27-1 provides in part:

> "The plaintiff in his complaint or in an answer to a counterclaim. . .may join either as independent or as alternate claims as many claims, either legal or equitable or both, as he may have against the opposing party."
>
> "Thus it is clear that a plaintiff may join claims for reinstatement and for foreclosure. . . ." 29 N.J. Prac., Law of Mortgages §13.10 (2d ed.), fn.49. (emphasis added)
>
> "If reinstatement is granted and the reinstated mortgage is in default, the court will, it seems, fix a relatively short time in which to bring foreclosure proceedings if foreclosure is not sought in the same suit." 29 N.J. Prac., Law of Mortgages §13.10 (2d ed.), fn.49, citing Wood v. Stover's Adm'rs, 28 N.J. Eq. 248 (E. & A. 1877)(emphasis added).

As to the court's finding that Plaintiff "did not seek to vacate the discharge of mortgage or reinstate the note at any time prior to the filing of the preference action,

the settlement of the preference action or the filing of this action", the facts are that prior to the bankruptcy preference action and the settlement of that action, the 2012 mortgage was not in default and there was no reason to seek its reinstatement. It was only after the settlement of the preference action and

the disgorgement of $60,000 of the mortgage payments previously paid by respondents' corporation, Floor Town, Inc., that the 2012 note and mortgage came into default. Moreover, Counts 1 through 4 of appellant's complaint (Pa1) and proposed amended complaint (Pa59) in the underlying action clearly sought reinstatement of the 2012 mortgage in addition to foreclosure.

The entire controversy doctrine, R.4:30A, is an equitable preclusionary doctrine. It provides:

> "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine. . . ." R.4:30A

The purpose of the entire controversy doctrine is to "encourage comprehensive and conclusive litigation determinations, avoid fragmentation of litigation, and promote party fairness and judicial efficiency." (R.4:30A, cmt. 1) The Rule generally requires that all aspects of a controversy between the parties to the litigation be included in a single action. See Thornton v. Potamkin Chevrolet, 94 N.J.1 (l983); Falcone v. Middlesex Cty.Med.Soc., 47 N.J. 92 (1966); Wm.Blanchard Co. V. Beach Concrete Co. Inc., 150 N.J. Super. 277 (App. Div. 1977), certif. denied 75 N.J. 528 (1977).

To require Plaintiff/Appellant to have filed a separate action for reinstatement of the 2012 mortgage and then file yet another separate action to

foreclose on the reinstated mortgage would result in fragmented litigation and judicial inefficiency in violation of both R.4:27-1 and the single controversy doctrine.

POINT II

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT'SCOMPLAINT PURSUANT TO R. 4:6-2(e) WITH PREJUDICE (Pa92) AND DENYING PLAINTIFF/APPELLANT'S CROSS MOTION TO AMEND ITS COMPLAINT (Pa98) BECAUSE:

A) Plaintiff's Cross-Motion to Amend its Complaint (Pa57) to Include a Claim for Breach of Contract Should Have Been Granted (Pa97; Pa99);

B) Plaintiff Stated a Claim for Reinstatement of the 2012 Mortgage (Pa96);

C) Plaintiff Stated a Claim for Equitable Estoppel and Unjust Enrichment (T11.20-23);

D) Plaintiff Stated a Claim for Cross Collateralization.(Pa97)

The standard to be applied by the Court in considering a Motion to Dismiss for Failure to State a Claim under R.4:6-2(e) is set forth in Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989). The Court is to search the Complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement being given the opportunity to amend

if necessary. Every reasonable inference is given to the plaintiff and the Motion is to be granted only in rare instances and ordinarily without prejudice. Id., at 746.

> "The inquiry of a reviewing court 'is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart, supra, 116 N.J.at746, 563A.2d 31 (citing Rieder v. Department of Transportation, 221 N.J. Super. 547, 552, 535 A.2d 512 (App. Div. 1987). The proper inquiry is thus whether a cause of action is suggested by the facts. Printing Mart, supra, 116 N.J. at 748, 563 A.2d 31 (citing Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 192, 536 A.2d 237 (1988). Every reasonable inference of fact is accorded the party whose claim is being assessed and that a motion to dismiss on these grounds is rarely granted. Printing Mart, supra, 116 N.J., at 746, 563 A.2d 31." Paternoster v. Shuster, 296 N.J. Super 544, 558-59 (App.Div. 1997).

Plaintiff's Complaint at Pa1 sets forth legitimate causes of action for breach of contract, unjust enrichment, and reinstatement of Plaintiff's mortgage and should not be dismissed.

A) Plaintiff's Cross-Motion to Amend its Complaint (Pa57) to Include a Claim for Breach of Contract Should Have Been Granted.

It is well-settled that "{a} party may amend any pleading as a matter of course at any time before a responsive pleading is served. . .and the action has not been placed on the trial calendar, at any time within 90 days after it is

served." R.4:9-1. A motion to amend is "required to be liberally granted and without consideration of the ultimate merits of the amendment." R.4:9-1, cmt. 2.1. The amendment should particularly be allowed in cases where "the litigation has just commenced and the complaint would otherwise be subject to dismissal for failure to state a claim." R.4:6-2, cmt. 2.1; Muniz v. United Hsps.Med.Ctr.Pres.Hsp., 153 N.J. Super. 79 (App.Div. 1977).

Even if an objection to the amendment of a complaint is made on grounds of futility for failure to state a cause of action, such objection "should be determined by the same standard applicable to a motion to dismiss under R.4:6-2(e)". R.4:6-2, cmt. 2, citing Maxim Sewerage v. Monmouth Ridings, 173 N.J. Super 84, 90 (Law Div. 1993).

Without any discussion or citation of authorities, the trial court simply concluded that "the plaintiff's motion to amend the complaint is futile" and denied Plaintiff's cross motion to amend.

B. Plaintiff stated a claim for reinstatement of the 2012 Mortgage.

The central issue in this case is whether a mortgage that has been cancelled under the mistaken belief that it was paid in full should be reinstated. It has been historically held that, as a matter of equity, where "no one is injured by the mistake but the party himself, and no one has changed his

position by reason of the act executed through the influence of the alleged mistake," the mistake should be corrected. Seeley v. Bacon, 34 A. 139, 141 (Ch. 1896). "That courts will reinstate a mortgage, the cancellation of which occurred through a mistake of facts, is entirely settled." Id. See, also, Banta v. Vreeland, 15 N.J. Eq. 103 (Ch.1862) (a mortgage cancelled under the mistaken notion that it had been paid was restored); Heyder v. Excelsior Bldg.Loan Ass'n, 42 N.J. Eq. 403 (Ch.1886) ("cancellation of a mortgage of record is only prima facie evidence of its discharge, and it is left to the owner making the allegation to prove the cancelling to have been done by fraud, accident or mistake". Id., at 407); Dubois v. Schaffer, 23 N.J. Eq. 401, 402 (Ch. 1873)(Complainant canceled a mortgage believing it was paid in full when in fact there was a $400 balance due on it). The Dubois Court affirmed the decision and holding in Dudley v. Bergen, 23 N.J. Eq. 397, 400 (Ch. 1873) that:

> "When the cancellation of a mortgage is procured by fraud, or made by mistake, or without authority, and without actual payment and satisfaction, the canceling will be set aside and the mortgage enforced." Id.

The Dudley Court cited as authority: Miller v. Wact, Saxt 214; Trenton Banking Co. v. Woodruff, 1 Green's Ch. 117; Banta v. Vreeland,15 N.J. Eq.

103 (Ch.1862) ; Harrison v. Johnson, 3 C. E. Green 420; S.C., on appeal, 4 C.E. Green 488.

For additional authority, see 29 N.J. Prac., Law of Mortgages §13.10 (2d ed.), fn.35, providing that reinstatement of a cancelled mortgage will be granted provided 'no one is injured by the mistake but the party himself and no one has changed his position by reason of the act executed through the influence of the alleged mistake." §8b of the Restatement (Third) of Restitution and Unjust Enrichment (2011) is also persuasive. It provides that "the mistaken discharge by an obligee of an obligation or the security therefor gives rise to a claim in restitution against the mistakenly discharged obligor to the extent of the benefit conferred." Id.

"Mistaken discharge of an obligation or a security interest is most simply remedied by treating the discharge as ineffective." Id.

In this case, there are no subsequent lenders, bona fide purchasers or other third parties who have relied to their detriment on the cancelled mortgage. It was Federici's own conduct in using Floor Town funds to pay his personal mortgage obligation that misled the Bank into believing that the Note was paid in full, and the Bank discharged the mortgage securing the Note in reliance on those payments. As a result, the Note is in default and the

mortgage should be reinstated. Respondents' reliance below on the unreported case of Wells Fargo Bank v. NJ Prop.Group, 2020 N.J. Super., Unpub., LEXIS 1130; 2020 WL 3124679 (Pa46), to support their position is misplaced. T12.8-12. Contrary to respondents' position, we contend the facts in Wells Fargo, supra, are distinguishable. In Wells Fargo, a purchaser who acquired title after the mortgage was discharged of record relied upon the Recording Act, N.J.S. 46:26A-1, et seq., which showed a cancelled mortgage. The third party changed his position by mortgaging and improving the property. In Wells Fargo, unlike here, reinstatement of the mortgage would impose extreme hardship on the successor grantee and mortgagee and, therefore, was disallowed. In stark contrast, the only two parties involved here are the Bank and Federici. No harm would result to anyone if the Federici mortgage was reinstated.

Respondents' argument below that reinstatement of the mortgage "would set a very dangerous precedent" (T-4.2) and "reek havoc on the real estate industry" (T4-8) is simply not true. The facts of this matter are unique and will not be a basis for a landslide of future cases.

The sole authority cited by the Court is Atwater v. Underhill, 22 N.J. Eq. 599, 602 (E.& A. 1872) (94a) holding that extinguishment of the underlying

debt also extinguishes the mortgage. Here, Plaintiff alleges that the underlying debt was not extinguished by virtue of the repayment to the Bankruptcy Trustee. Therefore, reliance on Atwater is inappropriate since the gravaman of Plaintiff's Complaint is that a portion of the debt is still outstanding.

Although the trial court agreed that Plaintiff "could be right that the reimbursement is appropriate" (T-11.22-23), its written analysis and decision (Pa95-97) were in error in that the court totally ignored all equitable considerations, including the non-existence of other innocent third parties who relied on the cancelled mortgage or who would suffer any detriment if reinstatement was granted. Moreover, it cited no authority to support its conclusions and its decision was contrary to established case law and other legal authorities as cited supra.

C. Plaintiff Stated a Claim for Equitable Estoppel and Unjust Enrichment.

The doctrines of equitable estoppel and unjust enrichment go hand to hand. Equitable estoppel applies to conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. Detrimental reliance occurs when one person depends on the actions of another and takes action

based on that trust which ultimately harms the first person's position. See Miller v. Miller, 97 N.J. 154 (1984), citing Fidelity Union Trust Co. V. Essex Cty. Mortgage Co., 130 N.J. Eq., 351, 353 (E.& A. 1941); Carlsen v. Masters, Mates Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); Clark v. Judge. 84 N.J. Super. 35, 54 (Ch.Div. 1964) aff'd, 44 N.J. 550 (1965); Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 474 (Ch.Div. 1961); Lawes v. Lynch, 7 N.J. Super. 584, 593 (Ch.Div. 1950) Aff'd, 6 N.J. 1, 11 (1950). An essential ingredient of estoppel is prejudice. Merchants Indem.Corp. Of N.Y. v. Eggleston, 37 N.J. 114, 129 (1962). In the recent case of Knopka v. Foster, 356 N.J. Supr. 223 (App. Div. 2002), the Appellate Division described the operation of the doctrine of equitable estoppel as follows:

> "Equitable estoppel embodies the doctrine 'that one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon'." Id. at 231 quoting Anske v. Palisades Park, 139 N.J. Super. 342, 348, 354 (App. Div. 1976).
>
> . . . .Estoppel is conduct, either express or implied, which reasonably mislead another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. Such estoppel is grounded not on subjective intent but rather on the objective impression created by the actor's conduct." Id., quoting Hill v.Middletown Bd.of Ed., 183 N.J. Super. 36, 41 (App. Div. 1982), quoting Dembro v. Union

> Cty. Pk. Comm'n., 130 N.J. Super. 450, 457 (Law Div. 1974).

"The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Associates Commercial Corp. v. Wallis, 211 N.J. Super. 231, 243 (App. Div. 1986). A common thread running through successful claims of unjust enrichment is

> "that the plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant at the time the benefit was conferred." Id., at 244 (quoting Callano v. Oakwood Park Homes Corp., 91 N.J. Super 105, 109 (App. Div. 1966).

One of the elements to recover under the doctrine of unjust enrichment is that the "plaintiff must prove that the defendant received a benefit and that retention of that benefit without payment therefor would be unjust." Id.

Federici's conduct in using Floor Town funds to pay his personal mortgage obligation misled the Bank into believing that the Note was paid in full, and the Bank discharged the mortgage securing the Note in reliance on those payments, to the detriment of the Bank. As a result, the Note is in default and the mortgage should be reinstated. By the claw back of the $60,000 mortgage payments made by Floor Town that should have been made

by Federici personally, Federici was actually unjustly enriched to the detriment of the Bank.

Federici is the party who directed the mortgage payments to be made by Floor Town, Inc. The fact that the Bank accepted these payments is irrelevant to the issues involved. Any implication made by the court or Defendants-Respondents that the Bank had some duty to reject these payments is contrary to banking procedure and would place an impossible burden upon the lending industry generally. Appellant contends that Federici is the party who committed the fraud, misled the Bank, and thus came to a Court of Equity with unclean hands.

> "The doctrine of unclean hands in equity matters has been expressed to be applicable in 30 C.J.S., Equity, §99, pp. 496, 497, in the following terms:
>
> 'Equity will not open its doors to one who seeks its aid for the purpose of violating a contract or who seeks to enforce alleged rights arising from a contract which he himself breached. * * *' Citing Pike v. Pike, 100 N.J. Eq. 486 (Ch. 1927) with approval.
>
> The doctrine of unclean hands has alternatively been expressed as follows: 'Equity will not aid a fraud doer', Herder v Garman, 106 N.J. Eq. 13 (Ch. 1930); 'He that hath committed iniquity shall not have equity. 2 Pomeroy, Equity Jurisprudence (5th ed. 1941) §397, p.90.
>
> 'Unclean hands' within the meaning of the maxim of

> equity, is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable i.e., morally reprehensible as to known facts.' Vulcan Detinning Co. v. American Can Co., 72 N.J. Eq. 387 (E.&A. 1906).
>
> . . .The rule is that while general iniquitous conduct will not operate to bar plaintiff from relief by reason of unclean hands, iniquitous conduct relating to the particular matter or transaction to which judicial protection is sought will operate to bar relief. . . .Where the relief sought by the plaintiff is the result of his own wrongdoing, where the unclean hands of the plaintiff has infected the very subject matter in litigation, the plaintiff is barred from relief in a court of equity." Pollino v. Pollino, 39 N.J. Super. 294 (1956).

Although the trial court agreed that Plaintiff "could be right that the reimbursement is appropriate," (T-11.22-23), it erred in failing to address Plaintiff's claim for unjust enrichment and the other equitable issues raised below in its Order dismissing Plaintiff's complaint. (Pa92)

D) Plaintiff Stated a Claim for Cross-Collateralization.

On January 24, 2022, the Federicis qualified for and executed to the Bank a home equity Note and Mortgage on the Premises in the amount of $97,000. The Mortgage contained the following cross-default provision:

"DEFAULT: The note describes the acts that will

> **constitute a default under this mortgage. Additionally, a default under any other mortgage covering the premises will constitute a default under this mortgage. If any default occurs, you can foreclose this mortgage. That means that you can arrange for the premises to be sold, as provided by law, in order to pay off what I owe you. If the money you receive from the sale is not enough to pay off what I owe you, I still owe you the difference." (Pa44)**

Under the above cross-default provision, a default under the 2012 mortgage constituted a default under the 2022 mortgage. The second count of Plaintiff's Complaint (Pa1) thus sought to foreclose on the 2022 Mortgage based upon the foregoing cross-default provision.

Defendants argument that because the 2012 Mortgage was cancelled and the "second mortgage was issued while the Plaintiff was in the litigation with the trustee", there "cannot be a basis for a default on the second mortgage" (T8.15-23) is without merit. It goes without saying that Plaintiff's claim for cross-collateralization of the 2012 and 2022 mortgages was based on the granting of the relief sought in the first count of Plaintiff's Complaint; i.e., reinstatement of the 2012 note and mortgage that was cancelled in error. Moreover, the fact that the 2022 mortgage was issued during the bankruptcy litigation is irrelevant.

The facts are that the Federicis qualified for the $97,000 equity loan.

The Bank was correct in not attributing any negative inferences to Federici as a result of the pending bankruptcy litigation, and the pending litigation simply did not provide any basis for the Bank to deny the loan. The 2022 loan remains in full force and effect and the cross-default provision is enforceable. Pa44

POINT III

PLAINTIFF/APPELLANT WAS NOT REQUIRED TO JOIN DEFENDANTS/RESPONDENTS IN THE BANKRUPTCY COURT PREFERENCE ACTION Pa96

The trial court erred in finding "plaintiff did not join defendants in the preference litigation even though it was plaintiff's responsibility to join all parties with a material interest in the controversy." Pa96. "Plaintiff could have joined defendants in the preference action but did not." Pa97. No authority was cited by the court for this proposition.

As a matter of law, the bankruptcy court had no subject matter jurisdiction to decide the dispute between the Bank and the Federicis. Neither was a party in the bankruptcy proceeding. Whether or not the Bank was successful in obtaining contribution from Federici would have no effect on the bankruptcy estate. It would not increase or decrease the amount of the estate.

In re Alfreda Johnson v. Bank of NY, 2006 WL 6613652, US Bankruptcy Court, E. D. Pennsylvania., the defendant in an adversary proceeding filed a third-party complaint for contribution and indemnity. The Court stated on p.3 of the decision:

> "Indemnity or contribution claims made by those who are sued by representatives of the bankruptcy estate against third parties generally fall outside the scope of bankruptcy court jurisdiction."

The Johnson court also stated:

> "Other courts have also concluded that third-party claims brought by those who were sued by the bankruptcy trustee will not fall within the subject matter jurisdiction of the court where the defendant would be the only one to recover on those third-party claims." Id.(See cases cited therein)
>
> "This follows because it does not matter to the bankruptcy estate or to the debtor whether or not the third party claimant is successful in obtaining indemnification or contribution." Id.

Similarly, in In Re: Green Field Energy Services, Inc. v. MOR MGH Holding, 554 B.R. 315 U.S. Bankruptcy Ct., D. Delaware (2016), the bankruptcy court held that it did not have subject matter jurisdiction on claims contained in a third-party complaint. The Green Field court stated:

> "The trustee is not associated with the third party complaint. . . and a third-party complaint does not have a close nexus to the plan or pending adversary

proceeding." Id., at 320.

In citing "Pacor Inc. v. Higgins, 743 Fed.2d. 984, 994 (3d Cir. 1984), the Green Field court held that:

> "The mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of Section 1471(b). Judicial economy does not justify federal jurisdiction." Id., at 320.

Also, "Commonality of fact and judicial economy are concepts of supplemental jurisdiction which bankruptcy courts do not possess." Id., at 321.

See, also, Citigroup Inc. v. Arthur Anderson LLP (In re Enron Corp., 353 B.R. 51 Bankr. S.D.N.Y. 2006). The Citigroup court found that there is no supplemental jurisdiction over a "nonfederal claim in instances where the claim has no impact on the bankruptcy estate." Id., at 61.

Therefore, the bankruptcy court lacked jurisdiction in this matter to decide a third-party complaint brought by the Bank against the Federicis.

Another specious argument made by Defendants/Respondents was that the Bank should not have paid $60,000 to settle the preference action and that it should have litigated until conclusion. T.4.16-21 The case could easily have been lost resulting in a judgment of almost twice the amount of the

settlement. It is pure speculation to assume that any case will be won or lost. It was the Bank's best judgment, based upon sound advice of bankruptcy counsel, that the settlement would be in the best interest of both the Bank and the Federicis.

CONCLUSION

For the foregoing reasons, this Court is urged to vacate the Order dismissing Plaintiff-Appellant's Complaint; to order the reinstatement of the 2012 note and mortgage; and to remand to the Foreclosure Unit for further proceedings.

Respectfully submitted,

DEXTER & KILCOYNE
Attorneys for Plaintiff-Appellant

By /s/ Bruce H. Dexter
Bruce H. Dexter

Dated: May 31, 2024

BOGOTA SAVINGS BANK, a Banking Corporation of the State of New Jersey, Plaintiff-Appellant, v. DAVID G. FEDERICI AND VALERIE S. FEDERICI, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-001943-23 SAT BELOW: Superior Court of New Jersey, Chancery Division, Gen. Equity Venue: Bergen County Docket No. BER-F-9364-23 Hon. Darren T. DiBiasi, J.S.C.

DEFENDANTS-RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

Like the Foreclosure Court, this Court should reject Plaintiff-Appellant Bogota Savings Bank's ("Plaintiff") argument that it can reinstate, and then foreclose, upon a mortgage that it discharged after receiving payment in full of the mortgage payments. This Court should affirm the Trial Court's holding that Plaintiff has no standing to foreclose on a discharged mortgage.

If the Court were to recognize Plaintiff's legal theory, then the County Clerk recording offices would be littered with discharged zombie mortgages that could be revived and reinstated at any time, for almost any reason. Creditors, good-faith purchasers, and the public would no longer be able to rely on those discharges being final.

The sole basis for Plaintiff's foreclosure action is an alleged $60,000 "loan deficiency" on the very mortgage that Plaintiff discharged. The "loan deficiency" was created by Plaintiff's voluntary settlement with the bankruptcy trustee wherein Plaintiff agreed to pay the trustee $60,000 in full and final settlement of the bankruptcy preference action. Defendants-Respondents David and Valerie Federici ("Defendants") took out that mortgage with Plaintiff on May 11, 2012, paid it off in full, and it was discharged on January 29, 2018. Defendant David Federici was the sole shareholder of Floor Town, Inc., which declared bankruptcy on February 2, 2018. Because Defendants paid their mortgage payments directly from Floor Town

to Plaintiff, the Bankruptcy Trustee filed an Adversary Complaint against Plaintiff to claw back the mortgage payments. While in active litigation with the trustee, on January 24, 2022, Plaintiff made a new loan to Defendants. About six months later, on August 10, 2022, Plaintiff settled the Adversary Complaint by agreeing to pay the trustee $60,000. Defendants were not involved in the Adversary Complaint and had no involvement with the negotiation of the settlement.

Plaintiff now seeks to both reinstate and foreclose on the discharged mortgage and foreclose on the second mortgage (which is current) on the basis that the $60,000 bankruptcy settlement is an event of default.

Plaintiff's position must be rejected. If Plaintiff had a claim for contribution or indemnification against Defendants, Plaintiff should have impleaded them into the Adversary proceeding in Bankruptcy Court. By not doing so, Defendants were prejudiced because they were deprived of the opportunity to present any claims or defenses in the Adversary proceeding and were unable to participate in the settlement negotiations with the trustee. Defendants would have been on notice Plaintiff believed it had a claim against them, and perhaps would not have executed the second note and mortgage. We will never know what would have happened, because Plaintiff declined to implead Defendants into the bankruptcy case.

Having made that choice, as well as the choice to loan Defendants money a second time in ten years, Plaintiff is now responsible for the consequences of those

decisions, which is that their opportunity to hold Defendants in default was extinguished by virtue of the discharge of mortgage.

For these reasons, as discussed in greater detail below, the Foreclosure Court's decision to dismiss Plaintiff's complaint should be affirmed in every respect.

PROCEDURAL HISTORY; STATEMENT OF FACTS[1]

A. The First Mortgage

On May 11, 2012, Plaintiff extended a loan to Defendants in the amount of $134,000. (Pa1). The loan was secured by a first mortgage (the "First Mortgage") on the residence of the Defendants located at 315 Momar Drive, Ramsey, New Jersey (the "Defendants' Residence"). (Pa2; Pa18).

At the time the First Mortgage was extended and thereafter, Defendant David Federici was the sole shareholder of Floor Town. (Pa2). Plaintiff accepted mortgage payments on the First Mortgage from Floor Town for years, despite the fact that Floor Town was not a mortgagor. (Pa2).

Once the First Mortgage was paid in full, Plaintiff prepared and recorded a discharge of mortgage. (Pa2). The discharge was recorded at the Bergen County Register's Office on January 29, 2018. (Pa2).

[1] Due to the intertwining of the procedural history and statement of facts, Defendants have combined the two sections into one to avoid unnecessary duplication.

B. Bankruptcy Proceeding, Second/Later Mortgage

On February 2, 2018 Floor Town filed a Chapter 7 bankruptcy petition under Case Number 18-12220. (Pa2). On January 30, 2020 the bankruptcy trustee filed an adversarial proceeding under Case Number 20-01045 against Plaintiff seeking the return of some of the mortgage payments made by Floor Town on the First Mortgage. (Pa2).

On January 24, 2022, *while in the midst of the trustee adversarial proceeding*, Plaintiff extended a Second Mortgage to the Defendants in the sum of $97,000 that was also secured by Defendants' Residence ("Second Mortgage"). (Pa4). On August 10, 2022, Plaintiff and the trustee entered into a consent order wherein Plaintiff voluntarily agreed to pay the trustee $60,000 in full satisfaction of the claims asserted by the trustee against Plaintiff for the recovery of some of the mortgage payments on the First Mortgage made to Plaintiff. (Pa2).

C. Foreclosure Action

On August 4, 2023 (more than three years after the bankruptcy trustee commenced the adversarial proceeding against Plaintiff and more than one year after the Plaintiff reached a voluntary settlement with the bankruptcy trustee) Plaintiff filed a foreclosure complaint against Defendants seeking to first reinstate and then foreclose on the First Mortgage that was discharged on January 29, 2018. (Pa1-4). Furthermore, the complaint sought to foreclosure on the Second Mortgage, arguing

that Defendants default on the First Mortgage (caused by the adversarial proceeding filed by the bankruptcy trustee against Plaintiff in which Plaintiff reached a voluntary settlement with the trustee) constituted a default under the Second Mortgage's cross-collateralization provision. (Pa4-5).

On October 13, 2023, Defendants filed a motion to dismiss the foreclosure complaint with prejudice. (Pa10).

On November 6, 2023, Plaintiff filed a cross motion seeking to amend the foreclosure complaint to add a count for breach of contract. (Pa57). On December 5, 2023, the Foreclosure Court, the Honorable Judge Darren T. DiBiasi presiding, heard oral argument on both motions. (Pa92; T3:1-13:18).

On January 22, 2024, the Foreclosure Court granted Defendants' motion to dismiss the foreclosure complaint with prejudice, stating that

> once a mortgage loan has been satisfied or paid in full, the mortgage that secures the obligation is no longer a valid lien. The effect of the satisfaction and extinguishment of the indebtedness for which the mortgage was collateral, is to discharge and extinguish the mortgage. See Atwater v. Underhill, 22 N.J. Eq. 599, 602. If a mortgage has been discharged, evidence of discharge constitutes a valid defense to any subsequent foreclosure action. Here, Plaintiff accepted payments in satisfaction of the mortgage from a business entity related to Defendants. Plaintiff could have litigated the preference action to conclusion but did not. Plaintiff could have moved to vacate the discharge but did not. Plaintiff cannot now foreclose on Defendants five years after it recorded a discharge. It lacks standing.

[(Pa92; Pa96-97).]

The Foreclosure Court then denied Plaintiff's cross motion to amend the complaint because it was "futile." (Pa97-98).

On March 1, 2024 Plaintiff filed a notice of appeal. (Pa100).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

Plaintiff asserts that the Foreclosure Court erred in dismissing its foreclosure complaint with prejudice. For the reasons that follow, this Court should affirm the decision of the Foreclosure Court in this regard.

A. Plaintiff Cannot Sustain a Cause of Action for Foreclosure

The Appellate Division reviews a trial court's ruling on a motion to dismiss de novo, "without deference to the judge's legal conclusions." Am. Civil Liberties Union of N.J. v. Cty. Prosecutors Ass'n of N.J., 474 N.J. Super. 243, 255 (App. Div. 2022) (citations omitted). A motion to dismiss for failure to state a claim under Rule 4:6-2(e) requires the trial court to search the pleading with liberality to determine whether a cause of action is suggested, Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989), and the court must "accept as true all

factual assertions in the complaint." Smith v. SBC Communications, Inc., 178 N.J. 265, 268-69 (2004).

Despite this indulgent standard, a motion to dismiss must nevertheless be granted if the complaint fails to articulate a legally sufficient basis entitling plaintiff to relief. See County Energy Recovery Assocs., L.P. v. New Jersey Department of Environmental Protection, 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009). "A motion to dismiss a complaint under [Rule] 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005). Although a plaintiff need not prove the truth of the factual allegations in response to a motion to dismiss for failure to state a claim, it is plaintiff's duty to demonstrate allegations "which, if proven, would constitute a valid cause of action." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)).

> In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue.

> [Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (internal citations and quotations omitted).]

Considering the facts alleged in the Foreclosure Complaint, in light of all documents annexed to the complaint, all of which are "matters of public record, and documents that form the basis of a claim," Plaintiff cannot meet the burden of showing it is entitled to relief.

Plaintiff does not deny that the mortgage was discharged of record on January 29, 2018. Rather, Plaintiff admits that "prior to the bankruptcy preference action and the settlement of that action, the 2012 mortgage was not in default and there was no reason to seek reinstatement." (Db13). Plaintiff fails to cite any authority to support the proposition that a mortgage, which was property discharged, can be reinstated years later and automatically be placed into default due to a bankruptcy proceeding which was commenced years after the discharge of mortgage was recorded.

Although Defendants concede that Rule 4:27-1 provides that "a plaintiff in the complaint or in an answer to a counterclaim . . . may join, either as independent or as alternate claims, as many claims, either legal or equitable or both, as he or she may have against the opposing party," it is axiomatic that the claim must be one recognized by our courts. There is no authority that allows Plaintiff to revive a discharged mortgage because of a default alleged to have occurred long after the mortgage was fully satisfied and discharged of record. If the Court allows Plaintiff

to reinstate a discharged mortgage in this case, it will not be long before other lenders also try to revive discharged mortgages, leading to the collapse of the real estate recording system as we know it.

"A revival of a mortgage once paid is tantamount to executing a new mortgage, and once satisfied, a mortgage may not be revived without the authorization of the obligor on the bond and the owner of the estate in land." Mc Carthy v. Schwalje, 234 N.J. Super. 396, 399 (Super. Ct. 1988) (citing First Federal v. Fink, 99 N.J. Super. 76 (Ch. Div. 1968) and Atlantic Seaboard Co. v. Borough of Seaside Park, 36 N.J. Super. 142, 154 (App. Div. 1955), certification denied, 19 N.J. 619 (1955)). No such authorization to revive the mortgage exists here.

It is well-established that the elements necessary for foreclosure are as follows: (1) the validity of the mortgage, (2) the amount of the indebtedness, and (3) the right of the holder to resort to the mortgaged premises. See e.g., Investors Bank v. Torres, 457 N.J. Super. 53, 65 (App. Div. 2018); Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). "A lender's right to foreclose is an equitable right inherent in a mortgage, triggered by a borrower's failure to comply with the terms and conditions of the associated loan." Investors Bank, 457 N.J. Super. at 65; S.D. Walker, Inc. v. Brigantine Beach Hotel Corp., 44 N.J. Super. 193, 202 (Ch. Div. 1957).

Here it is uncontroverted that the Plaintiff received all the payments due under the mortgage and thereafter prepared and recorded a discharge of mortgage on January 29, 2018. There was no mistake. Plaintiff's argument in this appeal that the commencement of the bankruptcy litigation by the trustee two years after Plaintiff received the final mortgage payment which was later settled constitutes a default of a long-ago discharged mortgage is not cognizable by our courts. The mortgage had been properly discharged years before the bankruptcy litigation commenced.

Plaintiff argues that the Foreclosure Court mistakenly relied on Atwater v. Underhill, 22 N.J. Eq. 599, 602 (E. & A. 1872) (Pa94) holding that an extinguishment of the underlying debt also extinguishes the mortgage. Plaintiff argues that the underlying debt was not extinguished because two years after the recording of the discharge of mortgage, a bankruptcy preference action was filed against Plaintiff which ended with a voluntary payment by Plaintiff to the trustee. The bankruptcy preference action does not revive the extinguished mortgage. Plaintiff cites no authority for this argument because there is none.

B. Laches & Equitable Estoppel Must Preclude Plaintiff's Requested Relief

From January 30, 2020, the date the bankruptcy trustee filed a complaint against Plaintiff to disgorge the mortgage payments on the first mortgage through the filing of the foreclosure complaint on August 4, 2023, Plaintiff took no steps to vacate the discharge of mortgage and reinstate the mortgage. Instead, Plaintiff is now

seeking to foreclose on a discharged mortgage that is null and void. See Wells Fargo Bank, 2020 N.J. Super. Unpub. LEXIS 1130, at *11 (Pa46). This course of conduct should not be permitted, according to the doctrine of laches.

"Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay" in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012) (citations and quotations omitted). It is an equitable remedy that has been described as "an equitable defense that may be interposed in the absence of the statute of limitations." Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 157 (2001) (quotations omitted).

Laches may be "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. 169, 180-81 (2003). The doctrine " may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." Id. at 181.

Here, Plaintiff failed to timely act once it was on notice and served in the bankruptcy action. Plaintiff did not assert its claims against the Federici's in the bankruptcy action. In addition, Plaintiff had an alternate remedy; namely, Plaintiff

could have filed a claim in the bankruptcy court for payment pursuant to 11 USC 502(h).

Plaintiff could have brought Defendants into the bankruptcy preference action so that Defendants could have participated in the action and the ultimate settlement perhaps contributing to the same. Instead, Plaintiff decided to extend a second mortgage to Defendants, while in active litigation with the bankruptcy trustee, and then negotiate the terms of the settlement with the bankruptcy trustee to the exclusion of the Defendants.

Plaintiff chose to voluntarily settle the bankruptcy preference action by paying the trustee $60,000. Plaintiff negotiated the terms with the trustee to the exclusion of the Defendants. Plaintiff could have litigated the preference action with the trustee and perhaps been successful, but they chose to settle instead. They cannot now be permitted to walk back on this decision, upon which Defendants relied. See Knorr, 178 N.J. at 178 (2003) ("to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment.").

Plaintiff does not dispute that it waited more than three years since the bankruptcy preference action was filed against it and more than one year after it voluntarily settled with the action with the bankruptcy trustee, to bring a foreclosure

action asking the Foreclosure Court to revive a discharge of mortgage. Plaintiff does not dispute that it issued a Second Mortgage while in the midst of the bankruptcy litigation that it seeks to use to revive a discharged mortgage and further use as a default under the cross-collateralization clause of the Second Mortgage. As stated by the Foreclosure Court, Plaintiff slept on its rights. (Pa 97).

Plaintiff relies on the entire controversy doctrine to argue that all claims should be brought before the court together. While this may be true in theory, it is simply inapplicable here. The entire controversy doctrine does not create law or new claims and certainly does not explain what caselaw Plaintiff relies upon to argue that a discharged mortgage can be revived and automatically go into default due to a bankruptcy preference action filed years after the Plaintiff received all the mortgage payments and prepared and recorded a discharge of mortgage. Plaintiff has no claim. If Plaintiff is concerned with judicial economy, Plaintiff could have sued Defendants in the bankruptcy court but failed to do so.

At this juncture it is simply too late for the Plaintiff to foreclose upon a discharged mortgage which would cause undue prejudice to Defendants.

Point II

TO PERMIT PLAINTIFF'S INTENDED COURSE OF CONDUCT WOULD CONTRAVENE PUBLIC POLICY

Indeed, if the Court were to reverse the decision of the Foreclosure Court to permit Plaintiff to revive and foreclose on the discharged mortgage, it would wreak

havoc on the real estate recording system which depends on the reliability of recorded documents such as deeds and mortgages. If the Court allows the Plaintiff to magically revive a discharged mortgage because of later bankruptcy litigation, one could only imagine the ways in which other attorneys in other matters would seize upon such caselaw to also set aside other discharges of mortgage and other recorded instruments when it suits their fancy.

> Generally speaking, and absent any unusual equity, a court should decide a question of title such as this in the way that will best support and maintain the integrity of the recording system. The underlying purpose of the Recording Act is clear.
>
> An historical study of the [Recording] Act, as well as an analysis of the cases interpreting it, leads to the conclusion that it was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence. The means by which the compulsion to record is accomplished is by favoring a recording purchaser, both by empowering him to divest a former non-recording title owner and by preventing a subsequent purchaser from divesting him of title. This ability to deprive a prior and bona fide purchaser for value of his property shows a genuine favoritism toward a recording purchaser. It is a clear mandate that the recording purchaser be given every consideration permitted by the law, including all favorable presumptions of law and fact. It is likewise a clear expression that a purchaser be able to rely upon the record title.
>
> [Jones, The New Jersey Recording Act -- A Study of its Policy, 12 Rutgers L. Rev. 328, 329-30 (1957).]

"Courts have thus held that the integrity of the recording scheme is paramount." Cox v. RKA Corp., 164 N.J. 487, 497 (2000) "[A]bsent any unusual equity' the stability of titles and conveyancing requires the judiciary to follow that course 'that will best support and maintain the integrity of the recording system.'" Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990) (quotations omitted).

This policy favoring the certainty of title to real property is further established in the statutes which pertain the recording of documents. For example, N.J.S.A. 46:21-1 provides that, "Except as otherwise provided herein, whenever any deed . . . shall have been or shall be duly recorded . . . such record shall, from that time, be notice_ to all subsequent . . . purchasers . . . of the execution of the deed . . . so recorded and of the contents thereof." Then, N.J.S.A 46:22-1 states that "Every deed . . . shall, until duly recorded . . . , be void and of no effect against . . . all subsequent bona fide purchasers . . . for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded . . . ." Lastly, N.J.S.A. 46:26A-12 states clear that "any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents."

In summation, and in the simplest terms, Plaintiff is seeking to foreclose on a mortgage that was discharged and therefore is null and void. See Wells Fargo Bank v. NJ Prop. Group, 2020 N.J. Super. Unpub. LEXIS 1130, at *11 (standing for the

proposition that once the mortgage is discharged, it is null and void and plaintiff lacks standing to foreclose) (Pa46). Plaintiff fails to cite a single case for the proposition that entitles it to reinstate a mortgage that was properly discharged because of a later bankruptcy litigation. For this reason, we ask that the Court affirm the Foreclosure Court's ruling which dismissed Plaintiff's complaint with prejudice.

POINT III

THE CROSS MOTION TO AMEND THE COMPLAINT TO ADD A BREACH OF CONTRACT CLAIM WAS PROPERLY DENIED

The Foreclosure Court property denied Plaintiff's cross-motion to amend their foreclosure complaint to add a count for breach of contract because there was no longer a contract for Plaintiff to enforce because the first note and mortgage were paid in full, and the mortgage was properly discharged. For this reason, it would be futile and a waste of judicial resources to permit Plaintiff's amendment to add a breach of contract count. For Plaintiff's to present a breach of contract count, it is axiomatic that there must be a contract. Here there was no contract because the Plaintiff received all the mortgage payments and prepared and recorded a discharge of mortgage. For this reason there is no contract for Defendants to breach.

The Appellate Division reviews "a trial court's decision to grant or deny a motion to amend the complaint for abuse of discretion." Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urb. Renewal Co., 435 N.J. Super. 51, 62, 86 A.3d 730 (App. Div. 2014) (citations omitted). "Rule 4:9-1 requires that motions for leave

to amend be granted liberally and that the granting of a motion to file an amended complaint always rests in the court's sound discretion." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quotations omitted).

Nevertheless, "in exercising that discretion, a court must go through a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Grillo v. State, 469 N.J. Super. 267, 275 (App. Div. 2021) (quotations and citations omitted). "The court determines whether the proposed amendment would be futile by asking whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Id. at 275-76. The requested amendment must be denied if it is "futile" and "not sustainable as a matter of law." Id. at 275-76, 279; see also Notte, 185 N.J. at 501.

Here, the Foreclosure Court did not abuse its discretion in denying Plaintiff's motion to amend its complaint. As set forth in full above, here, it would be futile to amend the complaint to add a breach of contract count because the contract is null and void. Defendant cannot breach a contract that does not exist. Short of using a time machine to go back in time and know that the bankruptcy trustee would file an adversarial complaint for mortgage payments made by Defendant's business and reject all the mortgage payments made by Defendant's business, there is nothing that

Plaintiff could plead in its foreclosure complaint which would cure this fatal deficiency.

POINT IV

PLAINTIFF CANNOT ESTABLISH THAT THE 2012 MORTGAGE WAS CANCELLED BY MISTAKE

Plaintiff now seeks, for the first time, to argue that the mortgage was cancelled by mistake. This argument was not presented in the Foreclosure Court and therefore should not be considered by this Court. (Da001 to Da007). "Appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available . . . ." J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021) (quotations omitted).

If this Court is inclined to consider Plaintiff's newly raised argument of a mortgage being mistakenly cancelled, the Court should also consider Plaintiff's position that the mortgage that was discharged on January 29, 2018 was not in default prior to the bankruptcy preference action on January 30, 2020. (Pb13). This is not a case where there was an accounting error that Plaintiff discovered after discharging the mortgage that there were monies still due. Here there was no mistake: Plaintiff does not dispute receiving all the money due under the mortgage. At the time the mortgage was satisfied and the discharge of mortgage was prepared and recorded, neither party was aware that two years in the future there would be a bankruptcy preference action. This is not a mistake but an unforeseen event that

neither party anticipated. For this reason all the cases cited by Plaintiff as to a mortgage being mistakenly cancelled are not applicable to the case sub judice.

POINT V

PLAINTIFF FAILED TO STATE A CLAIM FOR EQUITABLE ESTOPPEL AND UNJUST ENRICHMENT

Plaintiff argues that Defendants should have been equitably estopped from asking the Foreclosure Court to find that the 2012 mortgage had been discharged, and that by this result, Defendants have been unjustly enriched.

To make an equitable argument Plaintiff must show that Defendants knew or should have known that making the mortgage payments using the business' bank account would lead to a future bankruptcy preference action against Plaintiff, two years later. See Knorr, 178 N.J. at 178 (2003) ("to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment.").

Here, Defendant David Federici is a layperson who owned a flooring company and sold and installed different types of flooring such as tile, carpet, vinyl flooring. He did not know that a bankruptcy preference would result from his decision to pay his mortgage with company funds; he was simply making a good faith effort to pay the mortgage as he always had without an issue. Plaintiff never objected to Defendant making the payments from his business account.

Defendants did not receive any additional benefit from making the mortgage payments through the Floor Town bank account. If the business had paid Defendant a salary which would have been deposited into his personal bank account and then Defendants paid the mortgage from that account, it would have the same effect as to Defendants. The end result was that Defendant made sure the mortgage payments were made. The later bankruptcy preference action cannot retroactively trigger a default of the note and certainly do not constitute fraud which requires an element of intention on the part of Defendants.

As such, the Court should reject Plaintiff's claims for equitable estoppel and unjust enrichment.

POINT VI

PLAINTIFF FAILED TO STATE A CLAIM FOR CROSS-COLLATERALIZATION

Plaintiff attempts to argue that it should have been permitted to cross-collateralize, and therefore declare a default on the second mortgage pursuant to the cross-default provision, which states:

> "DEFAULT: The note describes the acts that will constitute a default under this mortgage. Additionally, a default under any other mortgage covering the premises will constitute a default under this mortgage. If any default occurs, you can foreclose this mortgage. That means that you can arrange for the premises to be sold, as provided by law, in order to pay off what I owe you. If the money you receive from the sale is not enough to pay off what I owe you, I still owe you the difference."

[(Pa44).]

However, since the First Mortgage was discharged prior to the date the Second Mortgage was made, as more fully set forth above, Plaintiff is unable to state a claim for cross-collateralization because there was no other mortgage in existence. Plaintiff could have attempted to reinstate the discharged mortgage prior to making the Second Mortgage but failed to do so. Plaintiff could have denied the Second Mortgage considering it was in active litigation with the bankruptcy trustee. Instead, Plaintiff chose to extend the Second Mortgage.

Plaintiff is seeking to have it both ways. It made the Second Mortgage while in the midst of the bankruptcy preference action and now seeks to use the very same bankruptcy preference action to revive a discharged mortgage and declare it and the Second Mortgage to be in default based on the bankruptcy preference action. The Court should not countenance this attempted course of action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the Foreclosure Court's order which dismissed the Plaintiff's complaint with prejudice and denied the Plaintiff's cross motion to amend the complaint.

Respectfully submitted,

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By: s/ Mercedes Diego
Mercedes Diego, Esq.

Dated: July 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001943-23

BOGOTA SAVINGS BANK, a Banking Corporation of the State of New Jersey)

Plaintiff-Appellant) CIVIL ACTION

v.) ON APPEAL FROM:

DAVID G. FEDERICI and VALERIE S. FEDERICI)

) Superior Court of New Jersey
) Chancery Division, Bergen County
Defendants-Respondents) Docket No. BER-F-9364-23

SAT BELOW:
DARREN T. DI BIASI, J.S.C.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Submission Date: August 1, 2024

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PRELIMINARY STATEMENT

This brief is filed in reply to the Respondents' Brief. Appellant, Bogota Savings Bank, relies fundamentally on its main Brief but replies to a number of Respondents' factual and legal assertions as set forth herein.

The issues before this Court are straightforward: Whether Respondents, David G. Federici and Valerie S. Federici ("Federici" or "Respondent") is obligated to reimburse Appellant Bogota Savings Bank ("Bogota" or "Appellant") for a portion of Federici's mortgage payments which were clawed back by a Trustee in Bankruptcy? Does the deficiency created by the clawback constitute a breach of contract under Federici's obligation to repay the full amount of the loan to Bogota? Was Federici unjustly enriched by the $60,000 loan deficiency resulting from the claw back? As urged in Appellant's main brief and as set forth herein, we believe the answers are in the affirmative.

POINT I

FEDERICI'S ARGUMENT THAT A MORTGAGE ONCE CANCELLED CANNOT BE REINSTATED IS WITHOUT MERIT

Respondent argues that a mortgage once cancelled cannot be reinstated under any circumstances, and claims that Appellant fails to cite any authority to support

that a properly discharged mortgage can be reinstated. Db8. Respondent further argues that if the Court were to reinstate the Federici mortgage, "creditors, good-faith purchasers, and the public would no longer be able to rely on those discharges being final" (Db1) and "it will not be long before other lenders try to revive discharged mortgages, leading to the collapse of the real estate recording system as we know it." Db9. Appellant cited numerous cases and other authorities in its main Brief to support its position that a cancelled mortgage can be reinstated for fraud, mistake, or misrepresentation provided there was no change of position or rights of subsequent lienholders involved as is the case here. Pb17-18. See 29 N.J. Prac.Law of Mortgages, §13.10 (2d ed.), fn. 35, and §8b of the Restatement (Third) of Restitution and Unjust Enrichment (2011).

Respondent's heavy reliance on Wells Fargo Bank v. NJ Prop.Group, 2020 N.J. Super. Unpub. LEXIS 1130 (Pa46) is misplaced and ignores the distinct factual differences between the facts in Wells Fargo and this case. In Wells Fargo, the real estate was purchased by a purchaser for value who relied upon the recording system which indicated a prior mortgage had been cancelled. There, the buyer changed his position by purchasing, mortgaging, and improving the property. Under those facts, the Wells Fargo Court held that the prior cancelled mortgage should not be

reinstated. In this case, unlike in Wells Fargo, the dispute is solely between Federici and Bogota. No one changed his/her position in reliance on the cancelled mortgage and no priority rights of subsequent lienholders, including Federici, exist. Should the mortgage be reinstated, the rights of other persons will not be affected. Therefore, the holding in Wells Fargo is not controlling.

Federici's arguments that public policy in reliance on the Recording Act will be violated and would lead to the collapse of the recording system is of no merit is absurd and a misunderstanding of the law. The decisional law in cases involving mortgage reinstatement is fact-sensitive and the facts of this case are unique. A remedy can be readily tailored to suit the facts without any detrimental effect whatsoever on public policy and the Recording Act.

POINT II

APPELLANT'S CLAIMS ARE NOT BARRED BY THE DOCTRINE OF LACHES AS ARGUED BY RESPONDENTS

As correctly stated by Respondent, laches is an equitable doctrine that "precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Db11. To prevail,

both prongs must be satisfied. Neither is satisfied in this case.

The bankruptcy "Adversary Complaint for Avoidance and Transfer of Property" filed on 1/30/2020 (Pa24) sought disgorgement from Bogota of four years' of mortgage payments totalling $105,697.90 improperly made by Federici's oneperson corporation, Floor Town, Inc. , at the direction of Federici.

From 1/30/2020 until 8/10/2022, Bogota vigorously defended against the Trustee's claim. Pa35. It was not until the preference action was resolved that

Bogota first knew the amount of its loss with any certainty, and its claim against Federici for restitution of the disgorged mortgage payments arose. It was less than one year later, on 8/4/2023 (Pa1), that Bogota filed its Complaint against Federici for reinstatement of the mortgage and restitution of the fraudulently made mortgage payments. Thus, there was no inexcusable or avoidable delay.

As to the required second prong requiring prejudice to another party, Federici seems to claim that he was somehow prejudiced by the exclusion of Federici in the litigation with the Bankruptcy Trustee and the settlement negotiations. (Db12). They claim that instead of settling, perhaps the defense could have been successful or Federici could have contributed to the settlement.

The facts are, as argued in Appellant's main brief at Pa27, that the Bankruptcy

Court had no subject matter jurisdiction over the dispute between Bogota and Federici, and that contribution from Federici would neither increase or decrease the amount of the bankruptcy estate. It is clearly speculative whether defending against the preference action to its conclusion would be successful. It likely would have resulted in an award of the full $105,697.90 sought by the Bankruptcy

Trustee and Bogota would now be seeking restitution of $105,697.90 instead of $60,000. The settlement worked to Federici's benefit not to their detriment. In fact, it was Bogota---not Federici---that relied to its detriment on Federici's representations (albeit mistakenly) that the mortgage payments were good and consequently suffered the loss of $60,000. Therefore, no prejudice or loss was suffered by Federici and no detrimental reliance has or can be shown.

POINT III

RESPONDENTS' ARGUMENT THAT APPELLANT FAILED TO STATE A CLAIM FOR EQUITABLE ESTOPPEL AND UNJUST ENRICHMENT IS WITHOUT MERIT.

Respondent argues that Appellant failed to make its claims for equitable estoppel and unjust enrichment because Appellant failed to show that Respondents "knew or should have known that making the mortgage payments using the Federici business'

bank account would lead to a future bank preference action." They excuse Federici's conduct because he was a layperson who was essentially ignorant that paying his personal mortgage debt with company funds was fraudulent, and ignorant of his company's financial condition. Rather than taking responsibility for his own actions, Federici attempts to shift the blame to Appellant for accepting the payments. They further claim that Federici received no benefit from this fraudulent conduct. The facts are that had Floor Town paid Federici a salary instead of making the mortgage payments directly, the salary payments would have been reportable taxable personal income to Federici. Federici reaped the benefit of reporting a lower income than would otherwise have been reportable had the mortgage payments been paid as salary to him.

Furthermore, David Federici is not a layperson but a businessman and the sole shareholder of his corporation, Floor Town, Inc. He personally authorized the payments to be made to Bogota from his business account with full knowledge that the mortgage was his individual obligation. Respondent does not deny that Floor Town's Chapter 7 Bankruptcy Petition was filed a mere three days after the mortgage was cancelled (Pa20). Clearly, Federici as CEO and Chief Financial Officer of Floor Town, Inc., knew or should have known well before the mortgage was cancelled that

his company was in financial difficulty and that a bankruptcy filing was imminent and, therefore, not unforeseen.

Any attempt to shift the blame to Bogota for accepting the payments should be disregarded. The payments were accepted in the mistaken belief that the payments were valid. The mortgage was cancelled by Bogota under the mistaken belief that the payments made by Federici were authorized. Had Bogota known the payments were fraudulently made, credit would not have been given and the mortgage would never have been cancelled. This argument is central to all contentions made by Bogota and was argued in the court below (Da004), contrary to respondent's contentions. Db18. As argued in Appellant's main Brief, to require a lender to compare each payment check or electronic transfer received with the name of each borrower would place an impossible burden on the lending industry and would be contrary to standard lending procedure. There is no disputing that if Respondent is not required to make restitution to Bogota of the $60,000 of mortgage payments that Bogota was required to pay to the Bankruptcy Trustee, Federici will receive a windfall of $60,000 and Bogota will incur a loss of $60,000. That $60,000 windfall constitutes unjust enrichment to Federici.

The issue here, simply stated, is whether, under the facts of this dispute,

Federici owes Bogota the money that was clawed back by the Bankruptcy Court. If so, Federici is obligated to make restitution to Bogota.

CONCLUSION

Bogota remains unpaid and Federici has been unjustly enriched. Federici has committed misrepresentations and fraud and now seeks to excuse his conduct by arguing for unacceptable and unprecedented interpretations of equitable doctrines in order to leave Bogota remediless. The law is clear that Bogota is entitled to be paid by Federici. Reinstatement of the 2012 note and mortgage and remand to the Foreclosure Unit for further proceedings are warranted.

Respectfully submitted,

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