SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1454-15T1

US BANK NATIONAL ASSOCIATION,
as Trustee for CMLTI 2006-WF2,

Plaintiff-Respondent,

v.

RACHELLE MATTHEWS,

Defendant-Appellant,

and

ROBERT GEBHARDT,

Defendant-Respondent.

Argued January 24, 2017 – Decided November 28, 2017

Before Judges Fisher and Leone.

On appeal from Superior Court of New Jersey, Chancery Division, Union County, Docket No. F-059626-09.

Rebecca Schore argued the cause for appellant (Jurow & Schore, LLC, attorneys; Ms. Schore and Margaret Jurow, on the briefs).

Henry F. Reichner argued the cause for respondent US Bank National Association (Reed

Smith, LLP, attorneys; Mr. Reichner, on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Defendant Rachelle Matthews appeals from the October 7, 2015 final judgment of foreclosure. She challenges a May 29, 2015 order allowing plaintiff US Bank National Association to reinstate its foreclosure complaint. We affirm.

I.

In January 2006, Matthews and defendant Robert Gebhardt, who is now deceased, obtained a $346,750 loan from Wells Fargo Bank. Defendants executed a note and a mortgage on their property in Union, which were assigned to US Bank, with Wells Fargo continuing to service the loan. Defendants defaulted in their payments in August 2009.

US Bank filed a foreclosure complaint in November 2009. On April 30, 2010, the Chancery Division struck defendants' answer and defenses, ordered default be entered, and transferred the action to the Office Of Foreclosure to be handled as an uncontested matter.

On December 20, 2010, the Chancery Division issued to Wells Fargo and other mortgage servicers an order to show cause why the court should not suspend the processing of all uncontested mortgage

foreclosure actions in which they were or had been involved. The order was based on concerns about the accuracy and reliability of documents submitted to the Office of Foreclosure. After addressing that issue in US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449 (2012), our Supreme Court issued an April 4, 2012 order authorizing further proceedings by order to show cause to determine whether plaintiffs in uncontested foreclosure actions with deficient notices should be allowed to serve corrected notices.

In August 2013, the clerk's office told US Bank its action would be dismissed for lack of prosecution unless US Bank showed exceptional circumstances. US Bank's counsel certified that the case could not proceed until the order-to-show-cause process concluded. On September 13, 2013, the clerk's office ordered pursuant to Rule 4:64-8 that the action was "dismissed without prejudice due to lack of prosecution. Reinstatement of the matter after dismissal may be requested by a motion for good cause."

In August 2014, US Bank filed a motion to vacate the dismissal and reinstate the complaint. The court's September 5, 2014 order conditionally granted the motion. The order provided the action "shall be reinstated upon the filing of a Motion for Final Judgment . . . not later than 120 days for the date of the . . . order." The order stated that if US Bank failed to file the motion, then the action "will remain dismissed and the Plaintiff shall be

required to file and serve a new complaint in order to foreclose on the subject premises." US Bank did not file the motion for final judgment, and the action remained dismissed.

In April 2015, US Bank filed a second motion to vacate the dismissal and reinstate the complaint. US Bank's counsel certified that US Bank "was unable to proceed from December 29, 2014, to February 6, 2015, due to a loss mitigation hold, precluding plaintiff from applying for Final Judgment within the permissible time frame as per the reinstatement order. The hold is now removed and Plaintiff may now proceed toward Final Judgment."

Matthews opposed the motion. She certified she had submitted her "most recent application for a loan modification to Wells Fargo in or around November 2014," that "Wells Fargo never sent me a written notice telling me that my application was either complete or incomplete as required by law," that "Wells Fargo never sent me a notice approving or denying my application for a loan modification," and therefore that the "'loss-mitigation' hold should still be pending."

In reply, US Bank's counsel submitted a certification attaching: a January 2, 2015 letter telling defendants that to process their loan modification application Wells Fargo would need additional information by February 1, 2015; and a February 4, 2015 letter telling defendants that because Wells Fargo had not received

the required documentation to complete the application, it was not able to offer loan modification assistance.

On May 29, 2015, the trial court conditionally granted US Bank's motion to vacate dismissal. In its statement of reasons, the court cited the certifications of Matthews and US Bank's counsel. In particular, the court cited counsel's certification that US Bank placed the loss mitigation hold on December 29, 2014, which the court noted was "within the 120 days the Plaintiff had to submit an entry for final judgment." The court found "that the review of a loss mitigation packet by the Defendant, which would benefit the Defendant, constitutes good cause to permit the Plaintiff to reinstate the complaint" "pursuant to R. 4:64-8."

The court's May 29 order provided the action "shall be reinstated upon the filing of a Motion for Final Judgment . . . not later than 150 days for the date of the . . . order."[1] Within 150 days, US Bank filed a motion for final judgment, which the trial court granted on October 7, 2015.

II.

Defendants appealed. US Bank argues that as defendants listed only the final October 7 order in their notice of appeal, they cannot appeal the interlocutory May 29 order. Under Rule 2:5-

[1] We denied Matthews's motion for leave to appeal the May 29 order.

1(f)(3)(A), "'it is only the orders designated in the notice of appeal that are subject to the appeal process and review.'" Petersen v. Meggitt, 407 N.J. Super. 63, 68 n.2 (App. Div. 2009) (citation omitted). Defendant's "case information statement, however, makes clear that" they sought to challenge the May 29 order, which we had denied them leave to appeal. Tara Enters., Inc. v. Daribar Mgmt. Corp., 369 N.J. Super. 45, 60 (App. Div. 2004). In those circumstances, we exercise our discretion to review the May 29 order. See W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 459 (App. Div. 2008).

"Our review of an order [grant]ing reinstatement of a complaint dismissed for lack of prosecution proceeds under an abuse of discretion standard." Baskett v. Kwokleung Cheung, 422 N.J. Super. 377, 382 (App. Div. 2011). We must hew to our standard of review.

III.

Matthews argues US Bank failed to show good cause to vacate dismissal and reinstate the foreclosure action because its motion was based on inadmissible hearsay in the certifications by US Bank's counsel. However, Matthews's certification agreed with the key statements in the initial certification of US Bank's counsel. First, Matthews agreed that defendants had filed a loan modification application within the 120 days in which the trial

court's September 5, 2014 order gave US Bank to file a motion for final judgment. Second, Matthews's certification agreed her application resulted in a "loss-mitigation hold" that barred US Bank from moving for a final judgment of foreclosure. When the parties agree on a fact, the court may consider that undisputed fact. See State v. Evans, 340 N.J. Super. 244, 247 n.1 (App. Div. 2001); see also Pressler & Verniero, Current N.J. Court Rules, comment on R. 1:6-6 (2018) (stating stipulated facts are cognizable).[2]

Those undisputed facts were sufficient to justify the trial court's finding of "good cause" for US Bank's failure to file a motion for a final judgment of foreclosure during that period. R. 4:64-8. As the court found, the loss-mitigation hold during the 120-day period allowed defendants' loan modification application to be reviewed. Moreover, federal regulations bar the filing of such a motion if a complete application has been filed, and provide a procedure to allow an applicant the opportunity to submit a complete application.

"If a borrower submits a complete loss mitigation application . . . , a servicer shall not move for foreclosure judgment or

[2] At oral argument before us, Matthews agreed defendants had applied for a loan modification which prevented US bank for filing for a final judgment.

order of sale, or conduct a foreclosure sale," unless a specified exception applies. 12 C.F.R. § 1024.41(g) (2014). "Promptly upon receipt of a loss mitigation application, [the bank shall] review the loss mitigation application to determine if the loss mitigation application is complete; and . . . [n]otify the borrower in writing within 5 days . . . that the servicer has determined that the loss mitigation application is either complete or incomplete." 12 C.F.R. § 1024.41(b)(2)(i)(A), (B) (2014). "If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete" as well as "a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete." 12 C.F.R. § 1024.41(b)(2)(i)(B), (ii) (2014).

Given the federal regulations, the trial court properly found US Bank had "good cause" not to file a motion for final judgment of forfeiture within 120 days of the September 5, 2014 order. R. 4:64-8. Because defendants filed a loan modification application during that period, the resulting loss-mitigation hold meant that US Bank could "not move for foreclosure judgment or order of sale, or conduct a foreclosure sale." 12 C.F.R. § 1024.41(g) (2014).

Rule 4:64-8 "follows R. 1:13-7." Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:64-8 (2018). As under Rule

1:13-7, good cause "'requires the exercise of sound discretion in light of the facts and circumstances of the particular case.'" Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (citation omitted). Moreover, "'reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later.'" Ibid. (citation omitted). "[A]bsent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality." Id. at 197.

Neither fault nor prejudice has been shown here. US Bank was not at fault because it could not file a motion for final judgment within the 120 days once defendants submitted their loan modification application. Matthews has shown no prejudice from the delay, during which her application was reviewed and she was able to remain in the house without making payments. Thus, we find no abuse of discretion.

IV.

US Bank's counsel also certified that the loss-mitigation "hold is now removed and plaintiff may now proceed toward final judgment," and supported that assertion with the letters attached to his reply certification. Matthews argues that this assertion

by US Bank's counsel was inadmissible hearsay, and that the trial court improperly relied on it.

However, there is no indication the trial court relied on that assertion. The court does not mention it in its statement of reasons. Moreover, the court could properly grant US Bank's motion without relying on that assertion.

The issue before the trial court on the motion to vacate dismissal and reinstate the forfeiture action was whether US Bank had good cause not to file a motion for final judgment within 120 days of the September 13 order. As set forth above, US Bank showed good cause because under the loss-modification hold it could "not move for foreclosure judgment or order of sale, or conduct a foreclosure sale." 12 C.F.R. § 1024.41(g) (2014).

"Nothing in § 1024.41(g) prevents a servicer from proceeding with the foreclosure process" in other ways, "so long as any such steps in the foreclosure process do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41." 12 C.F.R. Part 1024 (Supp. I, Official Bureau Interpretation, cmt. 2 to 41(g)). Thus, § 1024.41(g) did not bar US Bank from filing a motion to vacate dismissal and reinstate, and in that motion US Bank did not have to show the hold had been lifted.

Of course, until the hold was lifted, US Bank could not file a motion for a final judgment of foreclosure. However, the trial court gave US Bank 150 days to file that motion, and US Bank did not file that motion for four months. That gave ample time to lift the hold if it was still pending.

In any event, the record before the trial court indicated the loss-mitigation hold had been lifted before US Bank filed its motion to vacate dismissal and reinstate the forfeiture action. Not only did US Bank's counsel certify the hold had been lifted, but the letters attached to his reply certification supported that conclusion.

The letters indicated the procedures in the federal regulations were followed. See 12 C.F.R. § 1024.41(b)(2)(i)(A) & (B), (ii) (2014). The January 2, 2015 letter told defendants their loan modification application was incomplete, specified the documents needed to make the application complete, and gave defendants thirty days to submit those documents by February 1, 2015. When defendants failed to do so, the February 4, 2015 letter notified them it would not provide loan modification assistance. This supported the initial certification by US Bank's counsel that the loss-mitigation hold was removed February 6, 2015.

Matthews did not deny the authenticity of either letter. Instead, she argued the letters were hearsay and that they were

not properly served on her. However, in his initial certification, US Bank's counsel certified that he "personally reviewed" and was "familiar with the records maintained by our firm in the ordinary course of business in connection with our representation of Plaintiff in this matter," and that he had "personal knowledge of the facts set forth herein based upon that review." Moreover, the lifting of the hold under 12 C.F.R. § 1024.41 was arguably a legal matter peculiarly within the personal knowledge of counsel. Further, in his reply certification, US Bank's counsel certified each letter was "a true and accurate copy." Finally, the January 2 letter stated it was addressed to defendants and sent to the counsel who had represented defendants, and the February 4 letter stated it was addressed and sent to defendants.

We need not resolve whether the certification of US Bank's counsel that the hold was removed was "made on personal knowledge, setting forth only facts which are admissible in evidence." R. 1:6-6. We also need not determine whether the letters attached to his reply certification constituted hearsay or were admissible business records. See New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 317-19, 325-29 (App. Div.), certif. denied, 218 N.J. 531 (2014); Higgins v. Thurber, 413 N.J. Super. 1, 21 n.19 (App. Div. 2010); N.J.R.E. 803(c)(6). Nor need we resolve whether the letters were properly sent to and received by

defendants. Those matters go to whether the hold was lifted, an issue that the trial court did not have to resolve in order to grant the motion to vacate dismissal and reinstate.

Matthews was not prejudiced by reinstatement because she could have raised those issues in opposition to US Bank's subsequent motion for final judgment by arguing that the loss-mitigation hold was still in place, that the certification that it was removed was based on inadmissible hearsay, and that the letters which removed it were not sent to her. Nothing in the record indicates Matthews opposed the motion for final judgment or raised those arguments. Her failure to raise those matters then does not entitle her to invalidate the trial court's earlier, valid order to vacate dismissal and reinstate.

Matthews's remaining arguments, including her argument about dual tracking, are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E); see U.S. Bank Nat. Ass'n v. Curcio, 444 N.J. Super. 94, 113-14 (App. Div. 2016) (rejecting a similar dual-tracking argument). We need not address US Bank's other arguments.

Affirmed.