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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1578-15T2
A-1579-15T2

DB50 2011-1 TRUST,

Plaintiff-Respondent,

v.

PETER PAUL KAMINSKI; MRS. PETER
PAUL KAMINSKI, His Wife;
BANK OF AMERICA, N.A.; and
THE UNITED STATES OF AMERICA,

Defendants.

PETER PAUL KAMINSKI,

Defendant/Third-Party
Plaintiff-Appellant,

v.

MONARCH MORTGAGE SERVICES, LLC;
DANIEL VERDIA; SANDRA MAINARDI;
CRYSTAL PALING; JOHN CERZA;
PAULINE KAMINSKI; BANK OF AMERICA, N.A.,
a Successor to BAC HOME LOAN
SERVICING, INC., a Successor to COUNTRYWIDE
HOME LOANS, INC.; BANKUNITED, F.S.B.,

Third-Party Defendants,

and

PHILIP BLANCH and ROBERT J. GORMAN,

Third-Party Defendants-
Respondents.

PETER PAUL KAMINSKI,

Plaintiff-Appellant,

v.

MONARCH MORTGAGE SERVICES, LLC;
DANIEL VERDIA; SANDRA MAINARDI;
CRYSTAL PALING; JOHN CERZA;
PAULINE KAMINSKI; BANK OF AMERICA, N.A.,
a Successor to BAC HOME LOAN
SERVICING, INC., a Successor to COUNTRYWIDE
HOME LOANS, INC., BANKUNITED, F.S.B.,

Defendants,

and

PHILIP BLANCH and ROBERT J. GORMAN,

Defendants-Respondents.

Argued telephonically March 15, 2017 –
Decided March 30, 2017

Before Judges Fuentes, Carroll and Gooden
Brown.

On appeal from the Superior Court of New
Jersey, Chancery Division, Passaic County,
Docket Nos. F-022129-12 and C-43-13.

Michael F. DeMarrais argued the cause for
appellant (Alampi & DeMarrais, attorneys; Mr.
DeMarrais, on the brief).

Barbara A. Fein argued the cause for
respondent DB50 2011-1 Trust (The Law Offices

of Barbara A. Fein, P.C., attorneys; Ms. Fein, on the brief).

Michael P. DeMarco argued the cause for respondent Philip Blanch (DeMarco & DeMarco, attorneys; Mr. DeMarco, on the brief).

Ira A. Ginsburg argued the cause for respondent Robert J. Gorman.

PER CURIAM

Following a bench trial in the Chancery Division, Judge Thomas J. LaConte found that Peter Paul Kaminski (Peter)¹ was the victim of fraud committed by his daughter, Pauline Kaminski (Pauline), and Pauline's companion, Sandra Mainardi. Pauline and Mainardi's fraudulent conduct stripped Peter of the equity in the Wayne home he has occupied since 1953, and ultimately led to the filing of a foreclosure action by DB50 2011-1 Trust (the Trust). In this appeal, Peter challenges an October 30, 2015 order that entered a judgment of foreclosure in favor of the Trust, and a companion judgment entered on the same date dismissing Peter's claims against the Trust and several other parties who were alleged participants in the mortgage fraud.² For the reasons that follow, we affirm.

¹ Because Peter Paul Kaminski, his late wife Sophie, and his daughter Pauline, are all parties to these actions, we refer to them by their first names for clarity and ease of reference. We intend no disrespect in doing so.

² On October 15, 2015, the trial court also entered judgment in favor of Peter against Pauline and Mainardi, jointly and severally,

I.

As Judge LaConte noted in his cogent oral opinion, the underlying factual background is subject to little dispute. In 1953, Peter and his wife, Sophie, purchased the subject home on Atchung Road in Wayne, where they raised their eight children. By 1996, the children had all reached adulthood and left the home. However, their daughter Pauline moved back into the home in 1997, along with her companion, Mainardi.

In 1998, Pauline and Mainardi agreed to purchase the home from Peter and Sophie for \$185,000.³ Prior to the sale, the home was encumbered by two mortgages with loan balances totaling \$75,271.24. Pauline and Mainardi obtained two mortgage loans totaling \$171,500, which they used to finance the purchase and satisfy the existing mortgage liens owed by Peter and Sophie. The closing took place on November 25, 1998, at the office of Germain⁴ Financial, where Mainardi worked as a mortgage processor.

in the total amount of \$2,408,043.29. This judgment is not challenged on appeal.

³ The exact purchase price is subject to some dispute. Both Peter and Pauline testified that there was a side agreement that Peter and Sophie would be paid an additional \$100,000 after the closing. Peter and Pauline offered conflicting accounts as to whether a substantial portion of the additional \$100,000 was eventually paid.

⁴ Germain Financial alternately appears as Jermaine Financial in the record.

Upon taking ownership of the home, Pauline and Mainardi refinanced the mortgage indebtedness several times, culminating in a \$468,000 mortgage they executed on November 14, 2001. At some point, Mainardi was arrested for arson, and needed money for bail and attorney's fees. Subsequently, she also became the subject of various civil claims. According to Pauline, she and Mainardi became unable to pay their mortgage. As a result, Pauline turned to her parents for help, and they agreed to repurchase the home. Pauline testified she told her parents that "the house could be lost" if they did not buy it back. Pauline and Mainardi would continue to live in the home with their four children, and they agreed to pay the new mortgage in lieu of rent.

As noted, Mainardi worked as a mortgage processor, and she arranged for the mortgage financing that Peter and Sophie needed to repurchase the home and satisfy the 2001 mortgage. The purported purchase price was \$680,000, and Countrywide Home Loans, Inc. provided a first mortgage loan of \$544,000, and a home equity loan of \$34,000, to fund the purchase. Peter testified that an attorney, John Cerza, came to the home to close the loans on September 30, 2003. At that time, Peter and Sophie executed certain loan documents. They also reviewed a loan application that misstated their financial status. Specifically, the application falsely indicated that Peter and Sophie owned a

residence in Miami, had \$200,000 in savings, and that Peter was employed by a business owned by Mainardi. The closing was postponed after Peter pointed out the loan application was inaccurate. Peter and Sophie returned to Cerza's office on October 14, 2003, to finalize the transaction. According to Peter, his wife's health was deteriorating, and he signed the mortgage documents "because I had to have some place to live with [my] wife."

On January 6, 2005, Peter and Sophie refinanced the Countrywide first mortgage, which had an existing balance of \$542,249.46. At the time, Mainardi was employed by Monarch Mortgage Services LLC (Monarch), a mortgage broker, and she filled out and processed the loan application. The application falsely indicated that it was taken by Monarch's president, Robert J. Gorman, in a "face to face interview." It also misstated Peter and Sophie's income, Social Security benefits, bank account balances, and the value of a condominium they owned in Clearwater, Florida.

Monarch procured funding for the new \$546,400 mortgage loan through BankUnited, FSB (BankUnited). Attorney Philip Blanch served as closing agent on behalf of BankUnited. Blanch delegated

the closing process to Crystal Paling,⁵ who he described as an independent contractor. Peter testified that his wife's condition was "pretty bad," and they had just returned from dialysis when Paling arrived at their home with the loan documents. Paling told them that the new loan had a lower interest rate than the Countrywide mortgage. In fact, by virtue of the refinance, the monthly payment decreased from \$3711.04 to \$1368.73.

Pauline and Mainardi paid the BankUnited mortgage for a period of time pursuant to their verbal agreement with Peter and Sophie, but eventually ceased making payments. Sophie passed away in September 2007. Peter borrowed money from his sister to satisfy the \$34,000 Countrywide home equity loan. He also attempted, unsuccessfully, to modify the BankUnited mortgage. The parties stipulated that the mortgage went into default on August 1, 2008, and remained in default at the time of trial, by which time the mortgage debt, including unpaid real estate taxes and insurance, totaled \$860,813.99.

In May 2009, the federal government seized and closed BankUnited and named the Federal Deposit Insurance Corporation receiver of its assets. The Trust thereafter acquired the 2005 BankUnited note and mortgage and commenced servicing the loan.

⁵ Crystal Paling alternately appears as Crystal Pauling in the record.

Procedurally, the litigation that resulted from these transactions had two components. First, on May 21, 2012, Peter brought suit in the Chancery Division asserting various claims, including that Pauline, Mainardi, Countrywide, Cerza, Monarch, Gorman, Blanch, and BankUnited committed fraud and violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -95. The complaint sought economic damages and to void the 2005 BankUnited mortgage on the basis that it was procured by fraud. Second, on October 5, 2012, the Trust filed a complaint to foreclose on the 2005 BankUnited mortgage.⁶ Peter filed a contesting answer, along with a counterclaim and third-party complaint that essentially mirrored the claims asserted in his lawsuit. Pauline, Mainardi, Cerza, Monarch, and Paling did not file any responsive pleadings and default was entered against them. Peter settled his claims against Countrywide prior to trial, which thereafter proceeded jointly in both matters from May 18, 2015 to May 22, 2015.

Following oral argument and written submissions on behalf of Peter, the Trust, Gorman, and Blanch, Judge LaConte issued a single oral opinion on October 5, 2015. The judge concluded that Peter had been "victimized" by his daughter Pauline and Mainardi, and

⁶ Previously, on February 26, 2009, BankUnited filed a foreclosure action against Peter and Sophie. The trial court dismissed that complaint without prejudice on August 11, 2011, due to an insufficient notice of intent to foreclose.

that their conduct "[met] the factors of consumer fraud." The judge found that "by the time BankUnited got into the picture, Pauline and [Mainardi] had already stripped this property of all of its equity." He further found that "[i]t was [Mainardi] that put in all of that false information on the loan application . . . [a]nd she used her position with Monarch to [] get this mortgage through."

Judge LaConte further found that while Gorman, Blanch, and Cerza may have been "enablers," any misconduct on their part was not the proximate cause of any loss or damages sustained by Peter. The judge elaborated:

[T]his is a situation where there was a knowing sale in 1998 to a daughter and her partner. They own the property. They have the right as owners to go through these refinances and strip all the equity out. They just kept getting more and more money out of this real estate. But they were the owners. They had every right to do that.

Then . . . later in [] 2003 when [Mainardi] runs into her problems with arson and Lord knows what else, [Peter] is convinced to repurchase the property. He needs a place to live. If creditors start coming after [Mainardi], and she owns the property, there will be a problem. So he agrees to repurchase for \$680,000. There was never a contract. There was nothing.

And what does he do? He ends up repurchasing the property and finds himself with a combined mortgage to Countrywide of \$578,000. That's what he ended up with. And

frankly once the [refinance with] BankUnited took place, again despite . . . everybody involved in that, that really didn't hurt him. The repurchase in the Countrywide is what hurt him.

And . . . is the Trust who purchased this mortgage, are they supposed to be the fall guy in this saga? No. That would not comport with fundamental fairness to them, even though I really want the fundamental fairness to flow to [Peter], not necessarily the Trust.

The fact[] that I can't get away from is that the [refinance] didn't create this problem. It helped the problem to the extent that it reduced the monthly carrying charges of this jumbo mortgage.

. . . .

The question becomes even if [Peter] . . . had [] been fully informed that we are going to refinance with BankUnited to get a better rate than we get from Countrywide, he would have agreed to it. Who wouldn't have agreed to it?

And that's where I'm saying in the final analysis he wasn't harmed by the BankUnited mortgage. He was harmed by the series of refinances that preceded it, and the fact that [Mainardi] found herself in trouble with the law and they had to do two things. One, raise money for bail and attorney's fees, and get the title out of [Mainardi's] name. Because there were going to be problems down the road.

So if it wasn't the bank that was going to foreclose on him, it could have been some creditor [C]ertainly it made sense to get this title out of [Mainardi's] name with all the problems that she was having.

And, [Peter], if he said it once he said it probably [ten] times from the [witness] stand, ["I had to have some place to live"].

On October 30, 2015, the court entered three judgments, as follows: (1) a judgment in favor of Peter against Pauline and Mainardi for \$2,408,043.29, which included treble damages and attorney's fees pursuant to the CFA; (2) a judgment of foreclosure against Peter in favor of the Trust; and (3) a judgment dismissing Peter's claims against Blanch, Gorman, the Trust, Paling, BankUnited, Monarch, and Cerza. Peter now appeals the latter two judgments. The appeals were argued back-to-back, and because they share common facts and legal issues, we now consolidate them for the purpose of issuing a single opinion.

II.

Peter asserts the following arguments on appeal: (1) the January 6, 2005 BankUnited mortgage should have been declared invalid and unenforceable because it was procured by fraud; (2) the fraud was committed by Monarch, Gorman, and Mainardi, while acting as the soliciting and processing agent of BankUnited, and by Paling and Blanch, while acting as BankUnited's closing agent, and damages should have been awarded against them in addition to voiding the mortgage; (3) the actions of the various parties were unconscionable and constituted a violation of the CFA; (4) the trial court erred in finding that the BankUnited mortgage did not

result in Peter being damaged; and (5) reasonable attorney's fees should also be awarded pursuant to the CFA.

In response, Blanch argues that Peter failed to prove he engaged in any fraudulent conduct or unconscionable commercial practice. He further contends that his actions were not the proximate cause of any damages Peter may have sustained. Rather, it was undisputed that default would have occurred regardless of the BankUnited refinance because Pauline and Mainardi were unable to make the payments on their mortgage or the 2003 Countrywide loan that collectively stripped the property of all equity. Moreover, Peter failed to prove damages, since he actually benefited from the BankUnited loan, which carried a monthly payment that was approximately one-half the amount of the Countrywide payment.

Gorman cites the undisputed testimony and evidence that Monarch was an independent mortgage broker rather than an agent of BankUnited. He also points out that the type of loan issued by BankUnited did not require verification of the applicant's income, and that Monarch sent Peter and Sophie a number of pre-application notices and disclosures, all of which they signed and returned. Gorman disputes Peter's characterization of Mainardi as a loan solicitor, as opposed to her true function as simply a mortgage processor. Finally, he echoes Blanch's argument that

Peter failed to prove damages because he benefited from the substantially lower interest rate and monthly payment that the BankUnited mortgage carried.

Finally, like Gorman, the Trust argues that Peter presented no credible evidence that Monarch, Mainardi, Gorman, Blanch, or Paling were agents or employees of BankUnited. The Trust also asserts that Peter's claims are barred by the six-year statute of limitations governing fraud claims, N.J.S.A. 2A:14-1.

Having considered the parties' arguments in light of the record and applicable legal standards, we affirm substantially for the reasons set forth in Judge LaConte's thoughtful oral opinion. We add the following comments.

Our review of a trial court's fact-finding in a non-jury trial is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). Our inquiry is "whether . . . there is substantial evidence in support of the trial judge's findings and conclusions." Sipko v. Koger, Inc., 214 N.J. 364, 376 (2013)(quoting Seidman, supra, 205 N.J. at 169). Appellate courts do not disturb the factual findings of the trial judge unless convinced that "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 365 (App. Div. 2010)(quoting Rova Farms Resort

v. Investors Ins. Co., 65 N.J. 474, 484 (1974)); see also Beck v. Beck, 86 N.J. 480, 496 (1981).

"Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of the witnesses." Seidman, supra, 205 N.J. at 169 (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). However, we owe no deference to a trial court's "interpretation of the law and the legal consequences that flow from established facts[,]" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), and we review such decisions de novo, 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, supra, 65 N.J. at 483-84).

"To establish common-law fraud, a plaintiff must prove: '(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). In order to prevail on a fraud claim, a plaintiff must establish that

he or she suffered economic damages as a result. Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000).

In order to proceed on a CFA claim, "a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003) (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994)). To demonstrate "ascertainable loss," a plaintiff must show "either out-of-pocket loss or . . . loss in value[.]" Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005). The Supreme Court has held that "[t]he limiting nature of the requirement allows a private cause of action only to those who can demonstrate a loss attributable to conduct made unlawful by the CFA." Id. at 246 (emphasis added) (citing Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988)); see also N.J.S.A. 56:8-19 (stating that "ascertainable loss" must occur "as a result" of the claimed violation); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 560 (2009) ("[A] plaintiff who cannot prove the causal link between the asserted regulatory violation and his loss cannot find relief within the CFA.").

Peter correctly argues that a mortgage may be held void and unenforceable where a mortgagor is found to have been fraudulently induced into executing it. See Albizu v. Ace Enter. Co., 163 N.J. Super. 42, 48 (Ch. Div. 1978). See also Scott v. Mayflower Home Imp. Corp., 363 N.J. Super. 145, 160 (Law. Div. 2001) (holding "that home repair contracts, notes, and mortgages which violate or were obtained by practices which violate the [CFA] are void and unenforceable"). Nonetheless, to establish fraud sufficient to render a mortgage unenforceable, the mortgagor must establish damage as a result of the fraud. See Marsh v. Cook, 32 N.J. Eq. 262, 266 (Ch. 1880) ("no deception or artifice will be considered an actionable fraud, so as to be the proper subject of judicial redress, which has not been a cause of injury or prejudice to the party seeking redress").

Here, there is sufficient evidence in the record to support the judge's finding that, regardless of any misconduct by Gorman, Blanch, Paling, and Cerza, they were not the proximate cause of any economic damages or ascertainable loss Peter sustained. Rather, the record amply reflects that, after Peter and Sophie sold the property in 1998, Pauline and Mainardi engaged in a series of refinances that steadily escalated the mortgage indebtedness to \$468,000 and essentially drained the property of its equity. It is undisputed that the home Peter so fervently wished to remain

in with his wife was destined to be lost because of Pauline and Mainardis's inability to pay their mortgage and/or Mainardi's various legal problems. Peter and Sophie knew this when they agreed to repurchase the property in 2003. Importantly, Peter admitted at trial that when they repurchased the home, there was no equity in it. Nonetheless, he opted to proceed with the Countrywide loan as the means to accomplish the repurchase even though he was cognizant that the information in the loan application appeared inaccurate. Prior to trial, he settled all claims he may have had against Countrywide in connection with that transaction.

Turning to the subsequent BankUnited loan, it is true, as Peter contends, that when he refinanced the Countrywide mortgage, his mortgage indebtedness increased by approximately \$4150, from 542,249.46 to \$546,400. Nonetheless, this slight increase was amply offset by the economic benefit the BankUnited loan yielded by decreasing the monthly payment obligation from \$3711.04 to \$1368.73, where it remained at all relevant times. Accordingly, the BankUnited refinance resulted in no ascertainable loss or economic damage to Peter, as Judge LaConte correctly determined. Moreover, absent the BankUnited loan, Peter surely would have been in the very same position facing foreclosure due to his inability to make the substantially higher Countrywide mortgage payments.

Either way, the home would have been lost, which Judge LaConte aptly noted Peter was well aware of, and strove unsuccessfully to avoid.

We further conclude that Peter failed to establish that Monarch, Mainardi, and Gorman, were agents of BankUnited, so that any fraud on their part would serve to void the 2005 BankUnited mortgage. Rather, the undisputed evidence established otherwise. On August 8, 2004, well before the closing of the BankUnited refinance, Peter and Sophie signed a "mortgage broker agreement and disclosure" form in which they acknowledged their understanding that Monarch was "not an affiliate of any lender." Further, Monarch represented that, acting as a broker, it "places loans in the normal course of business with more than [three] sources," and "cannot commit any lender to provide financing." In his testimony, Gorman confirmed that Monarch was not affiliated with BankUnited, but rather acted as an independent broker.

We also conclude there is no competent evidence in the record that Blanch, as closing agent, was aware of the inaccurate financial information contained in the mortgage application that Mainardi prepared and processed. Both Peter and Blanch testified they never met or had any contact with each other. Judge LaConte correctly determined that any misconduct by Blanch in sending Paling to close the loan was not the proximate cause of Peter's

problems. There is also no evidence that Peter or Sophie brought the inaccuracies in the loan application to Paling's attention. Moreover, Paling informed Peter and Sophie the refinance would lower their monthly payment. That information was accurate, and inured not to their loss, but to their benefit.

Sadly, Peter is left only with a substantial judgment against his daughter Pauline and Mainardi, with little hope it will be satisfied. Like Judge LaConte, we find the conduct and actions of many of the participants in these multiple transactions distasteful. Nonetheless, we find no basis to disturb Judge LaConte's careful and detailed factual findings, which sufficiently support his sound legal conclusions.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION