SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1986-15T3

NATIONSTAR MORTGAGE, L.L.C.,

Plaintiff-Respondent,

v.

WILLIAM WEEDO and ANNE M. LAUTERBACH a/k/a ANNE M. WEEDO,

Defendants-Appellants,

and

JOSEPH HEIL,

Defendant.

Argued February 14, 2017 – Decided March 3, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-11563-15.

Michelle Joy Munsat argued the cause for appellants.

Robert D. Bailey argued the cause for respondent (Sandelands Eyet, L.L.P., and Ras Citron, L.L.C., attorneys; Mr. Bailey, of counsel and on the brief).

PER CURIAM

William Weedo and Anne M. Lauterbach (a/k/a Anne M. Weedo) (collectively defendants) appeal from a November 6, 2015 order denying their motion to vacate default, and a December 2, 2015 order entering a final judgment of foreclosure against them. We reverse.

In September 2006, defendants obtained a residential mortgage through Mortgage Lenders Network, USA, Inc. (Mortgage Lenders).[1] Mortgage Electronic Registration Systems, Inc. (MERS) was the nominee for Mortgage Lenders. In March 2011, MERS assigned the mortgage to BAC Home Loans Servicing LP (BAC) and recorded it. In October 2013, Bank of America, which had merged with BAC, assigned and recorded the mortgage to Ocwen Loan Servicing, LLC (Ocwen). In April 2014, Ocwen assigned and recorded the mortgage to plaintiff Nationstar Mortgage, L.L.C. (Nationstar). In December 2010, defendants defaulted on their loan. In August 2014, Nationstar served notice of its intention to foreclose on the property.

In March 2015, Nationstar filed its foreclosure complaint. Defendants retained counsel to defend them in the foreclosure action before their answer was due. Nationstar and defendants

[1] Defendant Heil, who is not an appellant, was not a borrower on the note. However, he executed the mortgage because he too held title to the property.

extended the deadline for filing their answer to June 8, 2015, but defendants failed to file the answer by that date. On August 25, 2015, Nationstar requested default, and on September 25, 2015, Nationstar moved for final judgment.

On September 29, 2015, defendants filed their motion to vacate default. They did so four days after Nationstar sought to reduce the default to a default judgment. Defendants alleged in their proposed answer they had been the victims of fraud and asserted violations under the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -73; and Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20.

In November 2015, the judge heard oral argument and entered the order denying defendants' motion to vacate default. Defendants essentially argued that they received the complaint, they immediately retained counsel, and counsel had taken steps to extend the filing of the answer. As a result, defendants contended that they showed good cause to vacate default. At this early stage in the foreclosure proceedings, the judge agreed with defendants and found there was good cause, "in terms of the timing" of filing their responsive pleading.

Nevertheless, the judge refused to vacate default because he concluded that defendants did not show a meritorious defense. The judge concluded that the defenses in defendants' moving papers

"[were] not meritorious defenses." A final judgment of foreclosure was entered a few weeks later.

On appeal, defendants argue (1) a meritorious defense is not required to vacate an entry of default; and (2) even if a meritorious defense is a prerequisite for vacating default, their answer, affirmative defenses, and counterclaims raised meritorious defenses.

We review the denial of a motion to vacate default based upon an abuse of discretion standard. Cf. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). It is well-settled that "the requirements for setting aside a default under Rule 4:43-3 are less stringent than [] those for setting aside an entry of default judgment under Rule 4:50-1." N.J. Mfr.'s Ins. Co. v. Prestige Health Grp., 406 N.J. Super. 354, 360 (App. Div.), certif. denied, 199 N.J. 543 (2009). "When nothing more than an entry of default pursuant to Rule 4:43-1 has occurred, relief from that default may be granted on a showing of good cause." Guillaume, supra, 209 N.J. at 466-67.

In considering whether good cause exists, courts "typically cite three factors . . . [w]hether the default was willful or culpable; [w]hether granting relief from the default would prejudice the opposing party; and [w]hether the defaulting party has a meritorious defense." James W. Moore, et al., 10 Moore's

Federal Practice - Civil § 55.70[2][a] (3d ed. 2013) (reviewing comparable Fed. R. Civ. P. 55(c), which states "[t]he court may set aside an entry of default for good cause"). Here, there was no evidence before the judge that defendants' conduct was willful and culpable, or that Nationstar would have been prejudiced had the judge granted defendants' motion to vacate default. Rather, the judge focused on whether defendants demonstrated a meritorious defense. We see no abuse of discretion by the judge in considering whether defendants demonstrated a meritorious defense.

We note that "the showing of a meritorious defense is a traditional element necessary for setting aside both a default and a default judgment[.]" Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:43-3 (2017). As with a motion to vacate a default judgment, there is no point in setting aside an entry of default if the defendant has no meritorious defense. "The time of the courts, counsel and litigants should not be taken up by such a futile proceeding." Guillaume, supra, 209 N.J. at 469 (quoting Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953)). We have noted that

> [t]his is especially so in a foreclosure case where the mere denominating of the matter as a contested case moves it from the expeditious disposition by the Office of Foreclosure in the Administrative Office of the Courts, R. 1:34-6 and R. 4:64-1(a), to a more protracted treatment by the Chancery Division providing

> discovery and raising other problems associated with trial calendars. If there is no bona fide contest, a secured creditor should have prompt recourse to its collateral.
>
> [Trs. of Local 478 Trucking and Allied Indus. Pension Fund v. Baron Holding Corp., 224 N.J. Super. 485, 489 (App. Div. 1988).]

"Good cause" can also mean not only "the presence of a meritorious defense . . . [but] the absence of any contumacious conduct[.]" O'Connor v. Altus, 67 N.J. 106, 129 (1975); see also Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:43-3 (2017) (repeating that "the showing of a meritorious defense is a traditional element necessary for setting aside both a default and a default judgment"). Here, there is no suggestion that defendants' conduct amounted to contumacious behavior. Therefore, for purposes of determining whether the judge erred by denying the motion to vacate default, we review the matter to see if defendants demonstrated a meritorious defense.

A foreclosure action is "a quasi in rem procedure . . . to determine not only the right to foreclose, but also the amount due on the mortgage." Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 272 (App. Div. 2001) (citation omitted). "The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgaged premises." Great Falls

Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super 542 (App. Div. 1994).

Rule 4:64-5 states:

> Unless the court otherwise orders on notice and for good cause shown, claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt. Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Non-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees. A defendant who chooses to contest the validity, priority or amount of any alleged prior encumbrance shall do so by filing a cross-claim against that encumbrancer, if a co-defendant, and the issues raised by the cross-claim shall be determined upon application for surplus money pursuant to [R.] 4:64-3, unless the court otherwise directs.

The single controversy doctrine "requires a liberal rather than a narrow approach to the question of what issues are 'germane.'" Leisure Tech.-Ne., Inc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 358 (App. Div. 1975). A counterclaim is germane if it is a "claim arising out of the mortgage foreclosed." Joan Ryno v. First Nat'l Bank, 208 N.J. Super. 562, 570 (App. Div. 1986). Moreover, we have generally found that CFA claims can be germane to foreclosure actions. See Troup, supra, 343 N.J. Super. at 279-

80 (reversing summary judgment on a defendant's CFA claim against an assignee).

On the limited record before the judge, we conclude that defendants have asserted a meritorious defense, at least to the extent that they were entitled to an order vacating default. As we have noted, their CFA claim allegedly arose out of the mortgage foreclosed, and the purpose of a foreclosure action is to determine "not only the right to foreclose, but also the amount due on the mortgage." Troup, supra, 343 N.J. Super. at 272. Moreover, defendants alleged that they had been the victims of fraud and asserted violations under the FFA.

We express no opinion as to the continued viability of defendants' meritorious defenses. The judge made no findings, nor could he on the limited record before him, on any defenses to defendants' claims of fraud and violations under the CFA or FFA. For instance, there were no findings as to whether Nationstar was a holder in due course, or whether there were viable limitations defenses available, just to name a few. In fact, counsel confirmed as much in oral argument before us. We anticipate that such matters will be the subject of further proceedings. The judge may certainly address whether summary dispositive relief is warranted after the record is more fully developed.

Reversed.