SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2163-15T3

BANK OF AMERICA, N.A.,

Plaintiff-Respondent,

v.

PIL S. OH AND JEOUNG
OK OH,

Defendants-Appellants.

Submitted August 8, 2017 – Decided August 21, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. F-41618-13.

Law Offices of Park & Kim, LLC, attorneys for appellants (Kyungjoo Park, on the brief).

Winston & Strawn, LLP, attorneys for respondent (Heather E. Saydah, on the brief).

PER CURIAM

Defendants Pil S. Oh and Jeoung Ok Oh appeal from a December 18, 2015 order entering final judgment in favor of plaintiff, Bank of America, N.A. We affirm.

On February 29, 2008, defendants executed a promissory note in favor of American Partners Bank (APB) when they borrowed $385,000. As security for the note, defendants executed a mortgage secured by their Jackson Township property in favor of Mortgage Electronic Registration System, Inc. (MERS) as nominee for APB and APB's successors and assigns. On April 28, 2011, MERS assigned the mortgage to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. (BAC). The assignment to BAC was recorded on August 16, 2011. On July 1, 2011, BAC merged with plaintiff. The note includes an allonge containing indorsements from APB to Countrywide Bank FSB, and from Countrywide Bank FSB to bearer by indorsement in blank.

Defendants stopped making payments on the loan in December 2010. Plaintiff sent defendants Notices of Intent to Foreclose on June 3, 2013, and subsequently filed a complaint to foreclose in November 2013. On January 15, 2014, defendants filed an answer asserting affirmative defenses and a counterclaim asserting violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 to -167, and the Truth in Lending Act, 15 U.S.C.A. §§ 1601-1616 (1968). On February 20, 2014, plaintiff moved to dismiss defendants' counterclaims, which the motion judge granted on March 14, 2014.

The matter proceeded to trial on November 5, 2014, where the trial judge heard testimony from plaintiff's witness and defendant, Pil S. Oh. The trial judge entered an order deeming defendants' answer uncontested and referred the matter to the Office of Foreclosure. On August 18, 2015, plaintiff moved for the entry of final judgment, which was entered December 18, 2015.

On appeal, defendants argue plaintiff's assignment was invalid, plaintiff was not authorized to foreclose, and plaintiff submitted unauthenticated documents. Defendants also argue the court erred dismissing their counterclaims and defenses. We disagree.

We accord "substantial deference" to the trial judge's determination and review the decision for an abuse of discretion. Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (citing U.S. Bank Nat'l Assoc. v. Guillaume, 209 N.J. 449, 467 (2012)). We will find a judge abused his or her discretion only "when a decision is 'made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Assoc., supra, 209 N.J. at 467-68 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

A party attempting to foreclose a mortgage "must own or control the underlying debt." Deutsche Bank Nat'l Tr. Co. v.

Mitchell, 422 N.J. Super. 214, 223 (App. Div. 2011) (quoting Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011)). Parties who can enforce such a negotiable instrument, such as a note, include "the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to N.J.S.A. 12A:3-309 or subsection d." N.J.S.A. 12A:3-301.

Regarding the first category, a person to whom the instrument is not payable may become the holder if there is a negotiation. Ford, supra, 418 N.J. Super. at 598 (citing N.J.S.A. 12A:3-201(a)). In order for a negotiation to occur there must be a transfer of possession and an indorsement by the holder. Mitchell, supra, 422 N.J. Super. at 223. An indorsement requires "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument." Ibid. (quoting N.J.S.A. 12A:3-204(a)). Without this indorsement, standing may be insufficient to satisfy this category. Ford, supra, 418 N.J. Super. at 598.

To fall within the second category, one must show the transfer of rights to the note. Id. at 599. Transfer occurs "when it is delivered by a person other than its issuer for the purpose of

giving to the person receiving delivery the right to enforce the instrument." N.J.S.A. 12A:3-203(a). This transfer "vests in the transferee any right of the transferor to enforce the instrument" whether or not a negotiation also occurs. N.J.S.A. 12A:3-203(b).

> If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder.
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> [UCC Comment 2 to N.J.S.A. 12A:3-203.]

Documents establishing transfer, including an assignment of a mortgage, must be properly authenticated with certifications based on personal knowledge, as required by Rule 1:6-6. Ford, supra, 418 N.J. Super. at 599-600.

Here, plaintiff falls within the first category. MERS assigned the mortgage to BAC, who merged to become plaintiff. This is documented by the indorsement on the note. MERS, as nominee for APB and its successors and assigns, had the authority to assign the mortgage to BAC, even if APB was no longer in business. This is apparent from the plain language "successors and assigns." During the trial, plaintiff's witness testified plaintiff, or its predecessor, BAC, has been in possession of the note since 2008, shortly after the loan originated. Based on our review of the

record, we are satisfied plaintiff was the holder of the note, thereby establishing the assignment was valid and plaintiff had standing to foreclose.[1]

Defendants argue the trial judge erred by not considering their defenses and counterclaims. Based upon the record before us, we see no reason to disturb the trial judge's finding defendants failed to establish by clear and convincing evidence the existence of fraud. Additionally, defendants have failed to support their affirmative defenses and counterclaims by credible evidence in the record; therefore, the trial judge did not err in striking the defenses and counterclaims.

Defendants argue the trial judge erred by allowing in inadmissible hearsay by plaintiff's witness which allowed documents to be submitted into evidence during trial. Defendants did not object to this testimony below, therefore we are constrained to review defendants' argument under the plain error standard.

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[1] Defendants argue MERS did not have the authority to assign the mortgage because the principal no longer existed at the time of the assignment. Defendant has provided no support for such a position. Other jurisdictions have considered the issue and determined the dissolution of the original lender does not affect MERS's ability to assign a mortgage, see, e.g., Rosa v. Mortg. Elec. Registration Sys., Inc., 821 F. Supp. 2d 423, 431 (D. Mass. 2011). We have never addressed this issue and do not address it based on this record.

We "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)). After reviewing the record, we do not find the issue to go to the jurisdiction of the trial court or concern matters of great public interest. Additionally, plaintiff's witness was allowed to testify to the business records presented based upon the business record exception to the hearsay rule as he was an employee of plaintiff, was familiar with the business records, and testified the records were created in the ordinary course of business. See N.J.R.E. 803(c)(6).[2] As such, the trial judge did not err in allowing the admission of the testimony.

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[2] N.J.R.E. 803(c)(6) states,

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it,

Affirmed.

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unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.