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This opinion shall not "constitute precedent or be binding upon any court." 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-2844-15T2

LSF8 MASTER PARTICIPATION TRUST,

Plaintiff-Respondent,

v.

MARTHA DEARTEAGA AND ALPHONSE DEARTEAGA,

Defendants-Appellants,

and

SIGNATURE BANK,

Defendant.

Submitted May 4, 2017 – Decided June 23, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-044020-10.

Martha DeArteaga and Alphonse DeArteaga, appellants pro se.

McCabe, Weisberg & Conway, P.C., attorneys for respondent (Stephany L. Gordon and Carol Rogers Cobb, of counsel; Ms. Gordon, on the brief).

PER CURIAM

This matter arises from a foreclosure action against defendants. Defendants Alphonse and Martha DeArteaga defaulted on their mortgage in 2009, and then-plaintiff Beneficial New Jersey, Inc. (Beneficial) instituted a foreclosure action against defendants in 2010. The trial judge granted Beneficial summary judgment in 2012. In 2014, the court approved substitution of LSF8 Master Participation Trust (LSF8) as plaintiff. The judge entered final judgment in January 2016 and later denied the motion to vacate judgment in March 2016. Defendants now appeal from the order granting summary judgment, as well as the two 2016 orders, claiming the judge at the 2012 hearing denied them due process and the current plaintiff does not have standing. We affirm.

In December 2004, defendants executed a mortgage with Beneficial on property in Piscataway for $434,689.82. Beneficial sent defendants a notice of intent to foreclose (NOI), because defendants had not paid the mortgage on October 1, 2009. Beneficial filed a foreclosure complaint on September 9, 2010.

Beneficial moved for summary judgment on March 29, 2012. At the April 16, 2012 hearing, defendants opposed the motion arguing Beneficial did not have standing because the NOI they received came from HSBC Consumer Lending, not Beneficial. However,

Beneficial's counsel established that due to the merger of companies the lender was the same. The court required Beneficial to send a revised NOI to defendants to address the discrepancies in the sender of the NOI, and then issued an order granting summary judgment and ordered the parties to participate in mediation. Defendants moved for reconsideration, which the judge denied on May 25, 2012.

On May 9, 2014, the court entered an order denying defendants' motion to dismiss the complaint and required Beneficial to serve a revised NOI on defendants by May 23, 2014. LSF8 sent a revised NOI on July 31, 2014. On August 13, 2014, the mortgage was assigned from Beneficial to LSF8. The assignment was recorded in Middlesex County on September 3, 2014.

During an October 10, 2014 hearing, the court noted the new NOI had not been sent within thirty days, as required by her May 9 order. The judge indicated the revised NOI did name the transferee; however, there was no evidence the NOI was accurate as the assignment was dated after the NOI was sent. The judge provided:

> If this case were at the very beginning, I would really be inclined to dismiss it without prejudice and have you start all over. The only thing stopping me from doing that is the fact that in . . . 2012, . . . [the judge] already granted summary judgment . . . .

The court denied defendants' motion to dismiss the complaint and allowed LSF8's substitution as plaintiff. The judge required LSF8 to make the original note and loan documents available to defendants at their office. In accordance with the judge's order, defendants were provided an opportunity to view the original note and allonge, mortgage, and assignment of mortgage.

LSF8 resent the NOI on October 22, 2014, and sent defendants notice it would be preparing for final judgment on December 16, 2014. LSF8 submitted the final judgment application to the office of foreclosure on December 31, 2015, and the application was granted on January 26, 2016. According to LSF8, the final judgment package mistakenly omitted the allonge.

Defendants moved to vacate final judgment on February 3, 2016. On March 4, 2016, the judge denied defendants' motion and ordered LSF8 "shall submit a complete copy of the note which includes the allonge with a certification that what is being submitted is a true copy of the original with a copy to counsel for def[endant]." LSF8 argues the certification and exhibits were mailed to the court and defendants on March 16, 2016. Defendants appealed from the April 16, 2012, January 26, 2016, and March 4, 2016 orders.

When reviewing a grant of summary judgment, an appellate court uses the same standard as the trial court. <u>Globe Motor Co.</u>

v. Igdalev, 225 N.J. 469, 479 (2016). We first must decide whether there was a genuine issue of fact. Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). If there is no genuine issue of fact, we then must decide whether the trial court's ruling on the law was correct. Ibid. When reviewing the denial of the motion to vacate the final judgment this court "must accord 'substantial deference' to a trial court's determination under . . . [Rule 4:50-1] and its decisions will be left undisturbed 'unless [they] result[ ] in a clear abuse of discretion.'" Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (alteration in original) (quoting U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012)).

Defendants argue LSF8, as a substituted plaintiff, had not shown sufficient proof it had standing to sue and the only evidence presented were statements of counsel, which defendants argue are insufficient. We disagree.

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 who the instrument is not payable to 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, as the current holder of the note, LSF8 falls under the first category. Although LSF8 did not include the note and allonge in its final judgment package, the court required LSF8 to allow defendants to view the original note in their offices. The court also required LSF8 to submit authentication, including a "complete copy of the note which includes the allonge with a certification that what is being submitted is a true copy of the original with a copy to counsel for def[endant]."

These documents include a copy of the original note, the allonge with authorized signature from Beneficial, and a certification by LSF8's counsel regarding the submission of these documents, dated March 4, 2016. These documents sufficiently establish standing because they evidence the transfer from

Beneficial to LSF8, as well as an indorsement. LSF8 submitted a copy of the note and arranged for defendants to view the original note in their office. Therefore, LSF8 established standing.

Defendants argue the trial court denied them due process because the judge "effectively acted as counsel for" Beneficial during the 2012 summary judgment. We disagree.

Judges have the authority to ask witnesses questions and even to summon witnesses on their own at times. Band's Refuse Removal, Inc. v. Fair Lawn, 62 N.J. Super. 522, 547, 550 (App. Div.), certif. denied, 33 N.J. 387 (1960). If a judge "participates to an unreasonable degree in the conduct of the trial, even to the point of assuming the role of an advocate, what he does may be just as prejudicial to a defendant's rights as if the case were tried to a jury." Id. at 549-50 (finding judge who produced and examined twenty-seven witness and offered exhibits "overstepped the permissible bounds of judicial inquiry").

Here, the judge was not an advocate for Beneficial. He asked the defendants' questions because they were representing themselves at the first summary judgment hearing. The judge also asked Beneficial's counsel numerous questions. Our review of the record does not reveal any impermissible inquiry. Moreover, defendants' assertion the judge did not read the papers is without merit. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION