SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3761-15T4

LAKEVIEW LOAN SERVICING, LLC,

Plaintiff-Respondent,

v.

JOHN JUBELT,

Defendant-Appellant,

and

MRS. JOHN JUBELT,

Defendant.

Submitted October 23, 2017 – Decided November 17, 2017

Before Judges Whipple and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-031413-14.

Law Offices of Joseph A. Chang, attorneys for appellant (Joseph A. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

KML Law Group, PC, attorneys for respondent (Jaime R. Ackerman, of counsel and on the brief).

PER CURIAM

Defendant appeals from a March 24, 2016 final judgment in foreclosure. We affirm.

We discern the following facts from the record. On June 12, 2009, John Jubelt (defendant), executed a note in favor of United Northern Mortgage Bankers, Ltd (United) for $242,165 secured by a mortgage against his home. He borrowed the money so he could buy his ex-wife's interest in the house as agreed upon in the divorce proceedings. Defendant asserts he was the victim of predatory lending practices by United and wanted to back out of the closing. Because he had a deadline to meet under the terms of the divorce agreement with his former spouse, he executed the note and mortgage to Mortgage Electronic Registration System (MERS) as nominee for United. Defendant defaulted on the note on August 1, 2011.

On October 27, 2011, MERS assigned the mortgage to Bank of America, NA, a successor by merger to BAC Home Loans Servicing LP, formerly known as Countrywide Home Loans Servicing LP, and on December 31, 2013, the mortgage was further assigned by Bank of America to plaintiff. On January 13, 2014, the assignment was recorded with the office of the Bergen County Clerk. On July 31, 2014, plaintiff filed a complaint to foreclose after having sent defendant a notice of intent to foreclose.

Defendant filed an answer asserting numerous defenses, including the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (CFA), and the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -68 (FFA).

Plaintiff moved for summary judgment on May 1, 2015. In support of its motion, plaintiff submitted the certification of a banking officer employed by M&T Bank, as attorney in fact for plaintiff. The certification set forth the officer's familiarity with business records pertaining to defendant's account and certified plaintiff was in possession of the note and assigned the mortgage prior to filing the complaint.

Defendant cross-moved to dismiss the complaint arguing consumer fraud, lack of notice, and outstanding discovery precluded summary judgment. On June 12, 2015, the court dismissed the CFA and FFA claims. The judge permitted additional depositions to be taken of bank employees. On August 14, 2015 the judge entered an order denying defendant's motion to dismiss and granting summary judgment to plaintiff. Final judgment was entered on March 24, 2016. This appeal followed.

Defendant argues the court should not have granted summary judgment because he presented a prima facie case of predatory lending and other affirmative defenses, which the court should have addressed. We disagree.

In reviewing a trial court's decision to grant a motion for summary judgment, the appellate court conducts a de novo review, using the same standard as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). It decides first whether there was a genuine issue of fact. If there was not, it then decides whether the trial court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), articulates the rule for determining whether there is a genuine issue of fact. The judge must engage in a weighing process and decide whether

> the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2.
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> [Ibid.].

Thus, "when the evidence is so one-sided that one party must prevail as a matter of law, . . . the trial court should not hesitate to grant summary judgment." Ibid.

To establish a prima facie right to foreclose on a mortgage, there must have been execution, recording and non-payment of the mortgage. Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952); see Somerset Tr. Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989).

Based on our review of the record, we are satisfied plaintiff established a prima facie right to foreclose on the mortgage. Defendant, in his certification in opposition to the motion for summary judgment, conceded, "I executed a Note and Mortgage securing the $242,165 Loan to [MERS] as nominee for [United]." Defendant also admitted the mortgage was duly recorded and did not deny there was a default on the mortgage.

Additionally, 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 of [N.J.S.A.] 12A:3-418." N.J.S.A. 12A:3-301.

Based on our review of the record, we are satisfied plaintiff has demonstrated it was the holder of the note, thereby establishing the assignment was valid, and plaintiff had standing to foreclose.

Defendant argues the trial judge erred by allowing inadmissible hearsay by plaintiff's witness which allowed admission of documents into evidence during trial to establish plaintiff's standing. We review evidentiary rulings by a trial court under the abuse of discretion standard. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010).

Plaintiff's attorney in fact presented a certification based upon the business record exception to the hearsay rule as an employee of M&T Bank. She 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).[1] We do not discern an abuse of

[1] 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, unless the sources of information or the method, purpose or circumstances of

the court's discretion in allowing the records, but even if the decision were in error, it was harmless as there was an independent basis for standing. Plaintiff produced an allonge proving the assignment of the mortgage to plaintiff, which predated the filing of the complaint. Thus, plaintiff had standing to enforce on this basis alone.

Defendant argues the trial judge erred by not considering his defenses and counterclaims. Based upon the record before us, we see no reason to disturb the trial judge's finding that defendant failed to establish by clear and convincing evidence the existence of fraud. Additionally, defendant failed to support the remainder of his affirmative defenses and counterclaims, including those under the CFA and FFA by credible evidence in the record.

Defendant argues the trial judge erred in dismissing his affirmative defense under the CFA without issuing findings of facts or conclusions of law as required by Rule 1:7-4. We disagree.

Under the CFA, the defendant must prove "(1) an unlawful practice, (2) an ascertainable loss, and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Lee v.

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preparation indicate that it is not trustworthy.

Carter-Reed Co., L.L.C., 203 N.J. 496, 521 (2010). Here, defendant has not shown he has suffered an ascertainable loss. "An ascertainable loss is a loss that is 'quantifiable or measurable'; it is not 'hypothetical or illusory.'" Id. at 522 (quoting Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005)).

At the June 12, 2015 hearing, the judge asked defendant, "What is the ascertainable loss?" Defendant responded, "it would be a calculation between what he paid out in the adjustable rate mortgage with the adjustment after that period of time based upon what he would have received had he gotten a 30-year fixed rate at that percentage." This hypothetical loss does not support a CFA claim. Furthermore, the judge found "[i]n the absence of any proof that the lender committed to one thing and then switched, there's no claim for consumer fraud based upon bait and switch." Defendant was unable to provide proof of any unlawful practice under the CFA.

Based on the foregoing, we clearly glean from the record the basis for the trial judge's dismissal of defendant's CFA claim was the lack of ascertainable loss. Additionally, our review of the record shows defendant did not set forth any other sufficient credible evidence to support his claim the plaintiff violated the CFA.

Therefore, the trial judge did not err in striking the affirmative defenses and counterclaims under the CFA nor in entering judgment for plaintiff.

Affirmed.