SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4774-14T2

KRONER, INC.,

Plaintiff-Respondent,

v.

M&B 21 HARRISON GROUP, LLC,
STUART ADLER, and ALISA ADLER,

Defendants-Appellants,

and

275 HARRISON AVENUE ASSOCIATION,
INC., 277 HARRISON AVENUE
CONDOMINIUM ASSOCIATION,
JORAM RADOS, and DANIEL BODNER,

Defendants.

Argued June 21, 2016 – Decided June 16, 2017

Before Judges Espinosa and Kennedy.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-11141-13.

Kenneth P. Traum argued the cause for appellants.

Kevin J. Bloom argued the cause for respondent (Law Offices of Abe Rappaport, attorneys; William J. Fishkin, on the brief).

PER CURIAM

Defendants M&B 21 Harrison Group, LLC (M&B), Stuart Adler and Alisa Adler appeal from two orders: (1) an order entered April 11, 2014 that granted summary judgment to plaintiff Kroner, Inc., and transferred the matter to the foreclosure unit as an uncontested matter, and (2) an order entering final judgment, dated May 15, 2015. We affirm.

I.

In December 2007, M&B executed a mortgage note to Kroner for the principal amount of $1,956,000, with monthly payments to commence on February 1, 2008 until its maturity date of January 1, 2009. The note was secured by a mortgage to Kroner; the mortgaged premises consisted of twenty-one residential condominium units located in Jersey City.

A complaint in foreclosure was filed in March 2013, alleging that M&B defaulted on January 1, 2009 by failing to pay off the loan in full according to the terms of the note.[1] M&B filed a contested answer and counterclaim. Kroner filed an answer to the counterclaim and subsequently moved successfully to amend the

[1] The complaint also named 275 Harrison Avenue Association, Inc. (275 Harrison), as a defendant, based upon its filing a claim of lien against M&B. 275 Harrison filed a non-contesting answer to the complaint. Default and final judgment were entered against 275 Harrison, which is not a party to this appeal.

complaint to add Stuart Adler, Alisa Adler, Joram Rados and Daniel Bodner[2] as defendants based upon an Indemnity and Guaranty Agreement they executed at the time the note and mortgage were executed.

Cross-motions for summary judgment were filed. By order dated April 11, 2014, the court granted Kroner's motion and denied the motion filed by M&B, Stuart Adler and Alisa Adler.

In June 2014, M&B filed a Chapter 11 petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York. See 11 U.S.C.A. § 301. In September 2014, M&B filed a complaint in the bankruptcy action against Kroner, Daniel Bodner, Hagit Bodner and Rados. The complaint alleged various forms of misconduct by the Bodners and Rados, including fraud and breaches of fiduciary duties, and sought the equitable subordination of the debt to Kroner and the claims made by Rados and Daniel Bodner, the recharacterization of the debt as a capital contribution by Daniel Bodner in M&B, and compensatory and punitive damages. In December 2014, M&B's case was dismissed with prejudice with the consent of M&B.

[2] Default was entered against both Rados and Bodner; final judgment was entered against them. They are not parties to this appeal.

The Chancery Division entered final judgment in May 2015 against M&B, 275 Harrison Avenue Condominium Association, Stuart Adler, Alisa Adler, Rados and Daniel Bodner for the sum of $1,300,173.41 plus interest and taxed costs, and a counsel fee of $7500. The order further directed that the mortgaged premises be sold at a sheriff's sale to satisfy the sum due. Defendants moved unsuccessfully to vacate the judgment.

The sheriff's sale occurred on September 24, 2015. Kroner was the successful bidder, buying the property for $441,000.

On appeal, defendants argue summary judgment should not have been entered against them as there were genuine issues of fact and law. They argue further that the trial court failed to make the requisite findings of fact required by Rule 1:7-4 and that, therefore, the final judgment must be vacated and the matter remanded to the trial court. We are not persuaded by these arguments.

II.

In reviewing a summary judgment decision, we consider the evidence "in a light most favorable to the non-moving party," and determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 38, 41 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529

(1995)). We need not accept the trial court's conclusions of law, which we review de novo. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).[3]

To defeat a motion for summary judgment, the opponent must "'come forward with evidence' that creates a genuine issue of material fact." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.) (quoting Brill, supra, 142 N.J. at 529), certif. denied, 211 N.J. 608 (2012). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

Defendants contend that summary judgment was improperly granted because they brought facts to the trial court's attention regarding the conduct of Rados and Daniel Bodner that warranted an equitable remedy in their favor rather than a judgment against them. Defendants asserted there was a breach of fiduciary duty, a breach of the covenant of good faith and fair dealing and that

[3] Because we apply the same standard as the trial judge in reviewing a summary judgment motion and review conclusions of law de novo, defendants' argument that reversal is warranted based on the trial judge's failure to make findings required by Rule 1:7-4 lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

equitable estoppel should have applied to preclude summary judgment.

Both the Statement of Undisputed Material Facts submitted by plaintiff and the Counterstatement of Material Facts submitted by defendants lacked specific references to the record, excluding pleadings, required by Rule 4:46-2(a). Nonetheless, defendants admitted the essential facts regarding the Note and Mortgage, including the following:

> The obligation in the Note and/or Mortgage contained an agreement that if any installment payment of interest and principal, taxes and/or insurance premiums should remain unpaid, the whole principal sum with all unpaid interest, should, at the option of Plaintiff, become immediately due and payable.

Defendants averred additional material facts through the certification of Alissa Adler. Among the assertions made were: Plaintiff failed to give defendants adequate notice that Hagit Bodner, a shareholder of Kroner, was married to Daniel Bodner. Plaintiff permitted defendants to make payments on the Note upon the sale of each of the units secured by the Mortgage, rather than pursuant to the schedule in the Note and never advised that this arrangement was unacceptable. Adler also cited provisions in the Mortgage regarding an Event of Default, the circumstances under

which Kroner could declare the debt immediately due, and asserted that Kroner never notified defendant that it was in default.

The thrust of defendants' argument is that Daniel Bodner, a member of M&B, had an undisclosed conflict of interest because his wife was the managing partner of Kroner. Defendants also argue that, despite the provisions of the Note calling for regular payments, the course of conduct of the parties – that payments were made only when a unit was sold "should have precluded, on an estoppel basis the entry of summary judgment."

Accepting these factual assertions as true, they do not present a genuine issue of fact. Even if Kroner permitted defendants to make payments that failed to comply with the strict terms of the Note, that did not estop Kroner from seeking the relief granted in this action. Defendants' argument is effectively precluded by Section VI, Paragraph M of the Note, which states:

> The failure of Lender to insist upon strict performance of any term hereof shall not be deemed a waiver of any of the obligations of Borrower or any of the rights or remedies of Lender hereunder. Lender may waive any Event of Default or performance of Borrower without waiving any other Event of Default or performance of Borrower. Lender may remedy any Event of Default without waiving the Event of Default remedied. No delay in performance of any right or remedy of Lender shall be construed as a waiver of such right or remedy. Acceptance of any payment after the occurrence of an Event of Default shall not be deemed to waive or cure such Event of

> Default. Acceptance by Lender of any partial payment or partial performance by Borrower shall not be deemed a waiver of full payment or full performance. No extension of time for the payment of any amounts due under this Note made by agreement with any Person now or hereafter liable for the payment of this Note shall operate to release, discharge, modify, change or affect the original liability of Borrower hereunder, either in whole or in part, unless agrees otherwise in writing.

Defendants' conflict of interest argument fares no better. In their brief, defendants contend that Bodner's failure to disclose his marriage to Hajit Bodner constituted a violation of "his fiduciary responsibilities to [M&B] and its members." (Emphasis added). Significantly, the breach of fiduciary duty alleged is that of a member of M&B to the entity and its members. The merit or lack of merit of such a claim has no bearing on whether Kroner had the right to foreclose on the property here. The relationship between Kroner and M&B was that of lender and borrower.

The Affiliated Business Arrangement Disclosure Statement made by Kroner to M&B included the following:

> This is give you notice that Kroner, Inc. has a business and personal relationship with some of the members of [M&B], because of this relationship, this referral may provide Kroner, Inc. with financial or other benefits.

Defendants contend this disclosure was inadequate; that Kroner had a duty to disclose the Bodners' marriage and that the failure to make this disclosure should have precluded summary judgment. We disagree.

Whether Kroner had a duty to disclose the specifics of the Bodners' marriage is a question of law, Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Group, Inc., 135 N.J. 182, 194 (1994), to be determined in light of the factual circumstances, United Jersey Bank v. Kensey, 306 N.J. Super. 540, 553-56 (App. Div. 1997), certif. denied, 153 N.J. 402 (1998).

Generally, a duty to disclose arises in three types of transactions: (1) "fiduciary relationships such as principal and agent or attorney and client," (2) situations in which there is either trust or confidence that is either expressly stated or necessarily implied, and (3) "contracts or transactions which in their essential nature, are 'intrinsically fiduciary.'" Id. at 551. "[C]reditor-debtor relationships rarely give rise to a fiduciary duty." Id. at 552. Defendants have provided no factual basis for finding a duty to disclose more than what was provided in the Affiliated Business Arrangement Disclosure Statement under any of these categories. This argument therefore fails to provide a basis for reversing the order granting summary judgment.

Affirmed.