SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5058-14T1

CITIMORTGAGE, INC.,

Plaintiff-Respondent,

v.

THOMAS AVELLINO,

Defendant-Appellant.

Argued October 13, 2016 – Decided March 16, 2017

Before Judges Alvarez and Manahan.[1]

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-43939-09.

Thomas Avellino, appellant, argued the cause pro se.

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[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive re-argument.

Brian Yoder argued the cause for respondent (Phelan Hallinan Diamond & Jones, PC, attorneys; Mr. Yoder, on the brief).

PER CURIAM

In this mortgage foreclosure case, defendant Thomas Avellino appeals from the May 29, 2015 order denying his motion to dismiss and the June 2, 2015 entry of final judgment.[2] We affirm.

We derive the following facts and procedural history from the record on appeal. On February 3, 2006, defendant executed and delivered an adjustable rate note to ABN AMRO Mortgage Group, Inc. (ABN) in the amount of $773,500. To secure payment, defendant delivered a mortgage encumbering real property located in Holmdel, New Jersey. The mortgage was duly recorded on February 14, 2006, in the Monmouth County Clerk's Office. In 2007, plaintiff CitiMortgage, Inc. acquired ABN. As a result of the merger, plaintiff became the holder of defendant's note and mortgage.

Defendant defaulted under the terms of the note on January 1, 2009. On May 7, 2009, plaintiff mailed a notice of intent to foreclose to defendant. Plaintiff filed a foreclosure complaint on August 18, 2009.

Plaintiff engaged in concerted efforts to serve defendant with the summons and complaint. Plaintiff attempted service upon

[2] Defendant does not appeal from a subsequent August 7, 2015 order denying his motion for reconsideration.

defendant through a private process server at the mortgaged property. According to the affidavit of service, an individual bearing defendant's name refused service. Plaintiff performed a good faith investigation which revealed another potential address for defendant in Florida. Plaintiff then attempted to serve defendant at the Florida address through a private process server who was advised defendant had moved. Plaintiff made inquiries with the Department of Motor Vehicles, the tax office, and the United States Postal Service which verified defendant resided at the mortgaged property. On October 9, 2009, plaintiff served defendant via regular and certified mail at the mortgaged property. The return on the certified mail indicated service was refused. However, the summons and complaint sent by regular mail was never returned.

After defendant failed to file a responsive pleading, default judgment was entered on December 31, 2009. On May 27, 2010, plaintiff mailed defendant a notice of motion for entry of final judgment. Due to an amendment to the Court Rules, however, the Office of Foreclosure did not enter final judgment.[3]

[3] Effective December 20, 2010, Rule 4:64-2(d) requires a party moving for the entry of final judgment of foreclosure to supply a certification of diligent inquiry.

On May 20, 2011, defendant filed a motion to vacate the default judgment based upon a claim of improper service, which the court denied on June 24, 2011. By letter dated October 7, 2011, defendant demanded proof from plaintiff that it was the rightful holder of the note or, if no such proof was provided, three times the amount of the default judgment and an immediate cessation of default proceedings.

In accord with our Supreme Court's decision in US Bank National Ass'n v. Guillaume, 209 N.J. 449 (2012), plaintiff filed an order to show cause seeking to issue corrected notices of intent to foreclose. The application was granted on May 29, 2013, and defendant was served with a corrected notice of intent to foreclose. Defendant filed a second motion to vacate the default judgment on October 10, 2013. On November 6, 2013, the court denied defendant's motion and held that the matter remain an uncontested foreclosure with the Office of Foreclosure.

On May 12, 2015, defendant filed a motion to dismiss for failure to state a claim. At defendant's request, oral argument was held on May 29, 2015. Notwithstanding his request, defendant failed to make an appearance at oral argument. On the same day, the court denied defendant's motion.

The court entered final judgment against defendant on June 2, 2015. Furthermore, the court ordered a sum of $1,174,563.75

be paid to plaintiff through the execution of a foreclosure sale of the mortgaged property. Subsequently, defendant filed a motion for reconsideration of the May 29, 2015 order. On August 7, 2015, the court denied the motion. This appeal followed.

Defendant raises the following points on appeal:

POINT I

THE APPELLATE DIVISION MUST DECIDE WHETHER A GENUINE ISSUE OF MATERIAL FACT WAS IN DISPUTE THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT, AND IF NOT, WHETHER THE TRIAL COURT RULED CORRECTLY ON THE LAW.

POINT II

EVIDENTIAL DOCUMENTS ESTABLISH THAT CITIMORTGAGE IS NOT THE HOLDER OF THE NOTE, AND THEREFORE LACKS STANDING TO FORECLOSE.

POINT III

TRANSFER OF A NEGOTIABLE INSTRUMENT IS GOVERNED BY THE UNIFORM COMMERCIAL CODE, WHICH REQUIRES PHYSICAL POSSESSION AND INDORSEMENT OF A NOTE PAYABLE TO ORDER.

POINT IV

PLAINTIFF'S ALLEGED OWNERSHIP INTEREST IN THE NOTE SUPPORTED ONLY BY VARIOUS VERSIONS OF COPIES FRAUDULENTLY STAMPED "CERTIFIED TO BE A TRUE AND CORRECT COPY.["]

POINT V

THE COURT MISAPPLIED THE HOLDER IN DUE COURSE DOCTRINE AND, HAVING FAILED TO SHOW THAT IT WAS THE HOLDER OF THE NOTE, PLAINTIFF ALSO FAILED TO SHOW THAT IT WAS A HOLDER IN DUE COURSE.

Defendant raises the following additional points in his reply brief:

POINT I

DEFENDANT[']S MOTION TO DISMISS WAS FILED IN A TIMELY MANNER.

POINT II

DEFENDANT'S MOTION TO DISMISS IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL.

POINT III

CONSIDERATION OF RELEVANT FACTS WERE NEVER ADDRESSED BY EITHER TRIAL COURT OR PLAINTIFF'S COUNSEL.

Defendant's arguments on appeal essentially contest plaintiff's standing to foreclose. Having reviewed the arguments on appeal in light of the record and applicable law, we conclude that defendant's arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following.

A motion to dismiss for failure to state a claim under Rule 4:6-2(e) should be approached with great caution and be granted only in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989). Appellate review of a motion to dismiss under Rule 4:6-2(e) is plenary and requires no deference to the legal conclusions of the trial court. Rezem

Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.), certif. denied, 208 N.J. 368 (2011).[4] A motion for failure to state a claim must be denied if, giving plaintiff the benefit of all allegations and all favorable inferences, a cause of action has been alleged in the complaint. Printing Mart, supra, 116 N.J. at 746. The test for determining the adequacy of a pleading is whether a cause of action is "suggested" by the facts. Ibid. (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

In this matter, the court found no merit to defendant's motion to dismiss for failure to state a claim. Moreover, the court properly found neither party disputed that a mortgage was executed, recorded, and subsequently defaulted upon by defendant.

Generally, "a party seeking to foreclose a mortgage must own or control the underlying debt" at the time the forfeiture complaint was filed. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011) (quoting Bank of N.Y. v.

[4] Although defendant frames his arguments on appeal as if governed by the summary judgment standard, we do not find that the court relied on materials outside of the pleadings which necessitates converting this Rule 4:6-2(e) motion to one for summary judgement. See Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006). In either event, the court's legal ruling is not entitled to deference.

Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010)). If the plaintiff cannot establish ownership or control, it "lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ibid. "If a debt is evidenced by a negotiable instrument, such as the note executed by defendant," whether the plaintiff established ownership or control over the note "is governed by Article III of the Uniform Commercial Code (UCC), N.J.S.A. 12A:3-101 to -605, in particular N.J.S.A. 12A:3-301." Ibid.

Thus, defendant had to show he fell within one of the "three categories of persons entitled to enforce negotiable instruments" as described in N.J.S.A. 12A:3-301. Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 222-23 (App. Div. 2011). N.J.S.A. 12A:3-301 provides:

> "Person entitled to enforce" an instrument means 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. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Saliently, under the Banking Act of 1948, N.J.S.A. 17:9A-1 to -467, when two or more banks merge, "the corporate existence

of each merging bank shall be merged into that of the receiving bank, and the property and rights of each merging bank shall thereupon vest in the receiving bank without further act or deed[.]" N.J.S.A. 17:9A-139(1). Here, plaintiff's merger history was documented in the foreclosure complaint. The judge concluded that plaintiff had standing and had established the elements necessary to obtain judgment in light of the undisputed merger and the acquisition history relating to defendant and ABN. We agree.

Consistent with N.J.S.A. 17:9A-139(1) and the requirements set forth in N.J.S.A. 12A:3-301, defendant was the "holder of the instrument" and was otherwise vested with the right to sue on instruments previously held by the acquired bank without presenting a separate assignment of the instruments. See also 12 U.S.C.A. § 215a(e); N.J.S.A. 17:9A-132(1), (2); N.J.S.A. 17:9A-148(C). As defendant demonstrated it was the holder of the note and the mortgage at the time of the complaint, it was therefore an appropriate party with standing to bring the foreclosure action. Mitchell, supra, 422 N.J. Super. at 224-25 (citation omitted).

Despite defendant's assertions to the contrary, plaintiff has demonstrated beyond dispute that it is the legal mortgagee and holder of the note. As plaintiff acquired ABN two years before defendant defaulted on his mortgage and plaintiff subsequently sought legal action to foreclose on the house, plaintiff's

possession of the note predates the original complaint. Pursuant to N.J.S.A. 12A:3-301, plaintiff is the holder of the note and the entity entitled to enforcement.

Affirmed.