SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2276-15T1

WILLIAM WILLIAMS,

Plaintiff-Appellant,

v.

HUDSON CITY SAVINGS BANK,

Defendant-Respondent,

and

MORTGAGE ACCESS CORP., d/b/a
WEICHERT FINANCIAL SERVICES, and
KEITH WANAMAKER,

Defendants.

Submitted January 30, 2018 – Decided March 1, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1545-13.

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

Parker McCay, PA, attorneys for respondent (Gene R. Mariano, of counsel; Stacy L. Moore, Jr., on the brief).

PER CURIAM

Plaintiff William Williams appeals from an October 9, 2015 order granting the summary judgment dismissal of his complaint against Hudson City Savings Bank (Hudson City); plaintiff's complaint sought damages based upon allegations of predatory lending and consumer fraud. Plaintiff also appeals from a January 13, 2016 order that imposed sanctions[1] against him and his attorney, and a March 18, 2016 order denying reconsideration of the sanctions award.

Following our review of the record, we affirm the grant of summary judgment, concluding that plaintiff failed to demonstrate predatory lending or consumer fraud. We also affirm the orders imposing sanctions and denying reconsideration, finding the motion judge did not abuse her discretion in the entry of these orders. We vacate and remand, however, solely for the trial court to allocate the fee sanction as between plaintiff and his counsel.

I

In July 2008, plaintiff executed a $268,000 note and mortgage in favor of Hudson City to purchase property in Bernardsville. To

[1] The court awarded Hudson City $27,306.58, the amount of counsel fees and costs incurred by the bank in defending against plaintiff's suit.

obtain the mortgage, plaintiff met with a Weichert Financial Services (Weichert) representative, Keith Wanamaker, who completed a Uniform Residential Loan Application (the Application) in plaintiff's presence, using information plaintiff provided.[2]

The Application stated that plaintiff had in excess of $150,000 in liquid assets, and he would make a $100,000 down payment towards purchasing the property; it also indicated his total monthly income was $7875.[3] Moreover, the Application contained an acknowledgment, which plaintiff signed, stating that the information he provided was "true and correct" and any "intentional or negligent misrepresentation" may result in civil or criminal liability.

Hudson City approved plaintiff's loan based upon the information he provided in the Application and its own independent underwriting process. Later, at plaintiff's request, Hudson City granted him a loan modification, reducing his monthly payment from $1628.40 to $1502.98. Nevertheless, on October 1, 2011, plaintiff defaulted on the loan.

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[2] Plaintiff also sued Weichert and Wanamaker; however, on October 9, 2015, the Law Division granted their summary judgment motion, dismissing plaintiff's claims.

[3] In contrast to the information contained in the Application, plaintiff asserts his monthly gross income when he applied for the loan was $3492.

On June 14, 2012, Hudson City initiated foreclosure proceedings. Plaintiff filed a motion to extend time to answer, which the Chancery Division granted. Plaintiff then filed an untimely answer and counterclaim, which the court struck, and foreclosure proceeded to final judgment. Ultimately, the parties negotiated a Consent Final Judgment of Foreclosure. See Hudson City Savings Bank v. Williams, No. A-1914-14 (App. Div. Oct. 25, 2016) (slip op. at 4).

On September 11, 2013, plaintiff filed a complaint in the Law Division alleging Hudson City engaged in predatory lending in violation of New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and common law fraud. On December 10, 2014, Hudson City served plaintiff's counsel with a frivolous pleadings notice pursuant to Rule 1:4-8; however, plaintiff and his counsel continued to pursue the action.

On August 31, 2015, Hudson City filed a motion for summary judgment,[4] which the trial court granted on October 9, 2015. Hudson City then filed a motion for sanctions under Rule 1:4-8. Following oral argument, the motion judge granted Hudson City's

[4] Hudson City also moved to bar plaintiff's expert. Plaintiff opposed and filed a cross-motion to extend discovery.

application, awarding $27,306.58 in attorneys' fees,[5] and issued a written opinion setting forth the reasons for her decision.

II

On appeal, plaintiff argues the motion judge erred in granting Hudson City's motion for summary judgment and imposing attorneys' fee sanctions. We address each in turn.

A. Plaintiff's Summary Judgment Motion

Plaintiff argues the motion judge erred in granting summary judgment and dismissing his CFA claim. Specifically, he asserts he presented a prima facie case of predatory lending, which the court should have addressed. We disagree.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the motion court. See Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We must "consider 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540

[5] The motion judge's January 13, 2016 order states plaintiff and his counsel, "jointly and severally, are responsible for and shall pay [Hudson City] $27,306.58 . . . ." Her January 12, 2016 written opinion, however, states "[p]laintiff's counsel is [o]rdered to pay [Hudson City] counsel fees and costs."

(1995). When reviewing such determinations on appeal, "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (citation omitted).

Under the CFA, plaintiff 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. Carter-Reed Co., 203 N.J. 496, 521 (2010) (internal quotation marks and citation omitted). Moreover, predatory lending has been defined as:

> a mismatch between the needs and capacity of the borrower . . . . In essence, the loan does not fit the borrower, either because the borrower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capacity to repay the loan.
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> [Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 267 (App. Div. 2001) (citing Daniel S. Ehrenberg, If the Loan Don't Fit, Don't Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending, 10 J. Affordable Housing & Community Dev. L. 117, 119-20 (Winter 2001)).]

Plaintiff failed to provide evidence to support his claim of predatory lending under the CFA. Plaintiff signed the loan documents, thereby attesting to the accuracy of the information

that led Hudson City to issue the loan. The terms of the note and mortgage were not commercially unreasonable, with an original interest rate of 6.125 percent and later, after plaintiff's loan modification, a reduced interest rate of 5.375 percent. Furthermore, as the motion judge noted, "[t]he case law that . . . plaintiff cites in his papers are in fact not on point in reference to any violations of the [CFA] or common law fraud."

Plaintiff's common law fraud claims are also unsupported by the record. As the motion judge noted, plaintiff fails to establish Hudson City had a duty to verify plaintiff's income. Moreover, Hudson City engaged in an extensive underwriting process before approving plaintiff's loan.[6] Accordingly, we agree with the motion judge's conclusion that "[t]here is no issue of material fact that makes the granting of summary judgment inappropriate."

B. Defendant's Fee Sanction Award

Plaintiff next argues the motion judge erred in finding his claims frivolous. He further contends defendant's "safe harbor" letter, as required under Rule 1:4-8, was deficient, and the motion judge's fee sanction determination was excessive. We disagree.

[6] According to Hudson City, its underwriting process included: "considering whether [plaintiff] could pay the mortgage loan debt based on his stated income in [the Application]"; "reviewing [plaintiff's] credit score"; confirming he "had sufficient assets for the requisite down payment"; and verifying defendant's "self-employment."

We review fee sanction awards for abuse of discretion. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407 (App. Div. 2009). An abuse of discretion occurs "if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (affirming sanctions award).

N.J.S.A. 2A:15-59.1 and Rule 1:4-8 permit a court to impose sanctions on a litigant and an attorney, respectively, for filing a frivolous complaint. To find a claim frivolous under the statute, the court must find it was pursued in "bad faith, solely for the purpose of harassment, delay or malicious injury," or that the non-prevailing party knew or should have known it was pursued "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b). Our Court Rules essentially use the same standard; to wit: a claim or defense is frivolous if asserted for an improper purpose, or if it lacked a factual or legal basis. See R. 1:4-8(a). We strictly interpret the statute and the rule against the imposition of sanctions. See LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009).

A sanction may not be imposed against a represented party unless the court finds that the party acted in bad faith in

pursuing the unsuccessful claim. Ferolito, 408 N.J. Super. at 408. The court may not impute the attorney's pursuit of a frivolous claim to the client. Rabinowitz v. Wahrenberger, 406 N.J. Super. 126, 136-37 (App. Div. 2009) (reversing fee sanction against client and attorney and concluding it should have applied against only the attorney).

Therefore, it is incumbent for the trial court to consider the responsibility of both the client and his or her attorney. Namely, if a claim "was frivolous on its merits, then the client who pursued such an action is liable under N.J.S.A. 2A:15-59.1." Savona v. DiGiorgio Corp., 360 N.J. Super. 55, 63 (App. Div. 2003). However, if the client "was genuinely unaware or uninformed of the frivolous nature of [his or] her claim and it was being pursued by [his or] her lawyer, liability may be posited under Rule 1:4-8 against [his or] her attorney." Ibid.

Here, we find no abuse of discretion in the motion judge's finding that plaintiff's claims were frivolous. As noted, plaintiff's counsel relied upon unpublished cases that are clearly inapplicable and distinguishable from the instant facts. Furthermore, as the motion judge observed:

> Plaintiff had the financial ability to repay the mortgage loan at issue and forfeited that ability in favor of pursuing the underlying suit. As stated in [plaintiff's] deposition, he paid his attorney [$1500] per month in lieu

> of making his monthly mortgage payment in the amount of [$1502.98]. That the amount paid to counsel is nearly identical to the amount owed speaks to the absence of merit of [p]laintiff's case. For that reason, only [p]laintiff's counsel has benefitted from the underlying litigation.

Finally, the motion judge awarded a reasonable fee sanction, based upon Hudson City's certification of legal fees and services. See e.g., Rendine v. Pantzer, 141 N.J. 292, 316 (1995) (stating that reasonable attorneys' fees are generally calculated by "multiplying the number of hours reasonably expended . . . by the attorneys' reasonable hourly rate . . . ."). Accordingly, the motion judge did not abuse her discretion in calculating the fee sanction.

We vacate and remand, however, solely on the issue of determining the responsibility of payment between plaintiff and his counsel. See Savona, 360 N.J. Super. at 63. To the extent the court determines that the fee sanction should apply to plaintiff, and not just plaintiff's counsel, the court must specifically allocate the fee sanction between plaintiff and his counsel.

Affirmed in part, vacated and remanded in part. We do not retain jurisdiction.