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APPROVAL OF THE APPELLATE DIVISION**

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-2511-16T1

U.S. BANK TRUST, N.A., as
Trustee for LSF9 Master
Participation Trust,

Plaintiff-Respondent,

v.

HENRY RICCIO,

Defendant-Appellant,

and

MRS. HENRY RICCIO, UNKNOWN
SPOUSE OF HENRY RICCIO,

Defendant-Appellant.

Submitted January 29, 2018 - Decided March 13, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,
Chancery Division, Essex County, Docket No.
F-041153-15.

Henry Riccio, appellant pro se.

Stern & Eisenberg, PC, attorneys for
respondent (Salvatore Carollo, on the
brief).

PER CURIAM

Defendant Henry Riccio appeals from the entry of final judgment of foreclosure, contending the action is barred by a six-year statute of limitations and the trial court failed to set forth its reasons for entering summary judgment in favor of plaintiff U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust. Because a twenty-year statute governs this action, and defendant does not dispute he borrowed \$410,000 from plaintiff's predecessor secured by a thirty-year mortgage on his home and made, at most, one payment on the loan, we affirm.

This was a contested foreclosure. After the answer was filed, the court conducted a case management conference and established a schedule for discovery, a deadline for filing dispositive motions and set a date for trial. Plaintiff answered defendant's interrogatories and request for production of documents and filed a motion for summary judgment. Due to a problem with the service of the motion, the court adjourned the return date one cycle. Notwithstanding the adjournment, the court granted plaintiff's motion shortly after the original return date as if unopposed.

Neither party apparently advised the court of its error. Instead, approximately three weeks later, defendant filed opposition to plaintiff's summary judgment motion and a cross-motion to dismiss the complaint. Responding to plaintiff's

statement of uncontested material facts, defendant admitted he executed and delivered a note and mortgage to Bank of America, N.A. in the principal sum of \$410,000 on February 26, 2008; that "the last payment was made in April 2008, and [p]laintiff elected to accelerate the Note as of May 1, 2008." Defendant argued plaintiff's claims were barred by the six-year statute of limitations governing negotiable instruments, N.J.S.A. 12A:3-118(a), and that it had failed to establish it was in possession of defendant's note and mortgage when it filed the complaint on December 22, 2015. Plaintiff filed a brief opposing the motion.

The court, apparently still unaware of the problem on the summary judgment motion, denied the motion "based on the [c]ourt's [o]rder dated August 5, 2016, granting summary judgment in favor of [p]laintiff." Defendant did not move for reconsideration nor oppose plaintiff's motion for final judgment. He now appeals, reprising the arguments he made to the trial court and adding that the trial court erred in failing to set forth its reasons for entering summary judgment for plaintiff.

The trial court obviously erred in entering summary judgment prior to the adjourned return date and without reviewing defendant's opposition. Under ordinary circumstances, we would vacate the judgment and remand for the judge to

reconsider summary judgment on the full record presented to the court. We see no purpose, however, in pursuing such a course here. The two orders defendant complains of were entered in August and September of 2016, almost eighteen months ago. Final judgment was entered in January 2017 and plaintiff regained possession at sheriff's sale last June. The facts essential to summary judgment for foreclosure being either undisputed or undisputable, we assert our prerogative to exercise original jurisdiction to bring this matter to a close. See R. 2:10-5; Price v. Himeji, LLC, 214 N.J. 263, 294-95 (2013).

"The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgaged premises." Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994). As we noted, defendant concedes the validity of the mortgage and the amount of the indebtedness. He contests only the right of the mortgagee to resort to the mortgaged premises in that he claims plaintiff failed to prove it possessed the note and mortgage when it filed its complaint.

We have held, however, that a plaintiff can establish its right to foreclose by "either possession of the note or an assignment of the mortgage that predated the original

complaint." Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012). Although defendant claims plaintiff failed to certify it "was in possession of the original [n]ote on December 22, 2015, the date the [c]omplaint was filed," it is beyond dispute that plaintiff produced a copy of the recorded assignment of mortgage from Bank of America to U.S. Bank Trust, which predated the filing of the complaint by almost eleven months. The assignment of mortgage recorded on January 28, 2015, easily established plaintiff's standing and right to resort to the mortgaged premises. See *ibid.*

Defendant's contention that the action is barred by the six-year statute of limitations applicable to negotiable instruments pursuant to N.J.S.A. 12A:3-118(a) misperceives the nature of this foreclosure action. Plaintiff has not sued on the note, it sued to foreclose the mortgage. See *Sec. Nat'l Partners Ltd. P'ship v. Mahler*, 336 N.J. Super. 101, 105 (App. Div. 2000) (explaining "a foreclosure proceeding is different and distinct from a suit on the underlying note"). Defendant's claim that a foreclosure suit is governed by a "six-year statute is contrary to long settled case law and has no merit." *Ibid.*

Moreover, in 2009 the Legislature enacted N.J.S.A. 2A:50-56.1, "[s]tatute of limitations relative to residential mortgage foreclosures." The statute provides an action to foreclose a

residential mortgage cannot be brought after the earliest of:
"[s]ix years from the date fixed for the making of the last
payment or the maturity date set forth in the mortgage"; or
"[t]hirty-six years from the date of recording of the mortgage";
or "[t]wenty years from the date on which the debtor defaulted."
N.J.S.A. 2A:50-56.1(a)-(c). The mortgage was recorded in 2009,
the year after defendant defaulted. The date fixed for the last
payment is 2038. Accordingly, plaintiff's foreclosure suit is
obviously timely under the statute plainly applicable to this
residential foreclosure action.

Defendant admits having defaulted on this \$410,000 mortgage
loan in 2008, after making no more than one payment. He
continued to live in the premises for almost ten years while not
paying the mortgage and without any contribution to the taxes or
insurance. In its application for final judgment, plaintiff
submitted a certification that its advances for real estate
taxes and hazard insurance alone totaled over \$85,000. Our
review of the record, including defendant's opposition to the
motion, convinces us plaintiff established its entitlement to
summary judgment striking defendant's answer and permitting the
matter to proceed as uncontested. Defendant's claims that the
matter was time-barred and plaintiff failed to establish its
standing to foreclose are plainly without merit.

Affirmed.

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

A handwritten signature in black ink, appearing to be 'AJW', is written over the printed text of the clerk's name.

CLERK OF THE APPELLATE DIVISION