SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2545-16T2

BAYVIEW LOAN SERVICING, LLC, a Delaware Limited Liability Company,

Plaintiff-Respondent,

v.

AMBER PAULEY a/k/a AMBER REA PAULEY and GLENN PAULEY a/k/a GLENN J. PAULEY, h/w, and TD BANKNORTH, N.A.,

Defendants-Appellants.

Submitted February 14, 2018 – Decided March 26, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. F-039564-15.

Glenn Pauley, appellant pro se.

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

PER CURIAM

In this foreclosure action, defendants, Amber and Glenn Pauley, appeal from the August 5, 2016 order for summary judgment, and the January 10, 2017 order for final judgment of foreclosure. Because we find the trial judge did not consider defendants' opposition to the summary judgment motion in which they produced a document that raised an issue of material fact, we are constrained to vacate the orders, and remand to the trial court solely for a consideration of defendants' contention concerning the pertinent document.

On August 29, 2005, defendants executed a promissory note to Washington Mutual Bank, FA for $482,000, secured by a mortgage on the property. Defendants defaulted on the loan on March 1, 2011. On September 12, 2012, JP Morgan Chase Bank, N.A.[1] assigned the note and mortgage to plaintiff, Bayview Loan Servicing, LLC. The assignment was recorded in October 2012.

On November 25, 2013, plaintiff sent defendants a notice of default and intent to foreclose. A complaint for foreclosure was filed on December 8, 2015. In their answer, defendants contended in several affirmative defenses that plaintiff was not the holder, assignee, or the owner of the original note and mortgage.

[1] JP Morgan Chase Bank, N.A. was the "successor in interest by purchase from the FDIC, as receiver for Washington Mutual Bank formerly Washington Mutual Bank, FA."

On July 1, 2016, plaintiff moved for summary judgment to strike the answer, enter default against defendants, and return the matter to the Office of Foreclosure as an uncontested case. The court's docketing system reflects an adjournment request was filed by defendants on July 27, 2016, prior to the summary judgment return date of August 5, 2016.

Defendants allege that they did not receive an answer to the adjournment request. As a result, they filed a cross-motion to dismiss the complaint on August 1, 2016. The supporting certification indicated it was in support of opposition to strike the answer and cross-motion to dismiss the complaint.

Attached to defendants' certification were numerous documents, including a letter from plaintiff to defendants dated November 30, 2012. The letter informed defendants that their mortgage had been transferred to a new creditor, BOF IIb MRA Asset Trust, effective October 25, 2012. It further advised that plaintiff would continue to service the mortgage loan.

On August 5, 2016, the judge considered plaintiff's summary judgment motion as unopposed. He stated in an oral decision: "I'm satisfied that [defendants] having not responded to the Summary Judgment [motion] have abandoned their counterclaims and affirmative defenses." Having found that plaintiff had established a prima facie right to foreclose, the judge granted

the summary judgment motion, striking the answer and transferring the case to the Office of Foreclosure. The August 5, 2016 order indicated the motion was "unopposed."

On August 8, 2016, defendants received a court notice that their August 1 filing would be decided on August 19, 2016, without oral argument. Although plaintiff opposed the cross-motion, it did not refer to the November 30, 2012 letter or provide any explanation. Defendants filed a reply brief. The judge considered the motion on August 19, stating in an oral decision: "I'll note that unusually this motion to dismiss the Complaint was filed after . . . the plaintiff's motion for Summary Judgment was granted. Plaintiff's motion for Summary Judgment was granted and decided on August 5th, 2016."

The judge acknowledged defendants' "lengthy brief" and "attachment" and stated:

> defendant[s'] primary argument had to do with standing and contests the plaintiff's standing. I'll note that as I previously found, the plaintiff has standing to foreclose in this matter both by virtue of the fact that the assignment of the mortgage and because it was the holder and owner of the original note.
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> . . . .
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> It is undisputed that there is a recorded assignment of mortgage which predates the filing of the Complaint, as I indicated previously in the Summary Judgment motion. That alone is sufficient under the case law

> . . . to confer standing. However, in this case the plaintiff is also the holder of the note and entitled to enforce the note.

Defendants' motion was denied. Final judgment was entered on January 10, 2017. This appeal followed.

Summary judgment is granted if the court determines "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court 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 (1995). We "review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016).

"To defeat a motion for summary judgment, the opponent must 'come forward with evidence' that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012)). Defendants argue on appeal that they presented evidence of an issue of fact: whether plaintiff was still the holder of the note and mortgage

at the time of the filing of the complaint. They contend that they raised this argument to the trial court in their opposition to the summary judgment motion. As noted, their certification included a letter sent to defendants by plaintiff advising of the transfer of their mortgage and note. The letter states the mortgage was transferred on October 25, 2012. This is several years before plaintiff filed its complaint in 2015.

Plaintiff did not respond to defendants' argument or address the letter in its opposition to the cross-motion. Even on appeal, plaintiff does not mention or provide any explanation of its own letter. There may be a logical explanation, but it was not presented to either the trial court or us. We, therefore, are satisfied that defendants have created an issue of fact.

In order to have standing, the "party seeking to foreclose a mortgage must own or control the underlying debt." Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011) (quoting Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010)). Standing is conferred 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) (citing Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 216, 224-25 (App. Div.

2011)). Plaintiff's own letter casts doubt on whether it owned or possessed the note at the time of the filing of the complaint.

It is evident that the judge was unaware that there was opposition to the summary judgment motion. Instead of hearing the motion and cross-motion together, the cross-motion was listed as a new motion on the following calendar date. This caused the court not only to consider the summary judgment unopposed, but also to misspeak when ruling on the cross-motion. Contrary to the judge's statement, the cross-motion was filed before the grant of summary judgment. Therefore, it should have been considered on its merits.

We do not comment upon the ultimate merits of defendants' opposition to the foreclosure complaint. However, they are entitled to a complete judicial review of their contentions in light of plaintiff's letter and the court is entitled to an explanation from plaintiff regarding its own document.

We, therefore, vacate the orders granting summary judgment and final judgment of foreclosure and remand the matter to the trial court. On remand, the trial judge is to use his or her discretion in conducting a proper review of the matter. The court may choose to issue an order requiring plaintiff to respond to defendants' arguments regarding the November 30, 2012 letter.

After a complete review, the court shall again consider the summary judgment motion.

We caution that we are only remanding for the court to consider any effect the subject letter has upon plaintiff's standing to foreclose on the mortgage. That is the only issue of merit asserted by defendants in their opposition to summary judgment. The court should complete its review within forty-five days of this remand.

Reversed, vacated, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.