SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2934-15T3

US BANK NATIONAL
ASSOCIATION AS TRUSTEE
FOR CMALT REMIC SERIES
2007-A 7-REMIC PASS-THROUGH
CERTIFICATES SERIES 2007-A7,

Plaintiff-Respondent,

v.

RONALD DELUCA a/k/a RONALD
D. DELUCA and PHYLLIS DELUCA
a/k/a FILOMINA DELUCA a/k/a
PHYLLIS A. DELUCA, his wife,

Defendants-Appellants,

and

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., as nominee for
QUICKEN LOANS, INC., its successors
and/or assigns, STATE OF NEW JERSEY,

Defendants.

Submitted October 11, 2017 – Decided January 19, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F–041672-14.

Joseph A. Chang & Associates, LLC, attorneys for appellants (Joseph A. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

Schoeman Updike Kaufman & Gerber LLP, attorneys for respondent (Mary Pat Gallagher, of counsel and on the brief; Alexandra T. Saites, on the brief).

PER CURIAM

Defendants Ronald and Phyllis DeLuca appeal from a March 1, 2016 order granting final foreclosure judgment to plaintiff US Bank National Association as Trustee for CMALT REMIC SERIES 2007-A7-REMIC PASS-THROUGH CERTIFICATES SERIES 2007-A7. For the reasons that follow, we affirm.

The record reveals that on March 22, 2007, defendants executed a promissory note (the note) to Quicken Loans, Inc. with an original principal balance of $624,000, pertaining to the purchase of their residence. Defendants secured the note with a mortgage against the property, naming Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Quicken Loans and then recorded the mortgage. MERS assigned the mortgage to CitiMortgage, Inc. Plaintiff subsequently took possession of the note and was assigned the mortgage.

In June 2010, defendants defaulted on the note and mortgage by failing to make monthly payments. Defendants were approved for three temporary payment plans but never agreed to a modification

plan under the federal government's Home Affordable Modification Program, claiming it was unaffordable. In October 2014, plaintiff filed a complaint in foreclosure. Approximately two months later, defendants filed an answer, with affirmative defenses, including reliance upon the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and third-party complaint against CitiMortgage, Quicken Loans, Sharon Son, and Title Source, Inc., also alleging violation of the CFA. The third-party claims, however, were voluntarily dismissed for reasons that are set forth in the record. Plaintiff suggests it was due to the federal court's dismissal for failure to state a claim of defendants' complaint, which made similar claims of CFA violations and common law fraud against the same parties. Deluca v. CitiMortgage, 543 F. App'x 194 (3d Cir. 2013).

In May 2015, plaintiff filed a motion for summary judgment and to strike defendants' answer. Defendants cross-moved to amend their answer in order to plead a counterclaim against CitiMortgage alleging a violation of 12 C.F.R. §1024.41(g). The court entered orders denying defendants' cross-motion and plaintiff's motion for summary judgment, but granted plaintiff's request to strike defendants' answer and remanded the complaint to the Office of Foreclosure to proceed as an uncontested matter. In its written decision attached to the orders, the court reasoned that plaintiff had standing to pursue foreclosure because it possessed the note

and defendants were properly notified of the intent to foreclose. In addition, the court determined defendants' counterclaim alleging violation of 12 C.F.R. §1024.41(g) was without merit; the federal regulation did not bar plaintiff under New Jersey's foreclosure process from striking defendants' answer if defendants were negotiating a loan modification plan because the matter was transmitted to the Office of Foreclosure for final disposition. Although only defendants' affirmative defenses relied upon the CFA, and not their counterclaim, it is unclear why the court stated that their "CFA claim" was untimely, and without merit because defendants could not establish an ascertainable loss. The court later denied defendants' motion for reconsideration, finding they did not establish that the court's decisions overlooked controlling law or erred in some manner. R. 4:49-2.

In December 2015, plaintiff moved for final judgment. The Office of Foreclosure, however, remanded the matter to the trial court when defendants objected to the final judgment amount due for unpaid principal balance, real estate taxes, homeowner's insurance premiums, and inspection fees. R. 4:64-9(b). After considering the parties' submissions, the court found no merit to defendants' objections, increased the interest owed to plaintiff, and returned the matter to the Office of Foreclosure. Final judgment of foreclosure was entered on March 1, 2016.

On appeal, defendants contend the court erred in striking their answer because plaintiff did not have standing as it did not possess defendants' promissory note and mortgage; finding plaintiff is required to prove either possession of the note or valid assignment of the mortgage; finding defendants did not have standing to challenge plaintiff's compliance with the terms of the pooling and servicing trust agreement (PSA) governing the mortgage; and dismissing defendants' prima facie CFA counterclaim and affirmative defense.

We start by addressing defendants' argument that plaintiff lacked standing to foreclose. In particular, defendants attack the certification by CitiMortgage's Patrick Walter, Vice-President, Document Control, claiming the certification did not establish Walter had personal knowledge that plaintiff possessed the note. The copy of the note attached to Walter's certification had no endorsement or indicia of plaintiff's ownership and the date plaintiff took possession. We are unpersuaded.

Plaintiff's status as holder of the note was established by Walter's certification. The court properly found that Walter's knowledge was sufficient. Our foreclosure rules require that

> [t]he affidavit shall be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's knowledge of the plaintiff's business records kept in the regular course of business, or by

> an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business.
>
> [R. 4:64-2(c); see also Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011) (noting that the relevant facts showing holder status may be established by a certification if based on "personal knowledge" as required by Rule 1:6-6).]

Where, as here, the mortgage was serviced not by plaintiff but by loan servicer, CitiMortgage, it was sufficient that Walter, employed by CitiMortgage, attested that he was "familiar with the business records maintained by CitiMortgage, Inc. for the purpose of servicing mortgage loans" and his examination of those records formed the basis of his knowledge. R. 4:64-2(c). The records Walter reviewed, as explicitly stated in his certification, reveal plaintiff's status as holder of the note and the mortgage through an assignment from CitiMortgage on February 28, 2014. Importantly, defendants failed to proffer any affidavit or certification contradicting the assignment of the note or mortgage, and thereby affirmed the assertions in Walter's certification. See Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014) ("[C]onclusory claims" without explanation and "[b]ald assertions are not capable of . . . defeating summary judgment.").

The competent proofs in the record establish that plaintiff had physical possession of the note before filing the foreclosure

complaint. Moreover, the assignment of the mortgage to plaintiff prior to the filing of the foreclosure complaint conferred standing to plaintiff. See Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (stating that standing is conferred by "either possession of the note or an assignment of the mortgage that predate[s] the original complaint") (citing Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011)).

Next, defendants' contention that plaintiff failed to comply with the PSA governing the mortgage lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We only add that defendants cite no controlling law to support their position, and we agree with the court's rejection of the argument on the basis that defendants lack standing to challenge compliance with the PSA because they were not parties to the trust agreement.

Finally, we conclude there is no merit to defendants' contention that the record and applicable law did not support the court's dismissal of their CFA counterclaim and affirmative defense. Defendants' answer did not include a CFA counterclaim. It included a third-party complaint alleging a CFA violation, however, the third–party complaint was voluntarily dismissed. Defendants' cross-motion to amend their answer to plead a counterclaim did not include a CFA claim but asserted a violation

of 12 C.F.R. §1024.41(g).[1] Even if we accept defendants' contention that they sought to plead a CFA counterclaim in their proposed amended answer, we conclude they did not make a prima facie CFA claim.

We review a trial court's determination on a motion to amend a pleading for a "clear abuse of discretion." Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003) (quoting Salitan v. Magnus, 28 N.J. 20, 26 (1958)). After a defendant files an answer to a compliant, a plaintiff "may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice." R. 4:9-1. "'[M]otions for leave to amend [are to] be granted liberally,' even if the ultimate merits of the amendment are uncertain." Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013) (quoting Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998)). "One exception to that rule arises when the amendment would be 'futile,' because 'the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor.'" Ibid. (quoting Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006)). "Thus, while

[1] Defendants do not appeal the trial court's denial of their cross-motion to amend their answer to add a counterclaim alleging a violation of 12 C.F.R. §1024.41(g).

motions for leave to amend are to be determined 'without consideration of the ultimate merits of the amendment,' those determinations must be made 'in light of the factual situation existing at the time each motion is made.'" Notte, 185 N.J. at 501 (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997)). "[C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. . . . [T]here is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Prime Accounting Dep't, 212 N.J. at 511 (alterations in original) (quoting Notte, 185 N.J. at 501).

To establish a prima facie claim under the CFA, a plaintiff must allege unlawful conduct, an ascertainable loss, and a causal relationship between the unlawful conduct and the loss. Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., 192 N.J. 372, 389 (2007). Unlawful conduct includes the "knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. 56:8-2. Since "a claim under the CFA is essentially a fraud claim, [Rule 4:6-2(e)] requires that such claims be pled with specificity to the extent practicable." Hoffman v. Hampshire Labs, Inc., 405

N.J. Super. 105, 112 (App. Div. 2009). The claim must be made within six years after it arose. N.J.S.A. 2A:14-1; Mirra v. Holland Am. Line, 331 N.J. Super. 86, 90 (App. Div. 2000).

Defendants' claim that the loan was the result of predatory lending arose in 2007 when the loan was secured. The court was therefore correct in dismissing defendants' 2015 motion to amend their answer to include a counterclaim, as well as the CFA affirmative defense raised in their initial answer in 2014, as untimely. These contentions were made well after the statute of limitations expired in 2013.

As for defendants' CFA affirmative defense pertaining to their inability to obtain modification of their loan, we agree with plaintiff that the defense is among the same claims and defenses that the Third Circuit dismissed with prejudice when it affirmed the District Court's dismissal of plaintiff's federal court action, Deluca, 543 F. App'x at 196-97, and, therefore under res judicata, cannot be re-litigated. Velasquez v. Franz, 123 N.J. 498, 506 (1991) (citing Restatement (Second) of Judgments § 27 cmt. d (Am. Law Inst. 1982) ("Under the principles of res judicata[,] claims that are actually litigated and determined before trial also are barred from being relitigated.").

Accordingly, we need not address the merits of defendants' CFA affirmative defense. Yet, for sake of completeness, we

conclude for the reasons substantially expressed by the court that defendants have not satisfied the CFA by identifying plaintiff's unlawful conduct nor by establishing that their mortgage indebtedness constituted an ascertainable loss.

Affirmed.