SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3416-16T2

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

Plaintiff-Respondent,

v.

LAMONT D. THOMAS,

Defendant-Appellant,

and

MR. or MRS. THOMAS, Spouse or Civil Partner of Lamont D. Thomas, and ATLANTIC COUNTY IMPROVEMENT AUTHORITY,

Defendants.

Submitted May 1, 2018 – Decided May 30, 2018

Before Judges Moynihan and Natali.

On appeal from Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. F-039199-15.

Lamont D. Thomas, appellant pro se.

KML Law Group, PC, attorneys for respondent (Caitlin M. Donnelly, on the brief).

PER CURIAM

In this foreclosure action, defendant Lamont D. Thomas appeals from a September 23, 2016 order which granted summary judgment to plaintiff U.S. Bank, N.A., as trustee for LSF9 Master Participation Trust. Defendant also appeals from the January 18, 2017 final judgment. Following our review of the record, we remand.

On May 6, 2010, defendant executed a $121,794 promissory note to First Mutual Corp. As security for repayment, defendant executed a mortgage in the same amount to Mortgage Electronic Registration Systems, Inc., as nominee for First Mutual. The mortgage was duly recorded.

The First Mutual mortgage was assigned four times: MERS to Bank of America, N.A., to Lakeview Loan Servicing, LLC, to the Secretary of Housing and Urban Development, and finally to U.S. Bank. Each assignment was duly recorded.

Defendant defaulted on the loan on May 1, 2012, over six years ago. A notice of intent to foreclose (NOI) was sent to defendant on September 20, 2013.[1] Plaintiff filed a foreclosure complaint on December 4, 2015, and on February 8, 2016, defendant filed his contesting answer with affirmative defenses, including

[1] The NOI was sent by M&T Bank as the loan servicer for Lakeview which held the assignment at the time.

the defense that plaintiff failed to "plead the facts that support its claim of mailing a Notice of Intention to Foreclose that is in full compliance [with] the Fair Foreclosure Act" (FFA), N.J.S.A. 2A:50-53 to -73.

On September 23, 2016, the trial court granted plaintiff's motion for summary judgment. At the motion hearing on that date, defendant appeared and the trial judge stated that although defendant had filed a contesting answer, the court had not received opposition to plaintiff's summary judgment application. During a brief colloquy, the trial judge asked defendant if "there [was] anything [he] would like to say" and restated his understanding that defendant had not filed opposition papers. Defendant declined the court's invitation and stated, "I have nothing further to add," and that he would "rely[] on what [he] submitted." At that point, the trial judge believed that defendant had only filed an answer. Accordingly, the trial judge stated that he would mark the motion as "opposed" on the September 23, 2016 order solely based upon defendant's appearance at the motion hearing.[2]

[2] Defendant's appendix contains a series of documents purportedly submitted to the trial court in opposition to the motion. Specifically, labeled as a "cross-motion to dismiss the complaint," defendant attached a certification of Lamont Thomas and a response to plaintiff's statement of material facts and a statement of disputed facts, with exhibits — both purportedly filed on July 22, 2016. First, none of the documents are marked "Filed" or contain any other notation suggesting proper filing in

Defendant claims that the trial court erroneously granted summary judgment because plaintiff was not a holder in due course of either the note or a valid assignment prior to instituting the foreclosure complaint and therefore did not possess standing to prosecute the action. He also maintains that the trial court failed to make findings of fact and conclusions of law in accordance with Rule 1:7-4 as to the assignments and NOI. Finally, defendant contends plaintiff violated various provisions of the FFA and the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 to 1667f.

A motion for summary judgment shall be supported by a brief and statement of material facts that "cit[es] to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." R. 4:46-2(a). Summary judgment should be 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

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the trial court. Additionally, despite representing in the appendix that these documents were filed on July 22, 2016, the appended materials are dated September 16, 2016. Finally, in response to plaintiff's argument that the motion was unopposed, defendant in his reply brief relies only on the notation in the court's September 23, 2016 order.

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). An opponent must come forward with evidence creating a genuine issue of material fact to defeat a motion for summary judgment. 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)).

While Rule 4:46-2(b) "provides that all sufficiently supported material facts will be deemed admitted for purposes of the motion unless 'specifically disputed' by the party opposing the motion[,] [p]ursuant to Rule 1:7-4(a), . . . the motion judge must still correlate those facts to legal conclusions." Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300 (App. Div. 2009) (quoting R. 4:46-2(b)). Accordingly the "court rules do not provide any exception from [the Rule 1:7-4(a)] obligation where the motion is unopposed." Ibid. 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).

We affirm the trial court's finding that plaintiff had standing to bring the foreclosure action. As to his Rule 1:7-4(a) findings, the trial court in its statement of reasons issued

immediately after oral argument stated that plaintiff satisfactorily "show[ed] every assignment." On this point, the summary judgment record contains a competent Rule 1:6-6 certification of Romualdo D. Fernandez of Caliber Home Loans, Inc., who is described as U.S. Bank's servicer and attorney in fact. He certified as to his knowledge of Caliber's business records including all records acquired by Caliber from the loan origination file. Significantly, he also certified that he had "personally reviewed" the aforementioned business records. As to the assignment from the Secretary of Housing and Urban Development to plaintiff, he certified that the mortgage was assigned to plaintiff prior to the commencement of the foreclosure action.

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 (App. Div. 2011)). Without ownership or control, a plaintiff cannot "proceed with the foreclosure action and the complaint must be dismissed." Ford,

418 N.J. Super. at 597 (citing Raftogianis, 418 N.J. Super. at 357-59).

We are also satisfied that plaintiff established a prima facie case for foreclosure.[3] As noted, plaintiff clearly demonstrated its standing to foreclose on the property based on the assignment of the mortgage from the Secretary of Housing and Urban Development to plaintiff on January 12, 2015, which predated the December 4, 2015 filing of the foreclosure complaint.[4] Upon that assignment and underlying transfer of possession, plaintiff became the holder of the instrument.[5]

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[3] Defendant also claims that plaintiff violated TILA by failing to provide to defendant a notice as to the assignment, sale, or transfer of ownership of a mortgage loan. We hold that the trial court properly granted summary judgment as the record is clear that any claim based on TILA was not raised either in an appropriately filed opposition to the motion or in the answer. Indeed, defendant's answer does not even assert any claims or defenses based upon TILA and, consequently, defendant did not request monetary damages or the equitable remedy of rescission under the statute. See R. 4:5-4.

[4] In his reply brief, defendant concedes the viability of the first and second assignments and challenges only the third and fourth assignments.

[5] Defendant also quarrels with the verbiage used in Fernandez's certification claiming only that plaintiff "acquired the Note" as opposed to "having possession of the Note." While the trial court did not address the alternative basis to confer standing — possession of the note prior to the filing of the complaint — it was not necessary to do so once he had correctly determined that standing was established by a valid assignment. See Mitchell, 422 N.J. Super. at 216.

However, we are unable to conclude from the record or the trial court's oral decision if plaintiff sent defendant an NOI in accordance with the FFA. In plaintiff's statement of material facts supporting its summary judgment motion, plaintiff stated that an NOI to foreclose "was mailed to the borrower at the mortgaged property by certified mail, return receipt requested, more than 30 days before this action was commenced. Said Notice identified Plaintiff as the borrower's lender." (emphasis added). To support this statement of material fact, plaintiff relied upon the NOI attached to Fernandez's certification. However, that NOI was sent, not by plaintiff as certified, but by M&T Bank on behalf of Lakeview. The trial court's Rule 1:7-4 findings did not address this discrepancy.

On appeal, plaintiff maintains that it fully complied with the requirements of the FFA and states that as an assignee, "[u]nder the plain meaning of the statute, any subsequent assignee was clearly contemplated by the legislature as not having to re-issue a[n] NOI as long as the underlying default had not been cured."

The FFA requires an NOI to be sent to a debtor prior to the commencement of foreclosure proceedings.[6] Specifically, the FFA provides,

> before any residential mortgage lender may accelerate the maturity of any residential mortgage obligation and commence any foreclosure or other legal action to take possession of the residential property which is the subject of the mortgage, the residential mortgage lender shall give the residential mortgage debtor notice of such intention at least 30 days in advance of such action as provided in this section.
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> [N.J.S.A. 2A:50-56(a) (emphasis added).]

The statute defines a "lender" as "any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned." N.J.S.A. 2A:50-55. The plain language of the FFA requires a holder or assignee of a residential mortgage

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[6] In relevant part, the FFA requires that an NOI shall "clearly and conspicuously" state,

> the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.
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> [N.J.S.A. 2A:50-56(c)(11).]

to send an NOI to a debtor prior to (1) accelerating the maturity of the mortgage obligation and (2) commencing a foreclosure action.

The NOI "is a central component of the FFA, serving the important legislative objective of providing timely and clear notice to homeowners that immediate action is necessary to forestall foreclosure." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 470 (2012). Moreover, the FFA's definition of "lender," in conjunction with the statutory requirements governing a proper NOI, reflects the "Legislature's intent that the homeowner be notified of the identity of the entity that currently holds the mortgage." Id. at 472. Critically as it relates to the issue on appeal, and as the Supreme Court stressed in Guillaume, it is the "identity of the lender – the prospective plaintiff – [that] is a crucial aspect of reasonable notice of a foreclosure claim." Id. at 474.

In the context of the facts before it, the Guillaume court noted that the Legislature did not prescribe a remedy for instances in which an NOI is timely served but noncompliant with the FFA's requirements governing its contents. Id. at 476. In the absence of legislative direction, "New Jersey courts retain discretion 'to fashion equitable remedies,' which are 'valuable because they allow relief to be fashioned directly to redress the statutory violations shown.'" Ibid. (quoting Brenner v. Berkowitz, 134 N.J.

488, 514 (1993)). In overruling the holding of Bank of New York v. Laks, 422 N.J. Super. 201, 213 (2011), which held that dismissal without prejudice is the exclusive remedy upon the submission of an NOI that violates N.J.S.A. 2A:50-56(c)(11), the Court held that a trial court "adjudicating a foreclosure complaint in which the notice of intention does not comply with [the aforementioned subsection] may dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case." Guillaume, 209 N.J. at 476. In crafting an equitable remedy, the Court emphasized that a trial court should consider the "impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default." Id. at 479.

In light of the FFA's requirements, the trial court erred by failing to make factual findings with respect to plaintiff's claim it sent defendant an NOI, particularly in light of defendant's contesting answer. As noted, the NOI attached to the Fernandez certification was sent by Lakeview not plaintiff. Plaintiff fails to cite any authority for the proposition that an assignee has complied with the FFA by relying upon an NOI sent by a different lender who did not also institute the foreclosure action.

Therefore, we remand to the trial court to make additional factual findings as to whether an NOI was sent by plaintiff to defendant. As stated in Guillaume, the trial court has within its equitable powers the ability to fashion an appropriate remedy in the event plaintiff did not send an NOI – including the service of a remedial NOI. Id. at 476. The trial court's findings shall be filed and served within sixty days.

Remanded. We retain jurisdiction.