SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-16T3

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF HSI ASSET SECURITIZATION CORP. TRUST 2007-NCI, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2001-NC1,

Plaintiff-Respondent,

v.

WITTMORE WILLIAMS AND CHERYL WILLIAMS,

Defendants-Appellants.

Submitted February 28, 2018 – Decided April 2, 2018

Before Judges Currier and Geiger.

On Appeal from Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. F-040245-08.

Franklin S. Montero, attorney for appellants.

Phelan Hallinan Diamond & Jones, PC, attorneys for respondent (Sonya Gidumal Chazin, on the brief).

PER CURIAM

Defendants Cheryl and Wittmore Williams appeal from a March 9, 2017 order denying their motion to vacate a March 8, 2016 sheriff's sale in this mortgage foreclosure action. We affirm.

Defendants purchased their home on March 7, 1997. On September 27, 2006, defendants executed an adjustable rate promissory note to MortgageTree Lending for $340,000, with initial monthly payments of $2,740.99 for principal and interest, and a maturity date of October 1, 2036. Initially, interest was calculated at 9.45% but was subject to readjustment every six months, up to a maximum of 16.45%. On September 27, 2006, defendants also executed a mortgage on their residence to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for MortgageTree Lending to secure the loan. The mortgage was recorded on October 25, 2006.

Defendants both became unemployed in 2008. They defaulted on the loan payments that fell due on May 1, 2008, and each month thereafter. A notice of intention to foreclose (NOI) was mailed to defendants, notifying them of the default and how to cure it. Defendants failed to cure the default.

On August 28, 2008, MERS assigned the mortgage to plaintiff Deutsche Bank National Trust Company, as Trustee for HSI Asset Securitization Corp. Trust 2007-NC1 (the Bank). The assignment was recorded on September 16, 2008.

Plaintiff filed a foreclosure complaint on October 14, 2008, and an amended complaint on October 28, 2008. A private process server served defendants with the summons and complaint on November 10, 2008. On January 8, 2009, default was entered against defendants for failure to respond to the complaint. On September 19, 2013, the matter was dismissed for lack of prosecution.

Defendants claim they applied and were approved for a loan modification in 2013. They certify they began making mortgage trial payments in May 2013, believing they would receive a permanent modification from Specialized Loan Servicing (SLS), the loan servicer at the time. Defendants allege after making a $1597.35 payment (an amount less than one monthly installment), plaintiff never refunded the payment and failed to follow through on the loan modification.

Plaintiff's complaint was reinstated on January 28, 2015. Plaintiff filed a motion for entry of judgment on May 22, 2015. On June 24, 2015, final judgment was entered in favor of plaintiff in the amount of $624,836.38. Defendants never filed a motion to vacate the default judgment.

A sheriff's sale was scheduled to take place on October 6, 2015. The sale was advertised in the Herald News on September 11, 18, 25, and October 2, 2015. The advertisement included the date, location, and time of the sale with a brief description of the

property and directions on where the full legal description could be found. The advertisement noted the sheriff reserved the right to adjourn the sale without further notice by publication.

Plaintiff voluntarily adjourned the sheriff's sale to November 17, 2015, and then again to January 5, 2016, for purposes of loss mitigation. The sale was then rescheduled to February 2, 2016.[1] On February 2, 2016, plaintiff again voluntarily adjourned the sale to March 8, 2016, for loss mitigation. Defendants were sent adjournment letters for each of the adjourned sales, with the possible exception of the original adjournment to November 17, 2015.[2]

On February 2, 2016, defendants filed a Chapter 7 bankruptcy. Shortly thereafter, on February 23, 2016, the bankruptcy was dismissed by the Bankruptcy Court. On the same day, defendants were sent a letter from an authorized agent of SLS regarding loss mitigation assistance, seemingly triggered by the bankruptcy petition. This letter is the only reference in the record

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[1] Plaintiff asserts the adjournment resulted from defendants exercising their statutory adjournment rights. This is inconsistent with defendants' claim that they were unaware of any sheriff's sale. The notice of adjournment does not indicate the reason for adjournment.

[2] Defendants may have been mailed a notice for this first adjournment as well, but a copy is not provided in either party's appendix.

regarding a purported loan modification. The letter stated: "The Client offers several alternatives that may provide you financial relief. Such options are listed below: Loan Modification[;] Short Sale[;] Deed in Lieu of Foreclosure."

The sheriff's sale took place on March 8, 2016, and plaintiff was the successful bidder. Defendants' redemption period expired on March 18, 2016. A sheriff's deed, dated March 21, 2016, was delivered to plaintiff's counsel on March 29, 2016; the deed was subsequently recorded on November 16, 2016.

Also on March 8, 2016, Cheryl Williams signed a response form to the SLS letter, expressing interest in the loss mitigation alternatives and checking a box that read, "I hereby authorize [SLS], upon successful approval of a loan modification, to file for court approval of the loan modification." The form is also signed by the "[d]ebtor's [a]ttorney." There is no proof this form was actually mailed back; if it was, it would have been received after the sheriff's sale.

On April 19, 2016, defendants re-filed their bankruptcy petition, allegedly unaware their home had already been sold and conveyed by the sheriff to plaintiff. On August 24, 2016, plaintiff obtained an order granting its motion for relief from

the automatic stay as to the mortgaged premises from the Bankruptcy Court.

Meanwhile, defendants entered into two lease agreements with tenants on April 1 and July 1, 2016 to "help [them] qualify [their] income in case any type of mortgage loan modification was available." On November 21, 2016, plaintiff's counsel sent a notice to the tenants regarding defendants' loss of the property due to foreclosure and advising the tenants to pay future rent to plaintiff. On December 29, 2016, plaintiff obtained a Writ of Possession for eviction purposes.

On January 16, 2017, more than ten months after the sale, defendants filed a motion to vacate the sheriff's sale. As of the time the motion was heard, the mortgage balance had increased to more than $650,000.

During oral argument, defendant's counsel conceded the property is "probably severely under water" because the mortgage balance far exceeds the value of the property. He further conceded the "property is in bad shape" and has "serious" heating issues.

Defendants expressed no ability or intent to cure the arrearages or redeem the mortgage. Instead, they only sought to modify the mortgage. Notably, defendants filed a Chapter 7 liquidation bankruptcy rather than a Chapter 13 wage earner plan bankruptcy commonly used by debtors to cure mortgage arrearages.

The motion was denied by the chancery court in an oral decision on June 5, 2017. In his oral decision, the motion judge noted plaintiff had not received a single mortgage payment in the more than eight years since defendants defaulted on May 1, 2008. He noted defendants had provided no evidence that redemption was a realistic possibility. The judge found the balance of equities favored plaintiff, which was facing "an enormous loss." He determined that vacating the sale would further prejudice plaintiff because the inevitable delay would result in additional expenses and costs.

The judge found defendants' reliance upon Rule 4:50-1 in their motion papers to be misplaced since defendant's motion sought to vacate the sheriff's sale, not reopen the final judgment. The judge further noted defendants were time-barred from relief under Rule 4:50-1 because their motion was filed seventeen months after the final judgment was entered on June 24, 2015. This appeal followed.

On appeal, defendants raise the following arguments: (1) the trial court erred in denying defendants' motion to vacate the sheriff's sale based on lack of notice and irregularities in the sale; (2) defendants lacked actual notice of the sheriff's sale in violation of their right to procedural due process; (3) the foreclosure sale was not properly advertised and was adjourned

excessively without proper notice; (4) defendants should not be foreclosed from pursuing all available redemption methods based on their current inability to pay; and (5) defendants furnished sufficient trial payments for a binding loan modification which plaintiff refuses to honor.

"[A]n application to open, vacate or otherwise set aside a foreclosure judgment or proceedings subsequent thereto is subject to an abuse of discretion standard." United States v. Scurry, 193 N.J. 492, 502 (2008) (citing Wiktorowicz v. Stesko, 134 N.J. Eq. 383, 386 (E. & A. 1944)). We find an abuse of discretion when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). It is against that standard that we evaluate the procedural and substantive issues raised by defendants.

Rule 4:65-2 mandates that "notice of the [sheriff's] sale shall be posted in the office of the sheriff of the county . . . where the property is located, and also, in the case of real property, on the premises to be sold[.]" Additionally, "at least [ten] days prior to the date set for sale, [the party obtaining the order or writ shall] serve a notice of sale by registered or

certified mail, return receipt requested," on "every party who has appeared" and the "owner of record." R. 4:65-2.

The sheriff "may continue such sale by public adjournment, subject to such limitations and restrictions as are provided specially therefor." R. 4:65-4. The rule does not require notice of adjourned sale dates be served in any particular manner. See First Mut. Corp. v. Samojeden, 214 N.J. Super. 122, 127-28 (App. Div. 1986). Service of the adjournment notices by regular mail is permissible.

Adjournment requests by the plaintiff, "whether or not agreed to by the debtor, are required to be granted by the Sheriff irrespective of any prior adjournments." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:65-4 (2018) (citing Wells Fargo Home Mortg. v. Stull, 378 N.J. Super. 449, 454-55 (App. Div. 2005)). Here, plaintiff adjourned the sale several times for loss mitigation, an appropriate reason to adjourn a sale. Defendants were not prejudiced by the adjournments. On the contrary, they benefitted from the postponements of the sale. Thus, defendants' contention that there were excessive sale adjournments has no merit.

Rule 4:65-5 requires motions for the hearing of an objection to a sheriff's sale to be "served within [ten] days after the sale or at any time thereafter before the delivery of the conveyance."

See Mercury Capital Corp. v. Freehold Office Park, Ltd., 363 N.J. Super. 235, 238 (Ch. Div. 2003) (noting that the right to object to the sale "is not finally terminated until the sheriff delivers a deed to the successful bidder"). Here, the property was sold on March 8, 2016, and the deed was delivered to plaintiff's counsel on March 29, 2016. Defendants filed their motion to vacate the sale on January 16, 2017, more than nine months after delivery of the sheriff's deed. The motion judge correctly found defendants failed to move to vacate the sale in a timely fashion.

We are mindful, however, that "as a matter of fundamental fairness, [Rule 4:65-2] must be construed as entitling interested parties to actual knowledge of the adjourned date upon which the sale actually takes place." Samojeden, 214 N.J. Super. at 123. Failure to comply with the rule requiring notice of the sheriff's sale normally requires voiding of the sale. See Assoulin v. Sugerman, 159 N.J. Super. 393, 397 (App. Div. 1978) (quoting Pressler, Current N.J. Court Rules, cmt. on R. 4:65-2 (1978)) (holding that noncompliance with the notice requirements imposed by Rule 4:65-2 "warrants setting the sale aside, 'provided the party entitled thereto has no knowledge of the pendency of the sale, seeks relief promptly upon learning thereof, and no intervening equities in favor of innocent third parties have been created in the interim'"); Orange Land Co. v. Bender, 96 N.J.

Super. 158, 164 (App. Div. 1967) (explaining that where mortgagor did not receive mandatory notice of sheriff's sale and had no knowledge of sale for five months, chancery court "could properly have set aside the sale or ordered redemption").

The motion judge found the notices sent by plaintiff's counsel to defendants advising of the March 8, 2016 adjourned sale date were mailed to the same address as the prior notices defendants admitted receiving. He further found the notices were not returned by the Post Office as undeliverable. As a result, the judge held there was presumptive good service. "New Jersey cases have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed." Ssi Med. Servs. v. HHS, Div. of Med. Assistance and Health Servs., 146 N.J. 614, 621 (1996) (citations omitted). The record supports the judge's conclusion that plaintiff complied with its duty to inform defendants of the March 8, 2016 adjourned sale date and that defendants had actual notice of the sale date. Accordingly, the denial of defendants' untimely motion was not an abuse of discretion.

Furthermore, the power to void a sheriff's sale "is discretionary and must be based on considerations of equity and justice." First Trust Nat'l Ass'n v. Merola, 319 N.J. Super. 44, 49 (App. Div. 1999) (citing Crane v. Bielski, 15 N.J. 342, 349

(1954)). To that end, the Court in Scurry applied the "time-honored maxims that the law does not compel one to do a useless act[,] and that equity follows the law." 193 N.J. at 505-06 (alteration in original) (citations omitted). Here, unlike the unique circumstances in Scurry, remanding this matter for a new sale or to permit a reasonable redemption period would be an exercise in futility. The market value of the property is far less than the redemption amount. Thus, defendants have no equity in the property. In any event, defendants concede they do not have the financial ability to cure the arrearages, let alone redeem the mortgage, within a reasonable period time. Therefore, a remand would serve no useful purpose.

Defendants remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.