SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3821-16T4

AURORA LOAN SERVICES, LLC by assignee NATIONSTAR MORTGAGE, LLC,

Plaintiff-Respondent,

v.

ANSELEM NWAORGU, a/k/a ANSLEM NWAROGU, his heirs, devisees, and personal representatives, and his successors in right, title and interest; MRS. NWAORGU; and JP MORGAN CHASE BANK, N.A.,

Defendants-Appellants.

Submitted March 1, 2018 – Decided April 11, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-044317-08.

Chinemerem N. Njoku, attorney for appellant.

Sandelands Eyet, LLP, and Shapiro & DeNardo, LLC, attorneys for respondent (Cara Ann Murphy, on the brief).

PER CURIAM

In this residential mortgage foreclosure action, defendant Anselem Nwaorgu appeals from an April 13, 2017 Chancery Division order denying his motion to vacate the Sheriff's sale, writ of execution, and final judgment of foreclosure in favor of plaintiff Nationstar Mortgage, LLC (Nationstar). We affirm.

We derive the following facts from the record. On December 1, 2006, defendant executed a thirty-year promissory note for $300,000 to First Financial Equities (FFE). On the same date, in order to secure payment of the note, defendant executed a purchase money mortgage on his Newark property to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for FFE. The mortgage was recorded with the Essex County Register on January 16, 2007. On February 28, 2007, MERS, as nominee for FFE, assigned the mortgage to Washington Mutual Bank, FA, which assignment was recorded on March 8, 2007.

On May 1, 2008, defendant failed to pay the monthly installment due on the note and mortgage, and has not made any mortgage payments since then. On October 28, 2008, by operation of a series of mergers and acquisitions, JP Morgan Chase Bank, NA, as successor in interest to Washington Mutual Bank, FA, as successor in interest to Washington Mutual Home Loans, Inc., as

successor by merger to Fleet Mortgage Corp., assigned the mortgage to Aurora Loan Services, LLC (Aurora), and the assignment was recorded on November 5, 2008.

On the same date, after complying with the notice requirement of the Fair Foreclosure Act, N.J.S.A. 2A:50-56, Aurora filed a complaint for foreclosure against defendant.[1] On December 9, 2010, the court entered a final judgment of foreclosure by default. The judgment specified that Aurora's "fixed rate note, mortgage and assignment of mortgage" were "presented and marked as exhibits by the [c]ourt," indicating that Aurora was in possession of the documents. In addition, a writ of execution was issued.

Subsequently, a Sheriff's sale, scheduled for December 4, 2012, was canceled. On April 18, 2014, Aurora assigned the foreclosure judgment to Nationstar Mortgage, LLC (Nationstar). The assignment was filed on April 24, 2014. On July 14, 2014, the trial court entered an order listing Nationstar as the plaintiff in the caption of the complaint and requiring that "[a]ll future pleadings filed with the [c]ourt" use Nationstar "as [p]laintiff in the caption."

[1] Although not participating in the foreclosure proceedings or appeal, JP Morgan Chase Bank, NA, was a named defendant in the foreclosure complaint because they were a holder of an instrument or interest appearing of record that may have affected the mortgaged premises.

On November 14, 2014, Aurora by Nationstar, its attorney-in-fact, assigned the mortgage on the subject property to U.S. Bank NA (U.S. Bank), as trustee, successor in interest to Wilmington Trust Company, as trustee, successor in interest to Bank of America NA, as trustee, successor by merger to LaSalle Bank NA, as trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6. On December 19, 2014, U.S. Bank filed a foreclosure complaint against defendant, and, on July 27, 2016, obtained a final judgment of foreclosure by default.

As a result of having two pending foreclosure judgments on the same property, the court entered two separate orders on September 30, 2016. In one order, on Nationstar's motion and with defendant's consent, the court vacated the December 9, 2010 foreclosure judgment and writ of execution, and ordered that the writ of execution be returned to the court marked "unsatisfied." In the other order, the court granted defendant's motion to vacate the July 27, 2016 foreclosure judgment and entered a case management order to schedule the litigation of the case.

Subsequently, the parties reached a settlement, and on October 25, 2016, the court entered two consent orders vacating its September 30, 2016 orders, reinstating Nationstar's December 9, 2010 foreclosure judgment and writ of execution, and dismissing U.S. Bank's foreclosure complaint with prejudice. On December 28,

2016, in accordance with Rule 4:65-2, Nationstar provided notice of a Sheriff's sale on the subject property scheduled for January 10, 2017. While the notice contained the correct defendant and property address, the caption referenced the dismissed U.S. Bank foreclosure complaint and docket number.

Over ten days after the sale, on February 1, 2017, defendant moved to vacate the Sheriff's sale, final judgment of foreclosure, and writ of execution under Rule 4:50-1, arguing "[t]here was no assignment of [the] mortgage or the note" to Aurora or Nationstar in order to confer standing. In addition, defendant argued the notice of sale was defective and the sale thereby invalid because "the docket number under which it was sold was under the docket number that was dismissed."

On April 13, 2017, after oral argument, the court denied the motion. The court determined that the motion was "well outside" the time constraints of Rule 4:50-1. Further, the court decided it was "not going to reopen a consent order" and "undo an agreement" that was negotiated while "[defendant] was represented by counsel." The court also rejected defendant's argument that Aurora lacked standing because it did not "have the note and mortgage," and explained that "the Office of Foreclosure never would have entered the judgment without those proofs."

Moreover, because Aurora assigned the foreclosure judgment to Nationstar, the court concluded Nationstar did not need to be in possession of the note and mortgage. According to the court,

> [a]t the point in time that the judgment has been transferred to them[,] [i]t's been transferred to them by the owner of the note and mortgage.
>
> . . . [T]he whole purpose of owning the note and mortgage up to the time of final judgment is to make sure somebody else doesn't come in with final judgment. Once they . . . get the final judgment, there's no need to transfer the note and mortgage because they have been deemed to be the owner of the . . . note, the holder of the mortgage[,] and they have a right to transfer their judgment, which they've done.

The court further pointed out that there was no "question in this case that . . . defendant [had] defaulted, at least as far back as 2008," and "[n]o one else [had] come forward in nine years" to foreclose on the property. The court concluded that "at some point, with a property that's been in default as long as this [had] been, and given . . . that prior applications were made to the [c]ourt" and "these issues were previously litigated" and "resolved," there was a need for "finality."

Turning to the notice of sale, the court agreed with defendant that the caption and docket number erroneously referred to the dismissed U.S. Bank foreclosure complaint. However, the court noted the complaint used "the same property address," and that

defendant would have known about the two docket numbers because he was involved in the litigation that led to the dismissal of the U.S. Bank foreclosure complaint and judgment. Although it did not find the errors had prejudiced defendant, the court extended the redemption period for twenty days from the date of the order, as an equitable remedy. In so doing, the court gave defendant twice "what the redemption period would [have been]," in order to "cover the ten days of the notice plus the ten-day redemption period." The court entered a memorializing order on the same date, and this appeal followed.

On appeal, defendant raises the following points for our consideration:

> POINT I:
>
> THE COURT ERRED IN DENYING DEFENDANT'S MOTION SEEKING TO VACATE THE SHERIFF'S SALE AND VACATE THE FINAL JUDGMENT OF FORECLOSURE AND WRIT OF EXECUTION BECAUSE PLAINTIFFS, AURORA LOANS AND NATIONSTAR MORTGAGE, LLC, HAD NO STANDING TO COMMENCE THE LAWSUIT AND PRESENTLY DO[] NOT HAVE ANY RIGHTS TO THE PROPERTY.
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> POINT II:
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> THE COURT ERRED IN NOT VACATING THE SALE OF THE PROPERTY BECAUSE THE NOTICE OF SALE WAS INVALID[,] AND ONLY A VACATION OF THE NOTICE COULD HAVE CURED THE INVALIDITY OF THE SALE.
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> POINT III:
>
> THE JUDGMENT OF FORECLOSURE, WRIT OF EXECUTION AND SHERIFF'S SALE SHOULD BE VACATED AND

> DECLARED VOID BECAUSE OF MISREPRESENTATION AND FRAUD AND FOR THE SAKE OF EQUITY.

Our review is governed by Rule 4:50-1, which permits a court, in its discretion, to relieve a party from a final judgment for the following reasons:

> (a) [M]istake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under [Rule] 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Motions seeking to set aside a judgment "must be filed within a reasonable time." Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012) (quoting Orner v. Liu, 419 N.J. Super. 431, 437 (App. Div. 2011)); see also R. 4:50-2 (requiring a motion for relief from a judgment or order to "be made within a reasonable time"). Specifically, claims based on subsections (a), (b), and (c) of Rule 4:50-1, are time-barred if filed "more than one year after the judgment, order or proceeding was entered or taken." R. 4:50-2.

Rule 4:50-1 is "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Mancini v. EDS, 132 N.J. 330, 334 (1993)). However, relief from judgment under Rule 4:50-1 "is not to be granted lightly." Cho Hung Bank v. Kim, 361 N.J. Super. 331, 336 (App. Div. 2003). Rather, Rule 4:50-1 "provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." Ross v. Rupert, 384 N.J. Super. 1, 8 (App. Div. 2006) (quoting Baumann v. Marinaro, 95 N.J. 380, 393 (1984)). Indeed, the discretionary authority afforded the trial court under Rule 4:50-1 is to be "exercised with equitable principles in mind, and will not be overturned in the absence of an abuse of that discretion." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div.), aff'd, 43 N.J. 508 (1964).

Further, it is generally recognized that "the showing of a meritorious defense is a traditional element necessary for setting aside . . . a default judgment." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:43-3 (2018); see also Marder, 84 N.J. Super. at 318. That is so because when a party has no meritorious defense, "[t]he time of the courts, counsel and litigants should not be taken up by such a futile proceeding."

Guillaume, 209 N.J. at 469 (quoting Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953)).

Here, defendant renews the same arguments that were properly rejected by the trial court. On this record, we find no abuse of discretion. Defendant has made no showing to justify vacating the final judgment under any provision of Rule 4:50-1 nor of a meritorious defense. Defendant does not dispute that he executed the loan documents and defaulted on the payments due under the mortgage note, which was duly recorded. Where a defendant does not challenge the execution, recording, or nonpayment of the mortgage, a prima facie right to foreclose is established. See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952); see also Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (1994).

In turn, the party "seeking to foreclose a mortgage must own or control the underlying debt." Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010) (citing Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008)). Here, the evidence clearly demonstrates that JP Morgan Chase assigned the note and mortgage to Aurora before Aurora filed the foreclosure complaint, thereby conferring standing, because "either possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." Angeles, 428 N.J. Super. at 318.

Moreover, "[a] final judgment in foreclosure is binding upon all parties to the action," and "[o]ne of the legal consequences of the final judgment is that the mortgage itself no longer has legal vitality." Resolution Tr. Corp. v. Griffin, 290 N.J. Super. 88, 91 (Ch. Div. 1994). At that point, "it has 'merged' into the final judgment," and "[w]hat had been a private claim under the mortgage contract becomes a special form of judgment entitling the plaintiff to a writ of execution to sell the designated property to satisfy the amount determined to be due." Ibid. Thus, as the trial court correctly pointed out, because the foreclosure judgment was assigned to Nationstar, there was no need for Nationstar to possess the mortgage note.

Indeed, even if Aurora lacked standing to foreclose, "standing is not a jurisdictional issue in our State court system[,] and, therefore, a foreclosure judgment obtained by a party that lacked standing is not 'void' within the meaning of Rule 4:50-1(d)." Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 101 (App. Div. 2012). Notably, as the trial court pointed out when it rejected defendant's belated challenge to plaintiff's standing, defendant did not claim that any other entity sought repayment of the mortgage loan during the nine-year period the loan was in default. As we noted in Angeles,

> In foreclosure matters, equity must be applied to plaintiffs as well as defendants. Defendant did not raise the issue of standing until he had the advantage of many years of delay . . . . Defendant at no time denied his responsibility for the debt incurred . . . . Rather, when all hope of further delay expired, after his home was sold . . . , he made a last-ditch effort to relitigate the case. The trial court did not abuse its discretion in determining that defendant was not equitably entitled to vacate the judgment.
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> [428 N.J. Super. at 320.]

Rule 4:65-2 mandates that "notice of the [sheriff's] sale shall be posted in the office of the sheriff . . . 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." Ibid. Moreover, Rule 4:65-5, which governs motions to vacate a sheriff's sale, requires the service of such motions to occur "within [ten] days after the sale" or before the delivery of the sheriff's deed.

The power to void a sheriff's sale "is discretionary and must be based on considerations of equity and justice." First Tr. Nat'l Assoc. v. Merola, 319 N.J. Super. 44, 49 (App. Div. 1999). However, in United States v. Scurry, 193 N.J. 492, 506 (2008), our

Supreme Court explained that "unique circumstances" may warrant a departure from procedural formalities in foreclosure actions. In Scurry, where the defendant's first notice of the foreclosure sale was the writ of possession, the Court's remedy for a notice failure included an extension of the redemption period. Id. at 506-07. The Court remanded the case for the trial court to determine a "reasonable" time period for the defendant to redeem and a redemption amount. Id. at 506. If the defendant was able to redeem, the Court ruled "[the defendant] is to be afforded the opportunity [he or she] would have had if [he or she] properly had been noticed of the sheriff's sale of the property: the opportunity to purchase [his or her] property free and clear of all existing liens." Id. at 507. However, should the defendant not be able to redeem "within a reasonable period of time, . . . then there is no need to vacate the sheriff's sale[,] and title will remain with plaintiff." Id. at 506.

Here, we agree with the court's decision to limit defendant's remedy to an extended redemption period. As the court noted, defendant was clearly aware of both foreclosure proceedings, having participated in the litigation that led to the reinstatement of the Nationstar judgment and the dismissal of the U.S. Bank judgment. Moreover, defendant did not deny having notice of the sheriff's sale, and only claimed that the caption and the docket

number erroneously reflected the U.S. Bank judgment that had been dismissed. Thus, under these circumstances, an extension of the redemption period was an appropriate remedy.

Affirmed.