SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4202-15T2

BANC OF AMERICA FUNDING CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,

Plaintiff-Respondent,

v.

KAP YEON JUN and WON SOON CHOI, wife and husband,

Defendants-Appellants.

Submitted September 18, 2017 – Decided February 20, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-003274-15.

Law Offices of Park & Kim, LLC, attorneys for appellants (Kyungjoo Park, on the brief).

Sandelands Eyet LLP, attorneys for respondent Banc of America Funding Corporation Mortgage Pass-Through Certificates, Series 2007-C, U.S. Bank National Association, as Trustee (Raymond Kim, on the brief).

Parker McCay PA, respondent pro se (Gene Mariano, of counsel; Stacy L. Moore, Jr., on the brief).

PER CURIAM

This appeal arises out of a voluntarily dismissed foreclosure complaint. The court dismissed the complaint and counterclaims without prejudice. The trial court thereafter denied, on a motion for reconsideration, defendants' request for sanctions. We affirm that order on appeal.

Shortly after defendant Kap Yeon Jun filed her answer and counterclaim, plaintiff sought leave of court to dismiss its complaint without prejudice. Plaintiff did so after its newly substituted counsel confirmed what Jun had been saying, with documentary support, since she successfully moved to vacate default: plaintiff had assigned the mortgage to another bank months before it filed suit. Plaintiff sought dismissal, although it claimed to still possess the note.

Jun and her husband, co-defendant Won Soon Choi, objected to the dismissal. They complained that predecessor counsel had acted unethically in failing to diligently examine the title records; failed to comply with Rules 1:4-8(a), 1:5-6(c)(1)(E), and 4:64-1; and ignored their evidence of the mortgage assignment. They alleged that a document execution specialist for the mortgage servicer was also delinquent. They sought sanctions against the prior attorneys and their firm, and the bank employee, including an award of fees, and an order barring them from handling

foreclosure matters. Defendants also complained that plaintiff had failed to respond to their pending discovery demands. Finally, they objected to the form of the dismissal order, noting that the mortgage assignee was improperly substituted in as plaintiff.

The court entered two orders dismissing the complaint and the counterclaims without prejudice and without costs. The second amplified and corrected the first order, by substituting the original plaintiff in the caption as opposed to the assignee, and by noting that defendants' pending discovery motion was dismissed as moot.

Defendants thereafter sought reconsideration. In renewing their argument for sanctions, they added reference to the frivolous litigation statute, N.J.S.A. 2A:15-59.1; the court's inherent powers; and, by analogy, the power to award fees to plaintiffs under Rule 4:42-9(a)(4). Defendants also cited an unpublished appellate opinion which had affirmed the award of fees and costs in connection with the voluntary dismissal of a foreclosure complaint where the plaintiff lacked a valid assignment. In doing so, however, defendants did not refer to Rule 4:37-1, although that was the basis for the award in that other case.

During argument, defendants' counsel confirmed that he did not send a so-called "safe harbor letter" under Rule 1:4-8(b)(1). The court explored whether dismissal of the counterclaims could

prejudice defendants, and if a statute of limitations defense could be raised upon revival of the claims. The court learned the counterclaims raised causes of action pertaining to the origination of the loan in 2007. Thus, absent a tolling argument, the limitations period had already passed.

The judge set forth his reasons for denying the motion in a written statement, which we quote a length:

> Defendants have not shown a palpably incorrect basis for the Court's entry of the January 4, 2016 Order. Nor was there a showing that the Court failed to consider the significance of competent probative evidence. Additionally, Defendants are arguing for an award of attorney fees claiming the original filing was frivolous.
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> Defendants allege they are entitled to attorney's fees under the unpublished decision . . . . The decision . . . however, only recognized that in permitting a voluntary dismissal pursuant to R. 4:37-1 a court could under the Rule condition the relief upon payment of defendant's attorney's fees. Such a condition is in the discretion of the court. This Court notes that such a condition was not requested by Defendants nor imposed when the voluntary dismissal of the foreclosure action was permitted.
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> Defendants further argued that Plaintiff did not have a prima facie right to foreclose. See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). As such the filing of the complaint was frivolous warranting an award of fees. Defendants challenge the chain of assignment of the mortgage arguing that Plaintiff does not have standing. However, a defendant, who is not a party to the

assignment of a mortgage, does not have standing to challenge that assignment. See Bank of New York v. Raftogianis, 418 N.J. Super. 323, 350-51 (Ch. Div. 2010). Here, the Court thoroughly addressed the issue of standing. Whether Plaintiff had standing to foreclose was raised in the initial motion and Defendants have offered nothing new that would warrant reconsideration.

Defendants also argue that attorney's fees should be imposed as the original Complaint was frivolous. However, sanctions are not warranted. First, because Defendants failed to comply with R. 1:4-8's safe harbor provision. Defendants never provided the notice required under R. 1:48(b). Even if Defendants complied with the procedural requirements, Defendants have not demonstrated that Plaintiff's foreclosure complaint constituted a frivolous action. N.J.S.A. 2A:15-59 provides that a complaint is frivolous if "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury." In this matter, Plaintiff's Complaint on its face establishes to the satisfaction of the Court that this case was not filed for an improper purpose. Therefore, Defendants' motion for sanctions is denied.

As to the issue of Defendants' counterclaims, originally, the voluntary dismissal was entered by the Court through an order dated December 11, 2015. Following the entry of that order, Defendants objected to the form. Defendants[] noted to two administrative errors. First, Defendants stated that "the first part of Plaintiff's name is not 'Bank' but 'Banc,'" and, second, that "Kivitz McKeever Lee, P.C." should be replaced with "KML Law Group, PC." As a result, Plaintiff's counsel submitted a revised [] December 11, 2015 Order. The revised order reflected the two administrative

> errors noted by Defendants, but was otherwise identical in substance. The Court received no objection to the form of the proposed order and entered it on January 4, 2016. The January 4, 2016 and December 11, 2015 Orders both state "all claims and counterclaims in this matter are hereby dismissed without prejudice." Therefore, there is no basis to reconsider the Court's Order to dismiss without prejudice the counterclaim along with Plaintiff's Complaint. If Defendants wish to pursue their claims, they can bring them in the Law Division.

On appeal, defendants essentially renew arguments they presented to the trial court with regard to sanctions under Rule 1:4-8, N.J.S.A. 2A:15-59.1, Rule 4:42-9(a)(4), and the court's inherent powers. Defendants for the first time expressly argue that the court was obliged to condition dismissal upon the award of fees under Rule 4:37-1. They also contend that their counterclaims should not have been dismissed.

We affirm, substantially for the reasons set forth in the trial court's opinion, subject to the following brief comments regarding voluntary dismissal of actions after service of an answer. Rule 4:37-1(b) provides that a plaintiff may voluntarily dismiss its complaint only by "leave of court and upon such terms and conditions as the court deems appropriate." Furthermore, if a counterclaim had been previously filed, as was here, "the action shall not be dismissed against the defendant's objection unless

the counterclaim can remain pending for independent adjudication by the court." Ibid.

The court is empowered to award a defendant fees as a condition of a voluntary dismissal without prejudice to protect the defendant against duplication of costs. See Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 260 (App. Div. 1990). On the other hand, when the prospect of renewed litigation is slight, a court may deem a fee award unnecessary. See Union Carbide Corp. v. Litton Precision Prods., Inc., 94 N.J. Super. 315, 317-18 (Ch. Div. 1967) (applying R. 4:42-1(b), predecessor to Rule 4:37-1(b)).

The award of fees as a condition of dismissal, as with counsel fee awards generally, is left to the trial court's sound discretion, which we shall disturb "on the rarest occasions, and then only because of a clear abuse . . . ." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). A reviewing court intervenes when the trial court relies on "irrelevant or inappropriate factors" or engages in a "clear error in judgment . . . ." Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155-56 (App. Div. 2016).

It appears likely that defendants will face a revived foreclosure complaint, as plaintiff submits that defendants have failed to make any payments on their mortgage note for several years. Nonetheless, we shall not disturb the trial court's denial

of defendants' motion. Defendants failed to submit a timely request for fees as a condition of voluntary dismissal under Rule 4:37-1. Defendants omitted any reference to the Rule in their initial opposition to the voluntary dismissal, instead seeking sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1, among other grounds.

Notably, defendants represented themselves in the initial proceedings, including Choi's answer, Jun's motion to vacate, and her subsequent answer and counterclaims. Even upon their motion for reconsideration, defendants did not file a certification of services from counsel, which would have enabled the trial court to determine what portion of fees were likely to be duplicated upon the revival of the suit. Presumably, if a second lawsuit is brought, a party will not incur the full amount of fees borne in the first case, to the extent previously drafted documents may be recycled without significant revision.

In sum, we discern no error in the trial court's denial of defendants' newly minted effort to secure fees under Rule 4:37-1(b) on their motion for reconsideration.

We also acknowledge that the court's order of voluntary dismissal deviated from the command in Rule 4:37-1(b) to preserve previously pending counterclaims. Instead, the court's January 4, 2016 order dismissed the counterclaims without prejudice.

However, defendants did not raise this issue in their brief in support of their motion for reconsideration.

We may "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (internal quotation marks and citation omitted). Neither the court's jurisdiction, nor a great public interest is at stake. However, to avoid any potential prejudice from the court's dismissal of the counterclaims, we order that if defendants revive the counterclaims as a free-standing action against the initial plaintiffs within sixty days (or if they have already filed such an action or filed the counterclaims in a revived foreclosure action), the filing shall relate back to the date of filing of the original counterclaims.

Affirmed.