SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4404-15T4

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2006 A8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-H UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2006,

Plaintiff-Respondent,

v.

LINDA POWERS AND WESLEY POWERS,

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, Warren County, Docket No. F-014297-13.

James F. Villere, Jr., attorney for appellants.

Blank Rome, LLP, attorneys for respondent (Matthew P. Rubba, on the brief).

PER CURIAM

Defendants Linda and Wesley Powers appeal from a January 23, 2015 order granting summary judgment to plaintiff, Deutsche Bank National Trust Company as Trustee of the Residential Asset Securitization Trust 2006-A8, Mortgage Pass Through Certificates, Series 2006-H Under the Pooling and Servicing Agreement Dated June 1, 2006, in this residential mortgage foreclosure action. We affirm.

Linda Powers has been in the real estate business since 1987 and is currently employed as a real estate broker. Between 1997 and 2006, defendants refinanced the mortgage on their residence on six different occasions to obtain a "better rate and tap into the equity." As part of the loan application process for the transaction in question, Quicken Loans, Inc. (Quicken) provided a Good Faith Estimate to defendants one month prior to closing, estimating defendants' monthly payment to be $3541.67, inclusive of real estate taxes, estimated at $916.67, and flood hazard insurance estimated at $58.33.

On April 13, 2006, defendants executed a promissory note to Quicken for $420,000. On the same day, defendants executed a mortgage on their residence to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Quicken to secure the loan. The mortgage was recorded on April 20, 2006.

At the time the loan closed, defendants were aware the annual real estate taxes on the property were $11,203. They received an escrow deficiency notice from Quicken within two months after closing. In addition, defendants claimed they received a subsequent notice from IndyMac Federal Bank (IndyMac) dated December 18, 2006, advising the monthly mortgage payment "would be $2926.77 representing an increase in escrow deposits to $520.52 from $466.67." Thereafter, by notice dated January 17, 2007, IndyMac informed defendants the mortgage payment in February 2007 would be $4034.11, due to an increase in escrow deposits from $520.52 to $1627.86 per month.

Defendants allege "a fact-finder might conclude that Quicken knew in advance the disclosed loan costs were less than would be charged," and "Quicken intended the defendants would enter into the agreement based on the lower costs but then switch them over to higher costs."

On April 3, 2009, MERS, as nominee for Quicken, assigned the mortgage to IndyMac (the first assignment). The assignment was recorded on April 20, 2009. An order reforming the mortgage nunc pro tunc was entered and recorded on October 22, 2009. Defendants defaulted on the loan on November 1, 2008. On April 9, 2009, IndyMac filed a foreclosure complaint against defendants. On August 10, 2012, the complaint was voluntarily dismissed without

prejudice. Thereafter, on November 26, 2012, the mortgage was assigned by Federal Deposit Insurance Corporation (FDIC), as Receiver for IndyMac, to plaintiff (the second assignment). The second assignment was recorded on December 6, 2012.

On January 17, 2013, IndyMac, as servicing agent on behalf of lender, Deutsche Bank, sent defendants a Notice of Intent to Foreclose (NOI) in compliance with the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -68. The NOI named plaintiff as the "Current Lender/Holder" of the note and mortgage. Defendants failed to cure the default.

On April 29, 2013, plaintiff filed a complaint in foreclosure against defendants. On June 4, 2013, defendants filed a contesting answer. On February 18, 2014, defendants filed a fifty-eight-page, 258-paragraph amended answer, counterclaim, and third-party complaint. The answer included sixteen affirmative defenses. The third-party complaint against Quicken and IndyMac contained eighteen counts. The counterclaim against plaintiff alleged: common law fraud; violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20; common law unconscionability; common law rescission; and negligent lending. The affirmative defenses included: NOI deficiencies in violation of N.J.S.A. 2A:50-56(b); common law fraud, recoupment under the CFA; recoupment for unconscionability; invalid mortgage due to lack of meeting of the

minds; lack of standing to foreclose; unclean hands; statute of frauds; plaintiff is not the holder of the note; plaintiff is not a holder in due course of the mortgage because it had reason to know it was purchasing a predatory loan; and failure to mitigate damages. On March 4, 2014, plaintiff filed its answer and affirmative defenses to defendants' counterclaims.

In essence, defendants claim Quicken fraudulently induced them to enter into the transaction by materially misrepresenting the amount of the real estate tax escrow included in the monthly payment by approximately $500 per month. They compare the misrepresentation to a bait and switch scheme and assert the increased tax escrow made the mortgage payment unaffordable.

On August 14, 2014, plaintiff filed a motion for summary judgment and to strike defendants' answer and affirmative defenses. The third-party claims against IndyMac are not the subject of the motion. Defendants dismissed their third-party claims against Quicken on November 5, 2014.

Judge Edward M. Coleman heard oral argument on January 23, 2015, and issued an order and comprehensive thirty-page memorandum of decision in which he: granted summary judgment to plaintiff; dismissed defendants' answer, defenses, and counterclaims with prejudice; and transferred this matter to the Office of Foreclosure as an uncontested case.

The judge noted defendants' affirmative defenses and counterclaims were based "on the notion that the original lender, Quicken Loans, Inc., provided an incorrect escrow payment [estimate] for the property's annual real estate taxes as of the April 2006 closing." The judge meticulously analyzed plaintiff's submissions, defendants' allegations and alleged material acts in dispute, and plaintiff's replies. Among other arguments raised by defendants, they alleged: predatory lending; bait and switch in violation of the CFA; violation of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601 to -2617; the right to recoupment of payments made to plaintiff; and that plaintiff was not a holder in due course.

The judge held defendants failed to rebut the prima facie elements of the foreclosure action. In reaching this conclusion, he made the following findings: (1) plaintiff had standing to foreclose because the note and mortgage were assigned to plaintiff prior to the filing of the complaint; (2) plaintiff established a prima facie case for foreclosure by demonstrating: (a) proper execution of the mortgage, (b) proper recording of the mortgage, (c) defendants' default in payment, (d) indebtedness, and (e) explicit provision in the note asserting plaintiff's right to the mortgaged premises; (3) the NOI sent to defendants complied with the notice requirements imposed by the FFA; (4) defendants failed

to plead a prima facie claim for fraud; (5) defendants' "vague, non-specific allegations" failed to sufficiently allege Quicken engaged in an unconscionable commercial practice; (6) defendants lacked standing to assert a CFA claim against plaintiff; (7) defendants' fraud and CFA claims were barred by the six-year statute of limitations, the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), and 12 U.S.C. § 1823(e), as informed by the D'Oench, Duhme[1] doctrine; (8) plaintiff was a holder in due course of the mortgage; (9) as a holder in due course, plaintiff was not liable for fraud in the inducement of the loan or for Quicken's alleged unclean hands; (10) defendants offered no facts in support of their claim plaintiff failed to mitigate damages; (11) defendants' negligence claim was legally deficient because plaintiff did not breach any legal duty owed to defendants; (12) defendants' RESPA claims are barred by the applicable one-year statute of limitations, citing 12 U.S.C. §§ 2607, 2614; (13) defendants provided no factual or legal basis for their statute of fraud defense; and (14) defendants' remaining defenses were legally insufficient.

The judge described defendants' defenses as being meritless and asserted only to attempt to delay the foreclosure proceedings,

[1] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

citing Somerset Tr. Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989). He noted the answer contained several "boilerplate" affirmative defenses and counterclaims that lacked "any legal or factual basis." Accordingly, the judge struck defendants' pleadings pursuant to Rule 4:65-5 as "insufficient at law."

On May 5, 2016, final judgment was entered in favor of plaintiff in the amount of $711,152.55. This appeal followed.

On appeal, defendants raise the following arguments: (1) the trial court erred by finding plaintiff was the holder in due course of the note and mortgage; (2) the trial court erred in barring defendants' fraud and unclean hands claims; and (3) the trial court erred in finding the statute of limitations barred defendants' affirmative claims and defenses.

"[W]e 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 of Fire Ins. Co. of Pittsburgh, 224 N.J. 198, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012)). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged

and that the moving party is entitled to judgment or order as a matter of law." R. 4:46-2(c).

When making this determination, the court must examine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). Accordingly, we must first "decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Henry v. N.J. Dep't. of Human Servs., 204 N.J. 320, 330 (2010) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). We afford no special deference to legal determinations of the trial court. Templo Fuente, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Having carefully reviewed the record, we find there were no material facts in dispute and plaintiff is entitled to judgment as a matter of law. We affirm substantially for the reasons expressed by Judge Coleman in his well-reasoned, comprehensive memorandum of decision. Defendants' arguments are without

sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

Defendants claim plaintiff lacked standing to foreclose. We disagree. 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)). Plaintiff had standing to foreclose based on the November 26, 2012 assignment of the mortgage from FDIC, which predated the filing of its foreclosure complaint on April 29, 2013.

Defendants also claim plaintiff was not a holder in due course because the loan was overdue, since they defaulted on November 1, 2008, before the first assignment on April 3, 2009, and before the second assignment to plaintiff on November 26, 2012. We again disagree. The first 120 monthly installments due under the note were for interest only. Thus, defendants defaulted by failing to remit interest payments. The first principal payment did not fall due until long after the second assignment to plaintiff. The principal payments had not been accelerated at that point. "Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal." N.J.S.A. 12A:3-304(c).

The Uniform Commercial Code "defines a holder in due course as one who takes a negotiable instrument for value, in good faith, and without notice of any defense or claim against it." Carnegie Bank v. Shalleck, 256 N.J. Super. 23, 33 (App. Div. 1992) (citing N.J.S.A. 12A:3-302; N.J.S.A. 12A:3-102(1)(e)). Plaintiff meets each of the requirements. A holder in due course may enforce the mortgage "free and clear of any personal defenses the mortgagor may have against the assignor." Id. at 45 (quoting 29 N.J. Practice, Law of Mortgages § 124, at 567-68 (Roger A. Cunningham & Saul Tischler) (1st ed. 1975); see Bancredit, Inc. v. Bethea, 65 N.J. Super. 538, 544 (App. Div. 1961) (stating a holder in due course is "immune to all personal defenses of the maker against the payee, including that of fraud in the inducement"). As a holder in due course, plaintiff is not liable for any alleged fraud, unconscionability, unclean hands, or other conduct forming the basis for defendants' personal defenses, that was committed by its predecessors. Accordingly, the trial court did not err in granting summary judgment dismissing those claims.

Defendants further argue their affirmative defenses were not time-barred. We once again disagree. The statute of limitations for fraud and CFA violations is six years. N.J.S.A. 2A:14-1; see Mirra v. Holland America Line, 331 N.J. Super. 86, 90 (App. Div. 2000). This time period is measured from the time the claim

accrued, that is, the date defendants knew or should have known of their cause of action. See O'Keefe v. Snyder, 83 N.J. 478, 491 (1980) (citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 291-92 (1978)). Defendants knew or should have known of the alleged fraud and unconscionable business practices when the loan closed on April 13, 2006, and certainly no later than the issuance of the second escrow deficiency notice on January 17, 2007. Their contesting answer was filed more than six years later on June 4, 2013.[2] Their amended answer was filed on February 18, 2014. Therefore, defendants' fraud and CFA claims are time-barred. For this additional reason, the chancery court properly dismissed defendants' fraud-related claims.

Affirmed.

[2] The record does not include the contesting answer. Therefore, we are unsure if it alleged common law fraud or violation of the CFA.