SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0992-21

1ST COLONIAL
COMMUNITY BANK,

Plaintiff-Respondent,

v.

BRIAN WOLFSON and
LAURIE WOLFSON,

Defendants-Appellants.

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Submitted March 22, 2023 - Decided June 22, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Camden County, Docket No. F-008123-20.

McDowell Law, PC, attorneys for appellants (Ellen M. McDowell and Joseph F. Riga, of counsel and on the briefs).

Saldutti Law Group, attorneys for respondent (Thomas B. O'Connell, of counsel and on the brief).

PER CURIAM

Defendants Brian and Laurie Wolfson[1] appeal from the orders of July 2, 2021, granting summary judgment in favor of plaintiff 1st Colonial Community Bank, and October 20, 2021, ordering foreclosure of the mortgage securing defendants' property. We affirm.

I.

In 2017, defendants sought a $1,490,000 loan to construct a house and barn on their property. They initially approached Fulton Bank with whom they had a longstanding banking and lending relationship as defendants were in the business of purchasing and renovating homes. Fulton denied the loan application, citing "[s]erious delinquency, and public record or collection filed," "[t]ime since delinquency is too recent or unknown," "[n]umber of accounts with delinquency," "[p]roportion of balances to credit limits is too high on bank revolving or other revolving accounts," and a high number of recent inquiries. Fulton later approved a $1,200,000 loan, subject to a "satisfactory appraisal." After the property was appraised at $1,560,000, Fulton denied the loan in March 2018 because the collateral was insufficient.

[1] We refer to defendants by their first names to avoid any confusion caused by their common surname. No disrespect is intended.

Defendants began speaking with plaintiff about procuring a construction loan. Defendants also provided plaintiff with the loan offer obtained from Fulton prior to the appraisal and subsequent withdrawal of the offer.

In April 2018, plaintiff provided defendants with a commitment letter offering a construction loan for $1,600,000 at 5.750% interest. Defendants informed Fulton of the mortgage commitment terms.

On April 20, plaintiff emailed defendants advising it could offer a "5-1 adjustable rate mortgage (ARM) with a [thirty] year amortization at 5.25%. If we modify/convert to perm[2] within [twelve] months we can guarantee the rate of 5.375% for the 5-1 ARM (no charge)." The loan amount was $1,600,000.

That same day, Fulton sent defendants a commitment for a loan of $1,482,000 at a 5% interest rate, and a 360-month term. The commitment included certain approval conditions. During her deposition, Fulton's representative explained that prior to the conversion of a construction loan to a permanent loan, Fulton would seek to "confirm that the borrower still has the ability to repay the mortgage. . . . [W]e want to be able to verify that the borrower's income and credit are still in line with the parameters of the loan as

[2] Defendants sought a loan that would convert to a fixed rate longer term of years after maturation—referring to it as a "permanent" loan.

it was approved." The representative stated, "if the borrower's credit tanks, that[] [is] a problem; or if the borrower no longer has a job, that[] [is] a problem." She explained Fulton would allow the borrower to stay in the ARM product for the period allowed by the agreement—here seven years—and every year the rate would adjust based on the prevailing rate. The representative stated this procedure was "like a safety net" if a borrower could not later qualify for the modification to the thirty-year fixed mortgage.

Defendants accepted plaintiff's loan commitment and executed the paperwork in May 2018. A document entitled "Balloon Payment Disclosure" was included. It contained a warning that read "Notice: Read Before Signing Your Loan Documents." The disclosure stated that the loan required eleven payments. After the last payment, the outstanding principal and accrued interest would be approximately $1,600,000 which was due and payable on June 1, 2019. The document further stated, "DO NOT SIGN ANY LOAN DOCUMENTS IF YOU HAVE ANY QUESTIONS ABOUT YOUR LOAN PAYMENTS," and

> [u]nless otherwise expressly disclosed in the [n]ote, or in an [a]ddendum or a [r]ider to the [n]ote, **THE LENDER IN THIS TRANSACTION IS UNDER NO OBLIGATION TO REFINANCE THE OUTSTANDING PRINCIPAL BALANCE OF THIS LOAN DUE ON THE MATURITY DATE**. You may be required to pay[]off the entire principal

> balance, plus any unpaid interest due thereon, on the [m]aturity [d]ate using personal assets.

Both defendants signed below this warning.

The agreement also included a "New Jersey Right To Own Attorney Disclosure," that stated

> the lender is required to advise you of the following prior to your acceptance of a written offer by the lender to you to make a loan secured by real property:
>
> 1. The interests of the borrower and the lender are or may be different and may conflict.
>
> 2. The lender's attorney represents only the lender and not the borrower.
>
> 3. The borrower is therefore advised to employ an attorney of the borrower's choice licensed to practice law in this state to represent the interests of the borrower.

Defendants did not retain counsel to represent them prior to or at the closing of the loan.

In the agreement, defendants represented that all financial information they provided was "true, correct and complete." Article Three of the agreement provided "[t]he proceeds of the [l]oan shall be used by the [b]orrower to acquire the [property] and complete the [p]roject." Furthermore,

> [s]ubject to compliance by [defendants] with the terms, provisions and conditions of this [a]greement,

> [plaintiff] shall make advances on the [c]onstruction [l]oan to [defendants] for costs of the [p]roject . . . incurred by [defendants] in connection with the construction of the [p]roject, as itemized . . . . [Plaintiff] shall not be obligated to make an [a]dvance unless [plaintiff] is satisfied . . . that the conditions precedent to the making of any such [a]dvance, as set forth in this [a]greement, have been satisfied by [defendants].

Defendants were further required upon plaintiff's request to "show[] payment of all bills and charges for which [a]dvances have been previously made" and any evidence requested to show "actual incurrence" of project costs. Advances were to be sent as a "trust fund to be applied for the purpose of paying the cost of the [p]roject."

The agreement set a construction completion date of June 1, 2019 at which time the availability of advances would expire and the loan would mature. The project would be considered completed when plaintiff and an inspector considered it to be completed, absent "minor punch list items" in substantial accordance with the plan; all furniture, fixtures, and equipment were placed on the property; every permanent and temporary certificate of occupancy (C.O.) and any other certifications and approvals were issued, and all costs and expenses were paid in full.

The agreement also required defendants to "[p]repare and timely file all federal, state and local tax returns . . . and pay and discharge all taxes,

assessments and other governmental charges or levies." "Events of default" included: failure to make payment of principal or interest; failure to perform or observe the covenants, agreements, or conditions of the agreement; failure to furnish financial documents upon plaintiff's request; and if the project was not completed in accordance with the agreement.

The agreement also contained an integration clause that provided:

> Along with the other [l]oan [d]ocuments, this [a]greement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, among the parties, and there are no warranties, representations or other agreements between the parties in connection with the subject matter hereof except as specifically set forth or incorporated herein.

In a certification, defendants stated they did not read the agreement before signing it.

During the loan negotiations, Brian advised plaintiff his annual income was approximately $1,000,000. In June 2018, Brian's employment was terminated. He was offered a severance package, but, according to his accountant, his earnings dropped "considerably." Defendants did not inform plaintiff of the termination or reduced income. Brian's 2019 tax return reflected gross earnings from a subsequent employer of approximately $254,000.

When the loan matured in June 2019, the parties extended the loan agreement for six months so defendants could complete construction on the property. A second modification occurred in July 2019, in which plaintiff increased the borrowing limit to $2,100,000. The loan modification agreement contained an identical balloon payment disclosure.

In December 2019, plaintiff again modified the agreement, extending the loan's maturity to March 1, 2020 to permit the completion of the project and to finalize the "take-out consumer mortgage." In January 2020, the municipality recommended the issuance of a temporary C.O., noting there were incomplete items on the property, including the installation of a driveway, retaining wall, and the landscaping. If defendants did not complete the construction by March 14, they could be subject to a fine or ordered to vacate the property.

On January 15, 2020, defendants requested a draw of $91,377.83 and included a list of completed items. The proffered reason for the draw was for deposits for the construction of the driveway and for "work on the front wall, entrance pillars and gate."

Plaintiff's representative contacted defendants in February and in March to discuss the maturity of the construction loan and finalization of the permanent

mortgage. On March 23, 2020, the parties executed another loan modification extending the maturity date to July 1, 2020.

On April 10, 2020, Brian's then-current employer terminated his position. Defendants sought a forbearance from plaintiff. Plaintiff granted it, providing that "all interest deferred in accordance with this [a]greement shall be due and payable on the [m]aturity [d]ate [of July 1, 2020]."

Defendants failed to pay the loan when it matured on July 1. The driveway, wall, gate, pillars, and landscaping remained incomplete. There were tax liens encumbering the property. Therefore, plaintiff sent defendants a Notice of Loan Maturity and Demand for Payment in Full. The notice stated:

> Several attempts have been made to contact you regarding the above referenced loan that . . . matured on July 1, 2020. Please be advised that [plaintiff] will not be offering any further extension of credit or maturity date. Please further allow this letter to serve as a Demand Notice for Payment in Full.

The parties discussed resolving the matter. Plaintiff's CEO advised that updated financial information was required prior to any conversion to a permanent loan. Defendants refused to provide any financial information and estimated they needed $150,000 to complete the construction. Plaintiff informed defendants they needed to complete the construction and obtain a C.O.

II.

Thereafter, defendants filed an action against plaintiff in the Law Division asserting breach of contract, misrepresentation, statutory and common law fraud, and promissory estoppel.[3] In February 2021, the court granted plaintiff declaratory judgment in that case, finding defendants defaulted on the loan agreement for failure to pay property taxes, complete construction of the property, and obtain a permanent C.O.

Plaintiff filed a complaint for foreclosure, asserting defendants defaulted on the loan agreement and alleging an outstanding balance of $2,151,994.02. Defendants' answer asserted defenses of breach of contract, fraudulent inducement, failure to state a claim upon which relief can be granted, unclean hands, and other equitable relief.

During discovery, plaintiff learned defendants had misrepresented certain financial information on their 2018 loan application, specifically denying any existing judgments, bankruptcy actions, or foreclosure proceedings within the previous seven years. Defendants affirmed the provided information was true. However, defendants had been the subject of two foreclosure actions; in February 2012 and March 2016. Plaintiff's representative testified he was

[3] This is a separate action from the matter before this court.

unaware of these proceedings, and if he knew of the foreclosures, plaintiff would not have offered defendants the construction loan.

Plaintiff's representative also testified he did not believe plaintiff was obligated to "make the second loan after the first loan was done." Although he explained plaintiff intended to refinance the construction loan into a permanent loan, and it informed defendants of that intent, he said additional information would have been required to make sure defendants could "carry the refinance." The permanent loan was considered a refinance loan that would require "an update[] [of] financials" in "an updated application."

Plaintiff also contended that defendants used $276,830.25 of the loan funds for personal expenses, such as credit card bills. Defendants countered that the draw money was used for credit card payments in some instances to reimburse a construction-related purchase made using the card.

Both parties moved for summary judgment. In an oral decision issued June 28, 2021, the judge noted plaintiff did not dispute it intended to modify the construction loan to a long-term mortgage loan, but the modification was contingent on defendants completing the project, which they did not.

The court found defendants defaulted on the loan in multiple ways, stating:

> They did not provide all of the certificates of occupancy that [were] required. They did not submit the additional financial documents that were required under the construction loan. They did not pay real estate taxes in a timely fashion and had to be asked by the lender as to the status of the real estate taxes. They defaulted a couple of times before the maturity of the loan and there were extensions made of those loans to accommodate them . . . .

The court also noted the misuse of the loan funds and the undisclosed judgment lien on the property.

The court found no credibility to defendants' argument they were induced into entering the loan agreement. In noting plaintiff's representative's emails informing of an intent to convert the loan after maturation, the court stated: "His intention to do that did not void or waive the requirements that were placed upon [defendants] to both provide the temporary C.O. and then a permanent C.O. and submit the financial documentation that would have shown or proven that they could afford to pay the loan back." The court granted plaintiff's summary judgment in a July 2, 2021 order, striking defendants' answer and permitting plaintiff to proceed with a foreclosure action. A final judgment of foreclosure was entered on October 20, 2021.

III.

On appeal, defendants contend they were fraudulently induced to sign the loan agreement, and therefore the court erred in not voiding the loan and in granting plaintiff summary judgment. Defendants assert plaintiff's representative misrepresented that the construction loan would be converted into a permanent loan and defendants relied on that misrepresentation to their detriment.

Our review of an order granting summary judgment is de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022) (citing Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). We apply the same standard as the trial court. Ibid. Summary judgment should be granted

> if 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 a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
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> [Rule 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).]

The elements of fraud in the inducement are a misrepresentation of material fact; knowledge or belief by the speaker of its falsity; intent that the other party rely on the misrepresentation; and reasonable detrimental reliance by the other party. Nolan ex rel. Nolan v. Ho, 120 N.J. 465, 472 (1990); Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015).

Defendants have not established facts to support their claim of fraudulent inducement. Plaintiff's representative advised the construction loan could be converted to a permanent loan and testified candidly that it was the plaintiff's intent to do so. Indeed, plaintiff's actions after the execution of the construction loan reflect its intention to continue its relationship with defendants. The loan term was extended several times after its maturation date and plaintiff increased the loan limit.

However, at no time did he or any representative of plaintiff ever represent there would not be an underwriting process to determine defendants' qualification for the long-term mortgage. And Brian testified he queried plaintiff and Fulton about the procedure at conversion. He stated both institutions advised there would be an updating of financial information, "a review at th[e] modification point." Defendants have not demonstrated any credible misrepresentation.

Moreover, the agreement executed by defendants was clear that plaintiff was not obligated to provide permanent financing; it advised defendants to read the documents and to obtain the advice of counsel before signing the agreement. Defendants disregarded the disclosures and signed without reading the agreement. Any statements made by plaintiff's representatives were extraneous to the clear terms of the agreement, which lacked any reference of an automatic conversion of the loan upon maturity. The purported extrinsic representations made by plaintiff's representative are directly contradicted by the terms of the written agreement and do not give rise to fraudulent inducement. The trial court properly granted plaintiff summary judgment.

We find no merit to defendants' argument that the court erred in not fashioning an equitable remedy. As the court noted, even if it were to order plaintiff to conduct an underwriting process, there was sufficient evidence in the record to reject any loan application based on defendants' failure to pay the loan and their misrepresentations in the initial application. Moreover, defendants had not complied with the requirements of the loan agreement—completing the construction and procuring a C.O. In addition, the prior ruling that defendants were in default of the agreement, in conjunction with the lien judgments, loss of

employment, and prior foreclosure actions would render any order for plaintiff to review a new application for a permanent loan futile.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION