SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1041-21

NATIONSTAR MORTGAGE, LLC, d/b/a MR. COOPER,

Plaintiff-Respondent,

v.

ATHENA KOSTOPOULOS and THOMAS KOSTOPULOS,

Defendants-Appellants.

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Argued October 17, 2023 – Decided October 24, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-002238-15.

Bruce D. Greenberg argued the cause for appellants (Lite DePalma Greenberg & Afanador, LLC, attorneys; Bruce D. Greenberg, on the briefs).

Michael Eskenazi argued the cause for the respondent (Friedman Vartolo, LLP, attorneys; Michael Eskenazi, on the brief).

Linda E. Fisher argued the cause for amicus curiae Linda E. Fisher.

PER CURIAM

In this residential foreclosure case, defendants Athena and Thomas Kostopoulos[1] appeal from an October 21, 2021 order denying their motion to vacate a June 23, 2018 final judgment of foreclosure and a July 23, 2021 order granting plaintiff an alias writ of execution. We affirm.

I.

On September 16, 2003, Athena obtained a mortgage loan from Lehman Brothers Bank, FSB (Lehman) in the amount of $564,000, for property located in Paramus. In return, Athena executed a note to Lehman and defendants executed a mortgage to the Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Lehman. The mortgage was recorded on October 10, 2003. In November 2003, Lehman assigned the mortgage note to a subsidiary that bundled a pool of loans, including defendants', into a securitized trust. Lehman filed for bankruptcy in September 2008.

On November 2, 2005, MERS filed a foreclosure complaint against defendants claiming that they had failed to pay required taxes and insurance on

[1] Because defendants share the same surname, we refer to them individually by their first names. In doing so, we intend no disrespect.

the property. Defendants apparently had changed home insurers, and in response MERS required them to pay additional insurance on the property.[2] A default judgment was entered, but it was subsequently vacated. MERS and defendants entered into a settlement agreement, dated November 2006, wherein defendants agreed to pay $40,578.18 in twelve monthly installments.

Defendants made only the first monthly settlement payment and then stopped. They claim they did so because MERS had failed to repair their credit as required by the settlement agreement. No payments have been made since that time. However, defendants claimed that they attempted to resume regular monthly mortgage payments in January 2007 at a local Citibank branch, and made other attempts "at that time," but were told that their mortgage account was locked due to the 2005 default foreclosure.

On December 21, 2010, MERS assigned the mortgage and note to CitiMortgage, Inc. (Citi). The assignment was recorded on January 10, 2011. On February 28, 2014, Citi assigned the mortgage to Wilmington Trust

[2] "Force-placed" insurance is insurance procured by a lending institution if it deems that the borrower has failed to maintain adequate insurance coverage. Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 568 n.8 (2011). The costs of the insurance are added to the borrower's account. Ibid.

Company (Wilmington). The assignment was recorded on March 14, 2014. On September 24, 2014, Wilmington sent defendants a notice of intent to foreclose.

On January 20, 2015, Wilmington filed a complaint to foreclose on the property. The complaint included a copy of the mortgage note and stated that the note was still in the possession of Citi, Wilmington's loan servicer. Defendants filed an answer and counterclaim on March 6, 2015, seeking a judgment declaring that Wilmington did not have the contractual or legal right to collect on the mortgage, and claiming a violation of both the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, and the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -73. On December 10, 2015, the trial court granted Wilmington's motions for summary judgment and to strike defendants' answer, and dismissed defendants' counterclaim.

Wilmington also filed a claim in the Lehman bankruptcy as trustee for 244 residential mortgage-backed securities trusts, which included defendants' mortgage. A settlement was eventually reached for approximately $2.375 million.

On August 7, 2017, Citi, mistakenly, executed an assignment which purportedly transferred defendants' mortgage, but not the note, to plaintiff Nationstar Mortgage, LLC (plaintiff or Nationstar). By way of a letter dated

August 9, 2017, Nationstar informed Athena that Citi had transferred the mortgage to it. On August 21, 2017, Wilmington assigned the mortgage to Nationstar, and the assignment was recorded on September 14, 2017. In October 2017, the court granted Nationstar's motion to be substituted as plaintiff in the action.

On May 21, 2018, Nationstar filed a motion for the entry of a final judgment of foreclosure. Defendants did not oppose the motion and the trial court entered a default foreclosure judgment in the amount of $1,063,755.67 on June 22, 2018, together with a writ of execution.

On August 15, 2018, defendants filed a motion to vacate the final judgment as well as a motion to vacate the December 10, 2015 order that struck their answer and substituted Nationstar as plaintiff. They also sought to dismiss the foreclosure complaint for lack of standing. The trial court held a hearing on the motion on October 26, 2018, at which defendants argued that Wilmington did not have standing to bring the foreclosure action.

On November 7, 2018, the trial court denied defendants' motion to vacate the foreclosure judgment, and a sheriff's sale was scheduled for January 25, 2019. Also on November 7, 2018, the court issued an order denying defendants' motions to vacate the court's order substituting plaintiff for Wilmington as the

foreclosing party and to dismiss the foreclosure complaint for lack of standing and fraud. The sheriff's sale was stayed until October 2019.

Defendants appealed to this court and raised

> a host of arguments, including: (1) summary judgment was improper because of contested issues of fact; (2) Wilmington lacked standing to bring the foreclosure action because it was not the trustee of the Series 2003-05 certificates and Nationstar already controlled the underlying debt; (3) defendants' motion to vacate should have been granted because two separate entities were attempting to service the loan; (4) the electronic notification of plaintiff['s] motion for judgment failed and thus service of the motion was inadequate; and (5) this court's opinion in Residential Mortgage Loan Trust 2013-TT2 by U.S. Bank National Association v. Morgan Stanley Capital, Inc., 457 N.J. Super. 237 (App. Div. 2018), requires reversal of the final judgment because necessary parties have not been noticed.
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> [Nationstar Mortgage, LLC v. Kostopoulos, No. A-1532-18 (App. Div. Sept. 20, 2019) (slip op. at 9).]

We held that plaintiff had standing to obtain the foreclosure judgment, rejected all of defendants' other arguments, and affirmed. Id. at 9-10.

The sheriff's sale was again delayed several times. In the interim, in February 2020, Athena filed for chapter 11 bankruptcy protection, triggering an automatic stay of the sheriff's sale. The bankruptcy proceeding was dismissed on October 27, 2020.

In March 2021, plaintiff assigned ownership of the mortgage to MTGLQ Investors LP (MTGLQ) and its servicer, Selene Finance, LP (Selene), and plaintiff transferred the servicing of the mortgage to Selene shortly thereafter. It is unclear whether those assignments were recorded. At the beginning of April 2021, plaintiff sent defendants a notice that their mortgage servicer would now be Selene. On April 26, 2021, MTGLQ sent Athena a letter informing her that it had become the owner of her mortgage loan. On May 18, 2021, Selene informed Athena that plaintiff was no longer her mortgage servicer, and that all payments should be sent to it.

On July 23, 2021, the trial court granted plaintiff's motion for an alias writ of execution.[3] In its written decision, the court rejected defendants' argument that plaintiff did not have standing to foreclose on the property. The court stated:

> Plaintiff has, at all times during this litigation, demonstrated standing to foreclose on the note and the mortgage by showing it has been in possession of the original [n]ote and the supporting loan documents. Defendants did not object to the amount due at the time [p]laintiff moved for entry of [f]inal [j]udgment. Instead, [d]efendants filed a motion to vacate the final judgment, which was denied by this court on the basis

[3] An alias writ is "[a]n additional writ issued after another writ of the same kind in the same case" to replace a previously issued, but unenforced or unsatisfied, writ. Black's Law Dictionary 1928 (11th ed. 2019).

> that no specific objection to the amount due was provided
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> . . . .
>
> None of the facts and circumstances in this matter previously found by this court and the Appellate Division which provided justification for the entry of Final Judgment . . . have been sufficiently challenged by [d]efendants' "objection." Defendants' assertions are merely conclusory and hearsay conversation purportedly involving a third-party and [d]efendants. No evidence of the alleged communications has been provided and no other documentation supporting the contention that [p]laintiff is not the holder of the Note has been provided. . . .

On July 30, 2021, defendants filed a motion to vacate the final judgment of foreclosure and to dismiss the foreclosure complaint under Rule 4:5-1 and Rule 4:6-2(e). In his supporting certification, Thomas claimed that defendants had only recently discovered "a previously concealed series of lies and misrepresentations made to this Court, both predating the judgment and thereafter" by Wilmington and Nationstar. Thomas stated that the "deceptions" were uncovered during Athena's bankruptcy proceeding. They included an alleged credit to which defendants were entitled, failure to provide defendants with notices regarding the status of the mortgage as well as the various assignments, and the use of fraudulent mortgage assignment documents. Thomas also maintained that plaintiff was concealing the current identity of the

mortgagee, MTGLQ. Thomas claimed that both MTGLQ and plaintiff were seeking to collect on the mortgage. Finally, Thomas offered a bank statement that showed that defendants had deposited $382,253.85 in a temporary bank account that he claimed corresponded to the repurchase amount.

In conjunction with these motions, defendants also submitted an affidavit, dated July 28, 2021, from Marie McDonell, a mortgage fraud and forensic analyst. McDonnell claimed to have found newly discovered evidence that was previously unavailable to defendants, specifically, that plaintiff had withheld material facts from both defendants and the court. These included that Wilmington had received $110,979.94 in settlement funds in March 2018 from the Lehman bankruptcy litigation based on the value of defendants' mortgage loan. She determined that amount based on Wilmington's $808,950.67 share of the settlement.

In addition, based on the dissolution of the securitized trust in which defendants' mortgage was included in November 2019, McDonnell claimed that defendants' loan had been repurchased for $382,253.85 by MTGLQ. She also claimed that defendants' mortgage had been paid every month for over thirteen years until the trust was dissolved by way of applying payments the trust received "from other borrowers whose loans had been securitized" along with

defendants', because all the loans were cross-collateralized and the trust was over-collateralized.

McDonnell further claimed that both Wilmington and Citi failed to comply with the notice provisions of the mortgage, which required them to send a pre-acceleration notice of default and a right-to-cure letter to defendants. She stated that while Wilmington sent defendants a letter on September 24, 2014, with notice to foreclose, the notice was "fatally defective" because it understated the amount required to cure the default by $80,041.44, representing escrow advances to defendants that were due and payable as of that date. Moreover, the notice was deficient because it was not sent by certified mail.

On August 11, 2021, defendants filed a motion for reconsideration of the alias writ.

On October 21, 2021, the trial court denied defendants' motion to vacate the final judgment of foreclosure, vacate the alias writ of execution, and dismiss the complaint. In so ruling, the court stated in its written decision:

> None of the facts and circumstances in this matter previously found by this court and the Appellate Division, which provided justification for the entry of [f]inal [j]udgment, have been sufficiently challenged by the [m]otions. Defendants' assertions are merely conclusory and a hearsay conversation purportedly involving a third party and [d]efendant[s]. No evidence of the alleged communications has been provided and

> no other documentation supporting the contention that [p]laintiff is not the holder of the [n]ote has been provided. Further, notwithstanding [d]efendants' assertions no third party has come forward to claim any interest in the [n]ote and [m]ortgage and to question [p]laintiff's right to pursue this matter.

Substantively, the court rejected defendants' argument that they were entitled to a loan credit for the Lehman settlement as "not a defense to foreclosure, especially considering that their default occurred eleven years before that settlement." The court further found that defendants' argument that plaintiff did not have standing to foreclose could not be raised post-judgment. In addition, the court found that defendants' objection to the amount due on the mortgage had been addressed in the earlier proceedings involving the foreclosure judgment and ensuing appeal.

This appeal followed.

II.

In Point I of their brief, defendants argue that the trial court erred in not granting their motion for relief from the June 23, 2018 final judgment of foreclosure under Rule 4:50-1(f). They assert that exceptional circumstances were present justifying this relief in the form of plaintiff's fraudulent misrepresentations and concealment as to the amount of payment due, the failure to provide them with notice of the various assignments, and the court's mistaken

holding that they could not argue lack of standing because they had failed to raise the issue prior to the original judgment. We disagree.

A court may grant a motion for relief from judgment for "any reason justifying relief from the operation of the judgment or order." R. 4:50-1(f). This catchall provision permits relief "as expansive as the need to achieve equity and justice." LVNV Funding, LLC v. Deangelo, 464 N.J. Super. 103, 109 (App Div. 2020) (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1977)).

In deciding a motion brought under this provision, a court should seek "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." Ibid. (quoting Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 120 (1977)). Relief is available only when "truly exceptional circumstances are present" leading to "a grave injustice." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 484 (2012) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283, 286, 289 (1994)).

"The trial court's determination under the rule warrants substantial deference and should not be reversed unless there is a clear abuse of discretion." Id. at 467. The movant bears the burden of demonstrating his or her entitlement

to the relief. Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003).

In an action to foreclose on a mortgagee, the only material issues are "the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to resort to the mortgaged premises." U.S. Bank Nat'l Ass'n v. Curcio, 444 N.J. Super. 94, 112-13 (App. Div. 2016) (quoting Sun NLF Ltd. P'ship v. Sasso, 313 N.J. Super. 546, 550 (App. Div. 1998)). A foreclosure action will be deemed uncontested if "none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it." R. 4:64-1(c)(2).

Defendants argue that they are entitled to relief because plaintiff "deliberately and fraudulently" concealed the Lehman "credit," which they assert was worth over $100,000. To establish common law fraud, the party making the claim must demonstrate that the other party made a material misrepresentation or omission of fact; knowing the misrepresentation to be false or the omission to be material; intending the other party to rely on it; and that the other party did rely on the omission or misrepresentation to its detriment. Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31, 43 (App. Div. 2000).

Here, defendants have failed to establish that the omission was material or that plaintiff intended them to rely on it. They cite no authority that the mortgagee was obligated to inform them of the Lehman settlement or how that settlement affected their mortgage, or even that the settlement amount reduced what they owed, an argument the trial court ultimately rejected.

Defendants rely on Bank v. Kim, 361 N.J. Super. 331 (App. Div. 2003), but that case is clearly distinguishable. In Kim, the defendant moved to vacate an amended default judgment, in part, because of questions involving the reliability of the judgment amount. Id. at 339. While the initial judgment amount was less than $400,000, the amended judgment amount, a year later, was nearly $1 million. Id. at 340. The only evidence in support of the increased amount was a certification from the plaintiff's counsel. Id. at 341. We held that because there was a "marked deviation" between the initial and amended amounts, proof beyond a mere certification by counsel was required. Id. at 342. The amount "should have been the subject of more complete proof before entry of the amended judgment of foreclosure and order for execution by sheriff's sale, and that [] constituted sufficient cause for relief under R. 4:50-1(f)." Ibid.

Here, there was no similar "marked deviation" between judgment amounts, merely a question of whether a credit should have been applied to the

judgment amount. The trial court denied defendants' request to include the credit. Nor, since plaintiff did not appear to dispute the amount, was there a need for further proof. Moreover, it is defendants, not plaintiff, who are seeking to establish facts and amounts by way of certifications. Thus, unlike in Kim, there was no need for "more complete proof" in this case.

Defendants next argue that they are entitled to relief from judgment because they were not notified of the assignments and were given insufficient notice of intent to foreclose. However, the record establishes that defendants were given notice of the mortgage assignment both from Wilmington to plaintiff and from plaintiff to MTGLQ and Selene. That the record does not contain notices of the earlier mortgage assignments, by itself, cannot be said to constitute a "grievous error" or "grave injustice" warranting relief under Rule 4:50-1(f). Defendants have therefore failed to sustain their burden of proof on this point.

As for the foreclosure notice, any deficiency in the notice could also not be considered a "grievous error" because the notice was sent in December 2014, nearly seven years prior to the entry of the order on appeal. The purpose of a notice of intent to foreclose is to protect homeowners at risk of foreclosure by providing them with "timely and clear notice . . . that immediate action is

necessary to forestall foreclosure." Guillaume, 209 N.J. at 469. Defendants have been on such notice throughout this lengthy litigation.

The same is true with respect to the alleged breach of the mortgage agreement by Wilmington's failure to include Thomas in the notice of foreclosure. Any error was cured by the numerous judicial proceedings that have taken place since the notice was sent in December 2014. Moreover, defendants were aware that Thomas had not been included in the notice but failed to raise the issue in the litigation that led to our September 20, 2019 decision in defendants' prior appeal. Therefore, we deem any defect in the notice to have been waived.

Defendants further argue that plaintiff lacked standing to foreclose. Specifically, they claim that some of the assignments in the mortgagee chain did not contain the mortgage note, that Citi and Wilmington both assigned the mortgage to plaintiff, and that it was unclear at other times which entity was the mortgagee. These arguments all lack merit.

Generally, a party seeking to foreclose on a mortgage must own or control the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). "In the absence of a showing of such ownership or control,

the plaintiff lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ibid.

A foreclosure plaintiff need not possess the original note at the time of the filing of the complaint in order to have standing to file the complaint. Capital One, N.A. v. Peck, 455 N.J. Super. 254, 258 (App. Div. 2018); Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 224 (App. Div. 2012). Either possession of the note or an assignment of the mortgage prior to the filing of the complaint is sufficient to confer standing. Mitchell, 422 N.J. Super. at 216. However, "[t]o preclude the possibility of one entity foreclosing on the home while the other enforces the note," we have held that "when the note is separated from the mortgage, the plaintiff in a foreclosure action must demonstrate both possession of the note and a valid mortgage assignment prior to filing the complaint." Peck, 455 N.J. Super. at 259.

The relationship between the note and the mortgage was addressed in Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323 (Ch. Div. 2010). There, the foreclosure defendant challenged the plaintiff's reliance on an assignment from MERS on the ground that MERS did not have the authority to assign the note to the plaintiff because MERS held only the mortgage and not the note, which was held by American Home Acceptance. Id. at 343. Therefore, the defendant

argued, without the note, the plaintiff bank did not have standing to proceed with the foreclosure. Id. at 345.

The court stated that the mortgage encumbered the property owner's real estate by securing the obligation to repay the debt while the note reflected the property owner's obligation to repay the lender. Id. at 344. It noted that while in most circumstances the note and mortgage will be held by the same individual or entity, "there is no technical reason why the interests could not be separated in one way or another." Id. at 345. In fact, in that case, as in this appeal, the mortgage was signed by both defendants while the note was signed by only one of them. Ibid.

The court described the defendants' argument as "creative, but not convincing." Id. at 346. It added that

> there was no real intent to "separate" the note and mortgage. The debt was clearly payable to American Home Acceptance. The designation of MERS as nominee on the mortgage was simply intended to permit the recording of the mortgage in a way that would facilitate subsequent transfers through MERS without the recording of additional documents. One could debate the propriety and efficacy of using MERS in terms of policy. It is clear, however, that there was no real intent to separate ownership of the note and mortgage at the time those documents were created.
>
> [Ibid.]

Thus, MERS, as nominee, did not have any real interest in the underlying debt, or the mortgage which secured the debt, and American Home Acceptance was not deprived of its right to security under the mortgage or to separate the note and the mortgage as a result of the nomination. Id. at 347. Consequently, it had the right to transfer both the note and the mortgage in its assignment to the plaintiff. Id. at 348.

Here, Nationstar, as the named plaintiff, received the mortgage by way of assignment from Wilmington and plaintiff thereupon recorded the mortgage. It is not clear from the record whether Wilmington also transferred the note to plaintiff. Nonetheless, as stated above, a mortgagee only needs the note or the mortgage, or the note and a valid assignment, to bring a foreclosure action. Peck, 455 N.J. Super. at 259; Mitchell, 422 N.J. Super. at 416. There is no dispute here that Nationstar held a validly assigned mortgage. Therefore, we reject defendants' standing argument.

Defendants also allege that they were entitled to relief because of fraudulent signatures in connection with some of the assignments. They point to third parties who were not authorized to sign on behalf of Citi and Wilmington. They include in the record what they claim are examples of such "robo-signatures" by a MERS employee, and employees of Wells Fargo.

However, without more, defendants fail to establish how these signatures are relevant to this appeal. Therefore, defendants' argument lacks merit.

In sum, we hold that the trial court did not abuse its discretion by denying defendants' motion to vacate the foreclosure judgment pursuant to Rule 4:50-1(f).

III.

In Point II, defendants argue that the trial court "erred in failing to vacate the foreclosure judgment under [Rule] 4:50-3," based on what they claim were fraudulent filings made by plaintiff. These included: misrepresentation of the amount due on the mortgage, deficient or undisclosed notices required by law and the mortgage, and invalid assignments of the mortgage. We reject this contention because defendants failed to raise it before the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Even if they had, they fail to offer sufficient proof to establish fraud on the court.

Rule 4:50-3 provides:

> A motion under R. 4:50 does not suspend the operation of any judgment, order or proceeding or affect the finality of a final judgment, nor does this rule limit the power of a court to set aside a judgment, order or proceeding for fraud upon the court or to entertain an independent action to relieve a party from a judgment, order or proceeding.

Relief under this rule may be obtained without limitation as to time. Tara Enters., Inc. v. Daribar Mgmt. Corp., 369 N.J. Super. 45, 52 (App. Div. 2004). However, the fraud in question must be fraud upon the court. Id. at 53.

Defendants claim that they raised the Rule 4:50-3 question before the trial court. However, they fail to point to where in the record they did so, and they did not cite R. 4:50-3 in their motion to vacate. Nonetheless, plaintiff does not argue that defendants did not raise the issue. Therefore, we will address it here.[4]

A fraud on the court occurs "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 298 (App. Div. 2010) (quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)). Reliance is not required. Ibid.

Fraud is never presumed but must be proven through clear and convincing evidence. Stoecker v. Echevarria, 408 N.J. Super. 597, 617 (App. Div. 2009).

[4] In its decision, and without addressing Rule 4:50-3, the court cited plaintiff's alleged failure to inform the court of matters involving the Lehman litigation.

Defendants offer no evidence beyond Thomas's certification and McDonnell's report. There is no evidence that Wilmington or Nationstar intentionally withheld the information about the Lehman credit from the trial court as part of some scheme to defraud the court. Nor is it even clear that they were obligated to inform the court of the settlement received in the Lehman action. Moreover, when defendants brought the credit to the court's attention, it declined their request to utilize that amount to reduce the foreclosure amount.

Defendants rely upon an unpublished[5] out-of-state case, which they allege involves an analogous situation where the court held that a "known robo signer" could not claim personal knowledge of matters he did not have. Defendants' reliance on this unpublished case in this appeal is misplaced because pursuant to Rule 1:36-3, the case has no precedential value and is not binding on any court. As we stated in Badiali v. New Jersey Mfrs. Ins. Grp., 429 N.J. Super. 121, 126 n. 4 (App. Div. 2012), aff'd, 220 N.J. 544 (2015), "as a general matter, unpublished opinions are not to be cited by any court absent certain specified circumstances."

None of those circumstances apply to the unrelated, unpublished case on which defendants rely. Moreover, defendants do not offer any competent proof

[5] Unpublished opinions do not constitute binding precedent. R. 1:36-3.

of robo-signing in the mortgage assignment chain in this case. Therefore, we are satisfied that defendants failed to establish fraud upon the court under Rule 4:50-3 to warrant vacation of the final judgment of foreclosure.

IV.

In Point III, defendants next argue that plaintiff's action should have been dismissed pursuant to Rule 4:5-1(b)(2) because it allegedly concealed the facts of the Lehman bankruptcy case that showed that defendants were entitled to a credit for the amount Wilmington had received in the settlement, approximately $110,000. This argument also lacks merit.

Among the general requirements for pleadings is notice of other actions: "Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court." R. 4:5-1(b)(2). In addition, "[e]ach party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification." Ibid.

Defendants argue that Wilmington failed to advise them, and the trial court, that it had filed a claim in the Lehman bankruptcy case. After plaintiff received the mortgage assignment, it also did not advise defendants and the court

of the Lehman action and the resulting credit. However, even assuming that plaintiff violated the rule as a result of these omissions, vacation of the foreclosure judgment is not warranted.

Dismissal is warranted under this Rule "only if the failure of compliance . . . was inexcusable and the[re] . . . was substantial prejudice[]." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.2 on R. 4:5-1 (2023). "The 'substantial prejudice' requirement limits the court's ability to impose the sanction of dismissal." Ibid. Substantial prejudice is present where it affects a defendant's ability to maintain a defense. Mitchell v. Procini, D.D.S., PA, 331 N.J. Super. 445, 456 (App. Div. 2000).

Defendants' ability to maintain a defense was not affected by nondisclosure of the Lehman settlement. The only effect would have been on the amount of the foreclosure judgment. Therefore, vacation of the foreclosure judgment was not warranted and we reject defendants' contention to the contrary.[6]

[6] In support of their argument, defendants again cite an unpublished opinion, where the court dismissed a legal malpractice complaint under Rule 4:5-1 because the plaintiff failed to inform the court that a prior action in the matter had been settled. However, that decision is factually distinguishable from the matter at hand and, as discussed above, we will not consider it here. See R. 1:36-3.

V.

In Point IV, defendants assert that the foreclosure action should have been dismissed for failure to state a claim under Rule 4:6-2(e), or at least plaintiff should have been required to submit a more definite statement under Rule 4:6-4. However, there is nothing in the record to indicate that defendants filed either motion after the original complaint in this action had been filed by Wilmington and prior to the judgment of foreclosure. They baldly claim that they requested this relief from the trial court, but they do not cite where in the record they did so, and we have not found any such motions from our examination of the record.

A motion to dismiss a complaint under Rule 4:6-2(e) is required to be filed within the time frame set forth by Rule 4:46-1. R. 4:6-2. That time frame is, at the latest, thirty days before the trial date. R. 4:46-1. A motion for a more definite statement under Rule 4:6-4(a) is required to be made before the answer to the complaint is filed. Again, there is no indication in the record that defendants made either motion. Since the answer to the complaint was filed some eight years ago, time has long since passed for them to raise the issue now.

VI.

Turning to Point V, defendants contend in subsections (A) through (D) that the equities favored their request for relief from the foreclosure judgment. Specifically, they claim that plaintiff committed the initial breach, that plaintiff was estopped from claiming default because Citi refused to accept defendants' payments, that plaintiff had unclean hands, and that the mortgage had been partially satisfied. We disagree with these contentions.

Defendants argue that they are entitled to relief because MERS breached the 2005 settlement agreement by not repairing their credit in return for defendants making a payment of back insurance and taxes. However, there is nothing in the record as to MERS's lack of effort to repair defendants' credit. Moreover, defendants' claim is too attenuated in terms of time and relevance to the motion to vacate the foreclosure judgment to warrant it being an equitable remedy barring foreclosure.

Defendants next argue that plaintiff should be estopped from obtaining a default judgment because it and its predecessor mortgagees, including Wilmington and Citi, refused to accept payments that defendants tried to make. The only evidence in the record on this point is Thomas's certification claiming

an effort to make payments in early 2007. Without more, there is an insufficient basis to hold plaintiff estopped from obtaining foreclosure.

Moreover, it is unclear from the record whether defendants raised this argument when foreclosure was first sought. If they did, the law of the case would preclude it. See State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974) (noting that "when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter"). If defendants did not raise this argument, then they certainly may not do so now. Nieder, 62 N.J. at 234. In any event, there is an insufficient basis in the record to apply estoppel on this ground.

Defendants also argue that plaintiff should be subject to the doctrine of unclean hands, which provides that "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511 (1981). "Foreclosure is an equitable remedy governed by the operation of traditional equitable principles and is subject to the defense of unclean hands." Curcio, 444 N.J. Super. at 113 (quoting N.J. Bank v. Azco Realty Co., 148 N.J. Super. 159, 166 (App. Div. 1977)). Defendants cite alleged violation of the foreclosure notice requirements, failure to disclose the Lehman credit, and fraudulent signatures on the assignment documents. Because, as

noted above, we have already rejected each of these arguments as a legal basis for reversal, we also reject application of the equitable unclean hands doctrine. Defendants offer insufficient evidence that plaintiff was a "wrongdoer" to the extent that vacation of the mortgage is warranted.

Defendants also claim that the judgment should be vacated to prevent a double recovery. They base this on McDonnell's assertion that as a result of the monthly payments from the securitized trust for thirteen years, as of November 2019, defendants' outstanding balance was $382,253.85, not the over $1 million found by the court. However, that amount was only the principal on the mortgage; interest was not included. The principal in the foreclosure judgment was stated as $681,931.44. The trial court was well within its discretion to reject McDonnell's calculation of the amount of the principal. See Brown v. Brown, 348 N.J. Super. 466, 478 (App. Div. 2002) (court is free to accept or reject an expert's testimony). Moreover, defendants fail to offer sufficient proof that such payments were made.

Therefore, we hold that all of defendants' equitable claims for relief lack merit.

VII.

In Point V(E), defendants argue that if the final judgment of foreclosure is not reversed, it should be reduced by way of recoupment. They argue that plaintiff violated the Consumer Fraud Act, specifically N.J.S.A. 56:8-2, by concealing the Lehman credit as well as the use of signatures on the assignments by those without the requisite knowledge of the matter.

While defendants did raise the Consumer Fraud Act as a counterclaim in their answer to the original foreclosure complaint, there is nothing in the record indicating that they raised it in their initial appeal from the foreclosure judgment or as a basis for their motion to vacate the foreclosure judgment. With respect to the fraudulent signing argument, as noted above, defendants failed to sustain their burden of proof on the question. Therefore, we reject defendants' attempt to reduce the judgment award.

VIII.

Finally, in Point V(F), defendants argue for the first time that the trial court erred by not joining MTGLQ and Selene as parties. This contention lacks sufficient merit to warrant further discussion. See R. 2:11-3(e)(1)(E).

Affirmed.