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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1386-21

WILMINGTON TRUST,  
NATIONAL ASSOCIATION,  
AS SUCCESSOR TRUSTEE  
TO CITIBANK, N.A., AS  
TRUSTEE OF STRUCTURED  
ASSET MORTGAGE  
INVESTMENTS II, INC.,  
BEAR STEARNS ALT-A  
TRUST II, MORTGAGE  
PASS-THROUGH  
CERTIFICATES, SERIES 2007-1,

Plaintiff-Respondent,

v.

SIMON ZAROOR, MR. or  
MRS. ZAROOR, spouse or  
civil partner of SIMON ZAROOR,

Defendants-Appellants,

and

NATIONAL CITY BANK, LYNX  
ASSET SERVICES LLC,  
LYNX ASSET, and FRANKS  
GMC TRUCK CENTER,

Defendants.

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Submitted May 24, 2023 – Decided July 14, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Bergen County, Docket No.  
F-013336-15.

Simon Zarour, appellant pro se.

Robertson, Anschutz, Schneid, Crane & Partners,  
PLLC, attorneys for respondent (Brandon Pack, on the  
brief).

#### PER CURIAM

In this mortgage foreclosure action, defendant appeals from a November 19, 2021 Chancery Division order denying his motion to vacate final judgment of foreclosure. We affirm.

In May 2007, defendant executed a promissory note to Franklin First Financial, LTD in the amount of \$672,000, secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc. The mortgage was recorded shortly thereafter in the Bergen County Clerk's Office.

Defendant defaulted on the loan installment due in July 2008. In November 2008, the mortgage was assigned to Citibank, N.A. (Citibank). The assignment was recorded the next month. Citibank filed a foreclosure complaint

shortly thereafter. On February 5, 2010, the court denied Citibank's motion for summary judgment and granted defendant's motion to dismiss the complaint without prejudice.

In July 2014, Citibank assigned the mortgage to plaintiff. The mortgage was recorded in August 2014. In November 2014, by corrective assignment, Citibank assigned the mortgage to plaintiff. The mortgage was recorded in December 2014.

In April 2015, plaintiff filed a complaint for foreclosure. In May 2015, defendant, represented by counsel, filed an answer that included a list of affirmative defenses and five counterclaims: predatory lending; violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227; fraud in the inducement; fraud by fabrication; and fraudulent concealment.

Thereafter, defendant filed a Chapter 11 Bankruptcy petition in the United States Bankruptcy Court. The court dismissed the petition with prejudice and enjoined defendant from filing a new Title 11 case through February 18, 2017. The foreclosure action was stayed during the pendency of the bankruptcy case.

In January 2017, plaintiff moved for summary judgment, and to strike defendant's answer and dismiss the counterclaims. Defendant opposed the

motion and cross-moved to dismiss the complaint. Defendant argued the statute of limitations, N.J.S.A. 2A:50-56.1, barred the foreclosure action.

On February 21, 2017, the Chancery Division entered an order accompanied by a written decision striking defendant's answer and affirmative defenses and dismissing defendant's counterclaims with prejudice. The court found the action was not barred by the statute of limitations. The court entered an order of default against defendant and transferred the case to the Office of Foreclosure as an uncontested foreclosure. A final judgment for foreclosure was issued July 17, 2017.

Defendant did not appeal from any of the orders. A second petition for bankruptcy was dismissed.

In October 2021, defendant moved to vacate the final judgment under Rule 4:50-1, dismiss the complaint, and cancel the sheriff's sale. Defendant argued plaintiff violated the CFA; the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -82; the Truth in Lending Act, 15 U.S.C. §§ 1601 to 1667f; and committed fraudulent concealment.

In a November 19, 2021 order and fifteen-page written statement of reasons, Judge Lisa Perez Friscia denied defendant's motion and requested relief. The judge carefully considered each of defendant's assertions in her

cogent decision and found defendant did not factually support any of his arguments. Defendant did not present any new facts or arguments from the 2017 summary judgment and dismissal motions. The judge also noted defendant did not file a motion for reconsideration of those orders nor a notice of appeal. Judge Perez Friscia also found the motion to vacate final judgment was untimely.

On appeal, defendant contends the Chancery judge abused her discretion in denying his motion and he is entitled to relief under Rule 4:50-1(c), (d), and (f). We are not persuaded.

"The decision whether to vacate a judgment . . . is a determination left to the sound discretion of the trial court, guided by principles of equity." F.B. v. A.L.G., 176 N.J. 201, 207 (2003). "The trial court's determination under [Rule 4:50-1] warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion exists "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Id. at 467-68 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Under Rule 4:50-1, a party may seek to vacate a default judgment by demonstrating: "(c) fraud . . . , misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; . . . or (f) any other reason justifying relief from the operation of the judgment or order."

A motion to vacate on grounds of fraud under Rule 4:50-1(c) must be filed "not more than one year after the judgment, order or proceeding was entered or taken." R. 4:50-2. A court may not "enlarge the time specified by . . . [Rule] 4:50-2." R. 1:3-4(c). Here, final judgment was entered on July 17, 2017. Defendant did not file his motion to vacate until October 20, 2021. Therefore, defendant's contentions involving fraud are barred by the one-year time limitation.

A motion asserting grounds under Rule 4:50-1(d) or (f) must be filed "within a reasonable time." R. 4:50-2. Defendant's motion to vacate was filed more than four years after final judgment was entered. That is not "a reasonable time." See Garza v. Paone, 44 N.J. Super. 553, 558 (App. Div. 1957) (concluding the defendant's nearly four-year delay in filing motion to vacate was not reasonable); Orner v. Liu, 419 N.J. Super. 431, 437 (App. Div. 2011) (stating a "reasonable time . . . in some circumstances[] may be less than one year from entry of the order in question").

We discern no abuse of discretion in Judge Perez Friscia's determination that defendant failed to timely file his motion to vacate final judgment on any grounds under Rule 4:50-1.

We further note that despite this determination, the judge considered each of defendant's arguments. Although defendant's application was untimely, we agree with Judge Perez Friscia's analysis of the contentions and affirm substantially for the reasons expressed in her well-reasoned statement of reasons.

As determined in the court's orders, defendant does not dispute the obligation, his failure to make payments, or the amount due. 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); Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). Defendant has not presented any evidence to disturb that finding.

Defendant further contends the action is barred by the doctrines of collateral estoppel and res judicata. These defenses were not presented in his counseled answer to the complaint or in the trial court proceedings. "It is a well-settled principle that our appellate courts will decline to consider questions or

issues not properly presented to the trial court when an opportunity for such a presentation is available." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Furthermore, res judicata is an affirmative defense that is waived if not timely presented in a responsive pleading. R. 4:5-4; see Cole v. Jersey City Med. Ctr., 425 N.J. Super. 48, 57 (App. Div. 2012). Moreover, the claims here were not previously adjudicated on their merits. A prior complaint for foreclosure filed by Citibank was dismissed without prejudice.

Any arguments not addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION