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APPROVAL OF THE APPELLATE DIVISION**

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3311-21**

**FEDERAL NATIONAL
MORTGAGE ASSOCIATION,**

Plaintiff-Respondent,

v.

**CIRILO ALVAREZ and
ALICIA ALVAREZ,**

Defendants-Appellants,

and

**HUDSON & KEYSE, LLC and
STATE OF NEW JERSEY,**

Defendants.

Submitted May 31, 2023 – Decided August 15, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Passaic County, Docket No. F-
031065-15.

Alsaidi & Chang, LLC, attorneys for appellants (Joseph A. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

McCabe, Weisberg & Conway, LLC, attorneys for respondent (James A. French, of counsel and on the brief).

PER CURIAM

Defendants Cirilo Alvarez and Alicia Alvarez appeal from a June 23, 2022 Chancery Division order denying their second motion to vacate the foreclosure sale of their property. Defendants have owned and occupied their home since 2006. Defendants defaulted on their mortgage in March 2013. A default judgment was entered against defendants in January 2017. Plaintiff Federal National Mortgage obtained a final judgment against defendants in December 2017.

As a result of bankruptcy-related delays and the COVID-19 pandemic, a foreclosure sale was not set until July 20, 2021. It is not disputed that defendants received notice of that foreclosure sale date. Plaintiff then voluntarily adjourned the sale while a vacancy requirement was in effect for foreclosure sales. After the vacancy requirement was lifted, the sale finally occurred on September 14, 2021.

Defendants thereafter filed two motions to vacate the sale. In their second motion—the subject of this appeal—defendants contend they did not receive notice of the September 2021 sale date. After carefully reviewing the record in light of the applicable legal principles and the arguments of the parties, we conclude the trial court did not abuse its discretion in denying defendants' motion and affirm.

I.

We discern the following facts and procedural history from the record of this protracted litigation. In March 2006, defendants executed a promissory note to Atlantic Home Loans, Inc. in the amount of \$380,000, secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc. The mortgage was recorded shortly thereafter in the Passaic County Clerk's Office. In May 2015, defendant's mortgage was assigned to plaintiff.¹

Defendants defaulted on their mortgage in March 2013. Defendants failed to cure the default, and plaintiff filed a mortgage foreclosure complaint in September 2015 and an amended complaint in February 2016. Defendants were

¹ We omit from the procedural history the series of assignments leading to plaintiff's acquisition of the mortgage as plaintiff's standing is not disputed.

served with the complaints and summons but did not file a responsive pleading. Default was entered against them in January 2017.

The trial court granted plaintiff's motion for final judgment in December 2017 and issued a writ of execution directing the sale of the property. Defendants then filed a series of bankruptcy petitions in the United States Bankruptcy Court for the District of New Jersey. The last bankruptcy case was dismissed in February 2020, thereby concluding the bankruptcy-related hold. In March 2020, the trial court issued an alias writ of execution directing the sale of the property.

As a result of the COVID-19 pandemic, however, in April 2021, the Passaic County Sheriff's Office ("Sheriff's Office") implemented a moratorium on lockouts, under which it would not permit foreclosure sales to proceed unless the lender certified that the property was vacant. Plaintiff filed a certification of vacancy, and the Sheriff's Office scheduled the property for sale on July 20, 2021.

Plaintiff served a corresponding notice of sale on defendants by regular and certified mail, as well as by publication. In June 2021, however, plaintiff received information indicating that the property was occupied by defendants. As a result of this new information, plaintiff voluntarily adjourned the sheriff's

sale on an ongoing basis. During this time, defendants retained a bankruptcy attorney to file for Chapter 13 bankruptcy.

The property was scheduled for sale on September 14, 2021. Plaintiff contends it served notice on defendant on or about August 13, 2021. The notice was mailed by a third-party service, and there was no tracking associated with the mailing. Plaintiff submitted an invoice from the third-party service related to the mailing.

On September 14, 2021, the Sheriff's Office lifted the vacancy prerequisite to a foreclosure sale. On that day, the sale was finally held, and the property was sold to plaintiff for \$649,433.84. The property was conveyed to plaintiff by way of written sheriff deed dated September 27, 2021. The deed was recorded in the Clerk's Office on October 5, 2021.

On October 14, 2021, defendants filed their initial motion to vacate the foreclosure sale, which plaintiff opposed. Defendants argued that the vacancy requirement prevented the sale. The court determined that the vacancy requirement had been lifted at the time of the sale and denied defendants' motion with prejudice on February 18, 2022. Plaintiff moved for a writ of possession, which the court granted on March 4, 2022. On April 4, 2022, plaintiff served

defendants with an eviction notice advising that they need to vacate their home by May 10, 2022.

After retaining new counsel, defendants filed a second motion to vacate the sale on April 18, 2022. This time, defendants argued that they never received notice of the adjourned sheriff's sale and submitted a certification to that effect. Because the court had not yet issued a decision on defendants' second motion to vacate, the court granted defendants' motion to stay the eviction.

On June 23, 2022, the court held oral argument on defendants' second motion to vacate and issued an order denying the motion. Thereafter, defendants filed a motion to stay the eviction pending appeal, which the court granted on July 27, 2022. This appeal follows.

Defendants raise the following contention for our consideration:

POINT I

BECAUSE THE DEFENDANTS RECEIVED NO NOTICE OF THE ADJOURNED SHERIFF'S SALE, ACTED PROMPTLY IN SEEKING RELIEF, AND THERE WERE NO THIRD PARTY PURCHASERS, THE CHANCERY DIVISION COMMITTED REVERSIBLE ERROR IN DENYING THEIR MOTION TO VACATE THE FORECLOSE SALE OF THEIR HOME.

A. The Defendants Did Not Receive Actual Notice of the Adjourned September 14, 2021 Sheriff's Sale.

B. The Plaintiff's Method of Proving Notice of the Adjourned Sale Failed To Satisfy the Common Law Mailbox Rule.

C. Because the Defendants Lacked Notice of the Adjourned Sale, Acted Quickly In Seeking Relief, and No Innocent Third Parties Purchased the Property, the Vacating of the Foreclosure Sale Is Appropriate.

D. The Chancery Division's Reasoning Does Not Support the Denial of the Defendants' Motion to Vacate.

II.

The scope of our review is limited. "[A]n application to open, vacate or otherwise set aside a foreclosure judgment or proceedings subsequent thereto is subject to an abuse of discretion standard." United States v. Scurry, 193 N.J. 492, 502 (2008). Accordingly, "[t]he trial court's determination . . . warrants substantial deference and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat. Ass'n v. Curcio, 444 N.J. Super. 94, 105 (App. Div. 2016) (omission in original) (quoting U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012)). We "find[] an abuse of discretion when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on impermissible bias.'" Guillaume, 209 N.J. at 467 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Relatedly, it is well-established that "a judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law." Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 514 (2019) (quoting Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999)). Our courts have the authority to "set aside a sheriff's sale for fraud, accident, surprise, or mistake, irregularities in the conduct of the sale, or for other equitable considerations." First Trust Nat'l Ass'n v. Merola, 319 N.J. Super. 44, 50 (App. Div. 1999). Importantly for purposes of this appeal, "[i]n foreclosure matters, equity must be applied to plaintiffs as well as defendants." Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 320 (App. Div. 2012).

As an initial matter, we note that both of defendants' motions to vacate the foreclosure sale were made outside of the moving period. Specifically, Rule 4:65-5 provides:

A sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served within [ten] days after the sale or at any time thereafter before the delivery of the conveyance. Notice of the motion shall be given to all persons in interest, and the motion shall be made returnable not later than [twenty] days after the sale, unless the court otherwise orders.

The trial court recognized that neither of defendants' motions complied with the rule. It noted, however, that defendants' initial motion was considered on the merits and that the court did have the authority to vacate a foreclosure sale outside of the time limits imposed by Rule 4:65-5 for lack of notice. Accordingly, the trial court considered defendants' second motion to vacate on its merits.

Rule 4:65-5 does not explicitly provide that the foreclosing lender must provide notice of an adjourned sale date, as distinct from the initial sale date. However, case law makes clear that some form of notice of an adjourned sale is required. In First Mutual Corp. v. Samojeden, we concluded:

Although we recognize that our rules do not expressly provide for the giving of notice of adjourned sales, we are nevertheless persuaded that their implicit predicate is the affording of actual knowledge of the effective sale date to those persons whose interests would be irrevocably affected by the sale and, most particularly, the owners and encumbrancers of the property whose equity and investment are likely to be lost unless they take the protective action of either redeeming after the sale or purchasing at the sale.

[214 N.J. Super. 122, 126 (App. Div. 1986).]

In Samojeden, thirteen months had passed between the initial sale date and the actual sale. Id. at 127. During that period, the property owner continued

to make monthly payments on the mortgage and assumed that no sale would occur while those payments were being made. Ibid. In view of those circumstances, we held that the property owner and other interested parties were not required "to continuously monitor [the bank's] intentions respecting a sale by making periodic inquiry" of the foreclosing party or the sheriff's office. Id. at 128.

We nonetheless held that the formal notice procedures spelled out in Rule 4:65-2 need not be employed to inform the property owner and other interested parties that the foreclosure sale had been adjourned and the date upon which the sale is to occur. Id. at 128. Instead, we stated that the foreclosing party must make "some reasonable communication" informing the property owner and other interested parties that the sale has been adjourned and the actual date of the sale. Ibid.

Here, the original sale date was set for July 20, 2021, and plaintiffs served defendants with the notice required. That mailing satisfies the requirements of Rule 4:65-2 as it was sent by regular and certified mail and certified to by plaintiff's counsel's office. Notice was also provided by an advertisement in the newspaper. Thus, plaintiff provided the initial notice explicitly required by the

rule. Plaintiff additionally submitted documentation regarding the mailing of notice of the adjourned sale date, although it was not sent by certified mail.

Considering all relevant circumstances, we are satisfied that plaintiff made a "reasonable communication" of the adjourned sale to defendants prior to the ultimate foreclosure sale through the use of regular mail. We add that unlike the homeowner in Samojeden, defendants did not have an agreement that the sale would be held off so long as they remained current in their monthly obligation. To the contrary, defendants have not been making regular payments. Indeed, the record indicates defendants have not made payments on the mortgage since March 2013. Relatedly, the record shows defendants knew they had been in default for eight years and that the sale would be rescheduled as soon as the sheriff's moratorium was lifted. In these circumstances, we are satisfied the trial court did not abuse its discretion in denying defendants' second motion to vacate the foreclosure sale.

To the extent we have not specifically addressed them, any remaining arguments raised by defendants lack sufficient merit to warrant discussion. 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