SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3725-20

NDF1, LLC,

Plaintiff-Respondent,

v.

EDWARD KITCHEN, his heirs, devisees and personal representatives and his or any of their successors in right, title and interest, KIMBERLY K. KITCHEN, individually, and as heir of EDWARD KITCHEN, MR. KITCHEN, unknown spouse of KIMBERLY K. KITCHEN, individually, and as heir of EDWARD KITCHEN,

Defendants-Appellants,

and

STATE OF NEW JERSEY and UNITED STATES OF AMERICA,

Defendants.

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Submitted December 14, 2022 – Decided August 8, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. F-005640-20.

Steven D. Janel, attorney for appellants.

Stern & Eisenberg, PC, attorneys for respondent (Salvatore Carollo, on the brief).

PER CURIAM

In this contested residential mortgage foreclosure action, defendant Kimberly K. Kitchen, individually and on behalf of her late husband's estate, appeals from summary judgment striking her answer and from the subsequent entry of final judgment in favor of plaintiff NDF1, LLC, the fifth holder of the second mortgage on the home she has resided in since 2006. She contends the trial court erred in entering summary judgment while discovery was ongoing, as there are gaps in plaintiff's proofs, and in the face of genuine disputes over material facts relating to her laches defense and the statute of limitations. She also contends the court erred in entering final judgment on the amount plaintiff claims was due, $131,091.64. Our review of the record convinces us that none of those arguments is of sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

The Chancery judge found the essential facts based on the certification of plaintiff's asset manager Lauren Wilcox, and the facts admitted by defendant in her answer and set forth in her certification. Defendant and her late husband bought their home in 2006 with a $180,000 purchase-money mortgage from Gateway Funding. She claims he wanted to take out a second mortgage the following year. She agreed, and both signed a $70,000 fifteen-year, fixed-rate promissory note to Yardville National Bank, secured by a second mortgage on their home.

Wilcox averred, based on her personal knowledge attained from a review of plaintiff's business records, which she certified were made at or near the time of the events and maintained in the ordinary course of plaintiff's business, that defendant and her husband defaulted on the Yardville note on August 28, 2008. Wilcox also averred the mortgage was subsequently assigned by PNC Bank, NA, successor by merger to Yardville, to US Mortgage Resolution, LLC in December 2018, as recorded in the Mercer County Clerk's Office. US Mortgage thereafter assigned the mortgage in 2019 to New Day Funding, LLC, which promptly assigned it to plaintiff, all as reflected in the Clerk's records.

On January 29, 2020, plaintiff sent defendant a notice of intent to foreclose the mortgage based on the 2008 default, asserting a past due amount,

without late fees, of $57,591.61. Defendant claims this was the first she knew of the default. She averred her husband, who died in 2017, was secretive about financial matters, and beyond signing the loan documents, she had "no personal knowledge as to what payments were made, whether a default was entered, or what the balance may be." She claimed she "certainly didn't see any of the proceeds of the loan."

Plaintiff filed its foreclosure complaint in April 2020. Following the setting aside of the entry of default, defendant filed her answer in October 2020, which plaintiff moved to strike the following January. Defendant opposed the motion, arguing it was premature as discovery had not ended, and the action was barred by the statute of limitations and laches, as the twelve-year gap between the alleged default and the filing of the foreclosure "significantly impaired" her ability to defend the action.

The Chancery judge rejected those arguments. He found no dispute that plaintiff was the record holder of a valid assignment and could thus proceed to foreclose the mortgage. He further found plaintiff had established a prima facie right to foreclose based on Wilcox's certification, which fully complied with the personal knowledge requirement of Rule 1:6-6 and Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599-600 (App. Div. 2011), and defendant

had offered no proof of her own to put the facts Wilcox attested to in issue, including that defendant and her husband missed the August 28, 2008 payment, causing the loan to go into default.

The judge found defendant's argument that the action was time-barred under N.J.S.A. 2A:50-56.1 was simply wrong. Because the maturity date set forth in the note was January 16, 2022, the judge ruled plaintiff had until 2028, six years after the note matured, to file suit to foreclose the mortgage under N.J.S.A. 2A:50-56.1, notwithstanding defendant's 2008 default. The judge rejected defendant's subsequent objection to plaintiff's proof of amount due as not comporting with the requirements of Rule 4:64-1(d)(3). He found defendant had failed to make any specific objection to the amount due, but only continued to assert the arguments she made in opposition to summary judgment "as to the adequacy" of the proofs.

Defendant appeals, reprising the arguments she made to the trial judge. We, of course, review "the grant of a motion for summary judgment de novo, applying the same standard used by the trial court." Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Doing so here provides us no basis to reverse the orders defendant appeals.

Defendant's main argument is that Wilcox's certification was inadequate to support summary judgment, and plaintiff should have been made to produce the records on which it relied in asserting the 2008 default. Although it is certainly true our Supreme Court has cautioned trial courts against granting a summary judgment motion before discovery has been concluded, Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988), we cannot find the court erred in doing so here.

Critically, the court conducted a case management conference in this matter shortly after defendant filed her answer, setting both a deadline for the parties to propound written discovery as well as a discovery end date. Defendant didn't send interrogatories or a request for production to plaintiff in advance of that deadline. Indeed, she never sought discovery from plaintiff at any time while the matter remained pending in the trial court. As we agree with the trial judge that Wilcox's certification met the demands of both Rule 1:6-6 and Ford, we cannot find the court prematurely granted plaintiff summary judgment striking defendant's answer based on discovery being incomplete in view of defendant's failure to seek the documents she now claims plaintiff should have produced.

We likewise reject defendant's argument that the foreclosure was time-barred by plaintiff's failure to have instituted suit within six years of the default. As Judge Fisher explained in Deutsche Bank Trust Co. Americas as Trustee for Residential Accredit Loans, Inc. v. Weiner, 456 N.J. Super. 546 (App. Div. 2018), until 2009 when N.J.S.A. 2A:50-56.1 became law, the statute of limitations in a residential foreclosure was twenty years. Id. at 547. On enactment, N.J.S.A. 2A:50-56.1 permitted a mortgagee to institute suit to foreclose a residential mortgage from the earliest of three points:

> • "Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note";
>
> • Thirty-six years from the date the mortgage was recorded or, if not recorded, from the date of execution; and
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> • Twenty years from the date of a default that "has not been cured."
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> [L. 2009, c. 105, § 1 (emphasis added).]

Here, the earliest date would be "[s]ix years from . . . the maturity date set forth in the mortgage or the note . . . secured by the mortgage," ibid., that is, January 16, 2022. Although the Legislature has since amended N.J.S.A. 2A:50-56.1 to shorten the statute of limitations in a residential foreclosure to six years after date of default, L. 2019, c. 67, § 1 (codified at N.J.S.A. 2A:50-

56.1(c)), section 2 of L. 2019, c. 67 provides: "[t]his act shall take effect immediately and apply to residential mortgages executed on or after the effective date." It is thus plainly inapplicable to this matter. See Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 390 (2016) (explaining a decision on a statute's retroactivity will be guided in the first instance by the plain language of the statute).

We are sensitive to defendant's claims that the nearly twelve-year delay in instituting the foreclosure action has made it difficult for her to recover from her own records information about payments on this loan, particularly as her husband, who apparently handled the family's finances, has passed away in the interim.[1] Our Supreme Court has, however, stressed the importance of "statutes of limitations that have been fixed by the Legislature to create defined and regularly applicable periods against which to determine timeliness," and that it is "only the rarest of circumstances and only overwhelming equitable concerns" where "laches might be applied so as to

[1] There is no information in the record as to the reason for the delay. Plaintiff's counsel speculates it likely had to do with this being a second mortgage, and thus leaving aside the sums due on this mortgage, any purchaser at sheriff sale, including the second mortgagee, would have to satisfy the balance of whatever remained due on the first mortgage of $180,000 in order to obtain clear title.

shorten an otherwise permissible period for initiation of litigation." Fox v. Millman, 210 N.J. 401, 422 (2012). Given that standard, we cannot find plaintiff's foreclosure complaint barred by laches. Defendant's contention that the court erred in entering final judgment in the amount due of $131,091.64 — based on the same contentions underlying her arguments on summary judgment — requires no further discussion. See R. 2:11-3(e)(1)(E).

Affirmed and remanded for further proceedings not inconsistent with this opinion.[2]

[2] The trial court granted defendant's motion to stay the sheriff's sale pending resolution of this appeal. Given the writ of execution to the sheriff has likely expired in the interim, we leave to the trial court the management of any further proceedings, including the lifting of the stay on the sale.