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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. F-4497-23

JOSEPH LAZARUS and RENAH LAZARUS,

Plaintiffs,

v.

HABIB TAWIL and LILLY TAWIL, husband and wife; MEIR HILLEL; COLUMBIA CAPITAL CO.; and CHARLES TAWIL a/k/a CHARLES C. TAWIL,

Defendants.

OPINION

Decided May 24, 2024.

Russell M. Finestein, Esq. (Finestein & Malloy, LLC, and Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys for plaintiffs Joseph Lazarus and Renah Lazarus).

Eric S. Landau, Esq. (Law Office of Eric S. Landau, LLC, attorneys for defendants Habib Tawil and Lilly Tawil).

John T. Lillis, Jr., Esq. (Kennedy Lillis Schmidt & English, attorneys for defendant Meir Hillel).

FISHER, P.J.A.D. (t/a, retired on recall).

This suit – the third involving mortgages on a Deal residence owned by defendants Habib and Lilly Tawil (collectively "Tawil") – presents numerous issues about the convoluted circumstances that have brought us to this point. Plaintiffs Joseph and Renah Lazarus (collectively "Lazarus"), and defendant Meir Hillel, pursue a summary disposition of their claims against Tawil that seek the foreclosure of mortgages they hold, as well as a summary resolution of their dispute about which of their mortgages has priority. Their arguments require some consideration of preclusion doctrines and the effect of a judgment in the first of the three related suits. For the following reasons, the court concludes that Tawil's answer to the claims seeking foreclosure asserted by Lazarus and Hillel are non-contesting, that Tawil's counterclaim should be dismissed, and that the Lazarus mortgage has priority over Hillel's.

While the circumstances are convoluted, many facts are undisputed and those that are disputed aren't germane. A good place to start this story is with the undisputed fact that, on October 23, 2017, Lazarus lent $1,450,000 to

defendants Tawil.[1] In exchange, Tawil executed a note that required monthly interest payments of $14,500 and full satisfaction of the indebtedness in eighteen months. Kofman Certification, Exhibit A. To ensure repayment, Tawil provided a mortgage, id., Exhibit B, and executed an estoppel certificate that represented this mortgage was "a valid first lien on the[ir] [Deal] premises," id., Exhibit C. The parties later agreed to extend the note's maturity date to May 1, 2020. Lazarus Certification, ¶ 4 and Exhibit A. Lazarus alleges that Tawil is in default. They claim that Tawil "did not pay off the outstanding principal balance at the extended maturity date," and that, while Tawil continued to make interest payments, which were accepted and applied against the indebtedness, those interest payments stopped in September 2022. Id., ¶ 5.

At the time of the Lazarus-Tawil transaction, there were four mortgages on Tawil's Deal property. The funds lent to Tawil by Lazarus in October 2023 were used to pay off three prior mortgages that totaled $1,300,000. Kofman Certification, ¶ 8 and Exhibit E.

According to defendant Meir Hillel, years earlier – between November 2012 and September 2017 – he lent Tawil nearly $3,900,000. On August 8, 2013, when this alleged indebtedness was "a little less than $2,000,000," HBr at 2; see

[1] While "Tawil" refers to both Habib and Lilly Tawil collectively, at times necessary for accuracy they may be referred by their first names, "Habib" and "Lilly," when speaking about them individually.

also Hillel Certification, ¶ 47 (alleging that, by that time, Habib had lent Tawil $1,928,469.40), Habib and his company, H&L North 16 LLC, executed a credit line promissory note memorializing their promise to repay Hillel the sums borrowed as of that date and any sums that might be lent thereafter, id., ¶ 45 and Exhibit 2. Both Habib and Lilly also provided Hillel with a mortgage on the Deal property as a means for ensuring their repayment of the indebtedness. Id., ¶ 46 and Exhibit 3. The mortgage was recorded on August 13, 2013, and Hillel claims that he then "underst[oo]d that [his] mortgage would be a first priority mortgage." Id., ¶ 51. Hillel claims that he continued to lend money to Tawil and that, by August 2017, the total indebtedness was $3,878,232.03. Id., ¶ 54.

Habib[2] commenced a suit against Hillel in the Law Division (Docket No. L-817-20), alleging Hillel agreed to discharge his August 2013 mortgage "in exchange for" his "foregoing receipt of his rightful compensation from their business and other consideration." Id., ¶ 66.[3] Hillel argues that Habib's claim "conveniently changed" and his amended complaint asserted that Hillel "agreed to discharge" the August 2013 mortgage because Habib "owned no debt." Id., ¶s 67-68. Hillel filed an answer in which he denied all these substantive

[2] Lilly was not a named plaintiff in that suit.

[3] The motion record provides some information about their businesses, the failure of Habib's business, and the circumstances under which Habib worked for Hillel's business. See, e.g., Hillel Certification, ¶s 55-64.

allegations; he also asserted a counterclaim that alleged a breach of contract and sought foreclosure of the August 2013 mortgage but did not name Lazarus or assert his priority over the Lazarus mortgage.

The case went to trial in February 2022. At its conclusion, the jury found, among other things, that Habib proved Hillel agreed to discharge the August 2013 mortgage, and Hillel failed to prove that Habib borrowed money from him on or after August 8, 2013. Based on these and other jury findings, on April 11, 2022, the trial judge entered a judgment, which declared Habib "is found to owe no sums of money to Hillel under the [August 2013 note and mortgage]," and all of Hillel's claims in his counterclaim, "including those alleging that monies are owed to [Hillel] by [Habib] in connection with the [August 2013 note and mortgage], are dismissed in full upon the merits and with prejudice." The judgment lastly noted an issue about whether the trial judge or a judge sitting in the Chancery Division "will issue the order directing the County Clerk" to discharge the mortgage. That last question about which judge was empowered to direct a discharge of the mortgage was to "be decided on subsequent motion or on the consent of the parties."

After Hillel filed a notice of appeal of this judgment, id., ¶ 85, Habib Tawil filed a motion seeking an order directing the clerk to cancel and discharge Hillel's mortgage, id., ¶ 86. Hillel opposed that motion, claiming the appeal

divested the trial court of jurisdiction. Id., ¶ 87. By order entered on October 21, 2022, the trial judge agreed he had no jurisdiction to act and denied Habib's motion to discharge the mortgage "without prejudice" because of the pending appeal. Id., ¶ 88 and Exhibit 15.

In February 2023, while the appeal was pending, Habib, Hillel, and their attorneys, met and reached an amicable resolution. That settlement was memorialized with Habib and Hillel – and later Lilly – executing three documents that were entitled as: a Settlement and Limited Release Agreement; a Credit Line Promissory Note Modification; and a Credit Line Mortgage Modification and Extension Agreement. Id., ¶s 89-93. These documents included a stipulation that the total owed Hillel was $3,875,232.03 as of January 31, 2023, id., ¶ 97(h), but permitted Tawil to discharge their obligations on this new note and mortgage by paying $1,200,000 and meeting other conditions, id., ¶ 97(i). This new mortgage was recorded on February 15, 2023. Id., ¶ 98 and Exhibit 18. That same day, the parties to that action filed stipulations of dismissal of the lawsuit and the pending appeal. Id., ¶ 99 and Exhibit 19.

On March 31, 2023 – soon after Tawil and Hillel reached their settlement in the first action – Tawil filed suit against Lazarus, as well as the title agency and title insurer involved in their 2017 transaction, in the Law Division in Ocean County. Tawil claimed that Lazarus was obligated at the time of their transaction

to bring about a discharge of the Hillel mortgage, which was then the fourth in time of four mortgages. Motions to dismiss filed by Lazarus and the other defendants were converted by the trial judge to summary judgment motions. The Ocean County judge concluded that Tawil was attempting to litigate – albeit against a different party – an obligation to discharge the Hillel mortgage for a second time; he entered orders dismissing with prejudice Tawil's claims against Lazarus and the other defendants on August 25, 2023. Bonchi Certification, Exhibit K.

On April 12, 2023 – a few weeks after Tawil filed the Ocean County suit that was dismissed in August 2023 – Lazarus commenced this action against Tawil, and Hillel as well, alleging Tawil defaulted on the note that memorialized their debt to Lazarus; Lazarus sought to foreclose their mortgage, and for a declaration that their mortgage has priority over Hillel's. Following that, Hillel sent Tawil a notice to cure what he claimed was their default on the note executed by Tawil to settle the Tawil-Habib lawsuit. Specifically, Hillel's notice alleged that Tawil had failed "to . . . pay . . . other payment obligations related to the [p]roperty of a nature that could result in a lien or foreclosure" or acted "in a manner that result[ed] in a manner that results in Hillel being named in litigation." Id., ¶ 105. When Tawil failed to cure the alleged default, id., ¶ 110, Hillel declared a default, id., ¶ 112, and asserted a claim in this action, alleging

Tawil is indebted to him in an amount, inclusive of interest, greater than $4,900,000, id., ¶ 116.

Now before this court are: the motion of Lazarus for a declaration that Tawil's answer and counterclaim should either be dismissed or deemed non-contesting; Hillel's cross-motion for summary judgment against Tawil; and Tawil's motion to dismiss.[4] Despite the voluminous papers submitted on these motions, and the convoluted nature of all these transactions and events, the issues are relatively simple and lead the court to the following conclusions, which are discussed in this sequence, that: (1) the dispositive motions are not premature and Lazarus is entitled to a determination that Tawil's answer is non-contesting and that Tawil's counterclaim should be dismissed; (2) Tawil's answer to Hillel's foreclosure claim is non-contesting; and (3) Lazarus's mortgage has priority over Hillel's.

I

The court will initially dispense with Tawil's argument that the dispositive motions are premature because in their view discovery isn't complete. It is certainly true that our courts often say that "summary judgment is inappropriate

[4] Lazarus has also moved to strike Tawil's answer because of Tawil's failure to provide discovery or, in the alternative, to extend the discovery deadline and adjourn the trial scheduled for June 3, 2024. Tawil has cross-moved to dismiss the complaint for Lazarus's failure to provide discovery.

prior to the completion of discovery," Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003), but that general assertion is concerning only when "critical facts are peculiarly within the moving party's knowledge," Valentzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988), and, even then, it remains incumbent on a motion's opponent, like Tawil, to "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements" of the cause of action or a pivotal defense, Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977); see also Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015). Tawil hasn't shown that there is critical information in the possession of others that hasn't been provided or that prevents them from presenting a defense to the motion. Indeed, they haven't shown why they couldn't have submitted their own sworn statements to rebut whatever has been asserted that they believe isn't true. And, even if that had been shown, the prematurity argument would still be irrelevant because it doesn't account for the fact that, at the conclusion of a case management conference that occurred on January 30, 2024, the court ordered that discovery end by March 15, 2024, and that a trial would take place on June 3, 2024. Whether the parties sought or obtained the discovery they felt relevant to the likely filing of these motions, is of no moment since, by the filing of these motions or their discovery motions

also to be decided today, see n. 4, the time for pretrial discovery is over and trial is imminent.

Second, Tawil has provided no sworn statement that contradicts or otherwise suggests a genuine dispute about a fact material to Lazarus's claim of foreclosure. In fact, Tawil has submitted no sworn statements at all. The only opposition received was a brief submitted by Tawil's counsel; the factual statements of counsel cannot create a genuine factual dispute. See Gonzalez v. Ideal Tile Imp. Co., Inc., 371 N.J. Super. 349, 358 (App. Div. 2004) (holding that "counsel's unsworn opposing letter was incapable of conveying any facts for summary judgment purposes," indeed, "[e]ven an attorney's sworn statement will have no bearing on a summary judgment motion when the attorney has no personal knowledge of the facts asserted"), aff'd o.b., 184 N.J. 415 (2005). Moreover, even if counsel's arguments could be assumed to be a sworn statement, those arguments do not appear to contest the elements necessary for foreclosure: the validity of the mortgage, the amount of the indebtedness, and the right of the holder to resort to the mortgaged premises. Investors Bank v. Torres, 457 N.J. Super. 53, 65 (App. Div. 2018); Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). "A lender's right to foreclose is an equitable right inherent in a mortgage, triggered by a borrower's failure to comply with the terms and conditions of the associated loan." Investors Bank,

457 N.J. Super. at 65; S.D. Walker, Inc. v. Brigantine Beach Hotel Corp., 44 N.J. Super. 193, 202 (Ch. Div. 1957). Tawil has not disputed that Lazarus made a loan, that its repayment was secured by a mortgage that allows for acceleration of the indebtedness and resort to the Deal property, and that they have defaulted on the repayment terms. Their argument that Lazarus somehow breached the terms of their 2017 transaction by failing to secure the discharge of the Hillel mortgage has been indirectly litigated in the action Tawil filed against Hillel – where Tawil asserted and demonstrated that nothing was due on the Hillel obligation and obtained a judgment to that effect that also called for a discharge of the mortgage – and was asserted directly against Lazarus in an Ocean County action that was dismissed with prejudice.[5] Lazarus has demonstrated an entitlement to foreclosure and the Lazarus motion will be granted, deeming Tawil's answer to the Lazarus complaint to be non-contesting.

II

The next issue concerns Hillel's right to foreclose. Again, the same principles apply and, again, Tawil has provided no sworn statements to rebut Hillel's contentions about the existence of the note and mortgage executed and

[5] Tawil attempted to appeal these dismissal orders, but that appeal was dismissed due to a deficiency and Tawil's motion for relief from that order was denied on December 8, 2023. Tawil v. Lazarus, No. A-572-23. In short, the Ocean County orders are inviolate from attack and bar Tawil's counterclaim against Lazarus.

recorded after Tawil and Hillel settled the earlier action in the Law Division here. Habib and Lilly Tawil also do not rebut that they have defaulted on their obligations on the new note in the manner described earlier in this opinion. To the extent Tawil asserts a breach by Hillel of an alleged promise to discharge the earlier mortgage that was litigated in the Law Division in Tawil's suit against Hillel, that claim was rendered irrelevant by their post-judgment settlement and the execution of the new note and mortgage.[6]

The only germane question concerns whether Tawil defaulted on the new note's terms and, so viewed, Tawil has not provided anything to suggest they are either not in default or that, if they are, Hillel may not resort to the property on his foreclosure claim. The mere existence of this suit seems to constitute a default as defined by the settlement agreement and accompanying documents. So, Hillel has also demonstrated that Tawil's response to Hillel's claim, and Tawil's counterclaim, are non-contesting.

[6] Tawil's argument that the settlement agreement lacked consideration is without merit since, although the agreement and the new loan documents put Tawil in worse position than the position provided by the jury verdict and the judgment, there was always a risk that the judgment would be reversed. Tawil, perhaps out of that concern, reached an agreement that bettered the position they were in before the Law Division suit was filed. In short, there was a trade-off that represents adequate consideration; courts don't inquire in this regard whether it was a good or bad deal, only that benefits were exchanged.

III

This leaves one more issue: which of the Lazarus and Hillel mortgages has priority? The answer requires consideration of what occurred in the earlier Law Division action[7] and what Tawil and Hillel did in settling that action.

In analyzing this priority dispute, the court must initially recognize that our recording statutes, N.J.S.A. 46:26A-1 to -12, firmly establish that our State is a "race-notice" jurisdiction, meaning that priority will be given to the first recorded mortgage "so long as" the holder "had no actual notice" of another's previously-acquired right. Palamarg Realty Co. v. Rehac, 80 N.J. 446, 454 (1979); see also Cox v. RKA Corp., 164 N.J. 487, 496 (2000) (holding that "as between two competing parties the interest of the party who first records the instrument will prevail so long as that party had no actual knowledge of the other party's previously-acquired interest").[8]

Had the Tawil-Hillel lawsuit never occurred and had the Tawil-Hillel financial relationship remained unaffected, and putting aside Lazarus's

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[7] For the remainder of the opinion all references to the earlier Law Division action refer to the first suit that resulted in a jury verdict in this vicinage, not the later Ocean County Law Division matter.

[8] In the absence of recording statutes, or when the recording statutes are inapplicable, the common law rule of "first in time, first in right" applies. See, e.g., Jenkinson v. N.Y. Finance Co., 79 N.J. Eq. 247, 258 (Ch. 1911); Weinstein, Law of Mortgages, 29 N.J. Practice § 10.2.

equitable subrogation claim that the court need not decide, Hillel would have had priority in a contest between he and Lazarus because Hillel's mortgage was recorded long before Lazarus's, even though, under at least one party's assertion, the Hillel mortgage should have been discharged at or about the time of the Lazarus-Tawil transaction. That, however, is beside the point. There was a suit, and their lender-borrower relationship was altered by that suit and the settlement that followed.

The Law Division suit produced a jury finding that Tawil owed Hillel nothing and that the Hillel mortgage should be discharged. The April 11, 2022 Law Division judgment so declared but, to be sure, it also did not exactly direct the county clerk to discharge Hillel's mortgage. The judge recognized that a discharge order was a necessary consequence of the jury's verdict but, in the judge's view, that task could not be accomplished until a procedural question could be answered: what judge should enter that particular order. Before an answer to that question could be ascertained, however, Tawil and Hillel sat down and entered into a settlement. They agreed that Tawil was indebted to Hillel, and Tawil executed new documents that memorialized their indebtedness to Hillel and reimposed a lien on the Deal property to secure payment of the indebtedness.

So, in determining the priority issue presented in this case and debated in the competing motions, the court must consider the significance of these

intervening post-Law-Division-judgment events. Because foreclosure is "a discretionary remedy" that "summons the court's equity jurisdiction," Brunswick Bank & Trust v. Heln Mgmt. LLC, 453 N.J. Super. 324, 330-31 (App. Div. 2018); see also US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 476 (2012) (recognizing that in fulfilling the intent of the Fair Foreclosure Act, "courts retain discretion 'to fashion equitable remedies'"); Sovereign Bank v. Kuelzow, 297 N.J. Super. 187, 196 (App. Div. 1997) (recognizing that equitable principles not only guide a court up to entry of a foreclosure judgment but beyond as well); Totowa Sav. & Loan Ass'n v. Crescione, 144 N.J. Super. 347, 352 (App. Div. 1976) (recognizing that, when seeking foreclosure, a party "expose[s] itself to the operation of equitable principles and must submit to an equitable resolution"), the court must consider the true status of Hillel's position and where it fits into the timeline relevant to this "race-notice" dispute.

To repeat, the judgment, which was based on the jury verdict in the Tawil-Hillel Law Division action, does not lack relevance to these issues. The Law Division judge determined that vindication of the jury's findings required a discharge of the Hillel mortgage. The only obstacle the judge saw was a concern that perhaps only a Chancery Division judge could direct such relief.[9] Before

[9] In my view, the judge was mistaken. A Law Division judge can direct a county clerk to discharge a mortgage. Just as a Chancery Division judge can grant legal relief to do complete justice in a manner, so too can a Law Division judge grant

the judge had the chance to resolve that concern, Hillel filed a notice of appeal. And when Tawil soon after filed the motion that the trial judge invited on the discharge question, the judge correctly recognized that Hillel's filing of a notice of appeal meant the Appellate Division had acquired jurisdiction, see R. 2:9-1(a) (declaring that "supervision and control of the proceedings on appeal . . . shall be in the appellate court from the time the appeal is taken"),[10] so the discharge order was left to await further direction from the Appellate Division.

That an order discharging Hillel's mortgage was never entered in the Law Division imposes no obstacle here. We are, as mentioned above, dealing with

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equitable relief. See Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 617 (App. Div. 2005); Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515, 526 (App. Div. 1991).

[10] There's no point to wandering deeper in the weeds by considering whether the gaining by the appellate court of supervision and control under Rule 2:9-1(a) depends upon a proper submission of a notice of appeal. It suffices to note that the judge was certainly correct in leaving it to the Appellate Division to make that determination before entering any substantive relief. It is also true that a trial court always retains jurisdiction to enforce a judgment, see R. 2:9-1(a)(7), unless or until the imposition of a stay of the judgment, see R. 2:9-5(a), and the nature of the remaining issue about discharging the mortgage could possibly be interpreted as a matter of enforcement rather than substantive relief, but the court will assume that the Law Division judge was correct in not entering the discharge order unless or until the Appellate Division granted a limited remand for that purpose. Indeed, only anarchy could come out of a dispute between the two divisions over which has jurisdiction, so trial judges should – in doubtful circumstances – leave it to the higher court to direct the proceedings even if a litigant has mistakenly lodged an appeal when leave to appeal should have been sought.

equitable principles, and equity "regards and treats as done what, in good conscience, ought to be done." Goodell v. Monroe, 87 N.J. Eq. 328, 335 (E. & A. 1917); see also Zaman v. Felton, 219 N.J. 199, 216 (2014); Marioni, 374 N.J. Super. at 600-01. If not for Hillel's precipitous filing of a notice of appeal when all issues as to all parties had not been finalized, see Grow Co. v. Chokshi, 403 N.J. Super. 443, 457-58 (App. Div. 2008), the trial judge would undoubtedly have recognized, via the motion he invited, that he was empowered, despite his assignment to the Law Division, to order a discharge of Hillel's mortgage; indeed, even if the judge came to a contrary conclusion about the scope of his power, he would have, at least, referred the matter to the Chancery judge for entry of the required discharge order. In short, the jury rendered findings that warranted, in the Law Division's view, a discharge of Hillel's mortgage, and all that was left to accomplish that was a ministerial act stymied by Hillel's appeal. The court should regard the Law Division judgment as if it then directed the county clerk to discharge Hillel's mortgage.

A further twist comes from the fact that during the pendency of the appeal, Tawil and Hillel sat down and settled their disputes. Their settlement agreement required Tawil's execution of a new note as well as a new modified mortgage, which was recorded on February 15, 2023. Hillel Certification, ¶ 98 and Exhibit 18. Although the new recorded document purports to modify or leave intact the

earlier mortgage, its execution and recordation should not be understood as reviving – insofar as the race-notice dispute is concerned – the 2013 Hillel mortgage. That earlier-recorded mortgage had been eviscerated by the jury verdict and the Law Division judgment. If that is not so – or even were it not believed by Hillel to be so – why would his settlement agreement with Tawil call for Tawil's execution and recordation of a new document imposing a lien on the Deal property? There is no dispute that these things occurred and demonstrate the lack of a triable issue on the priority dispute. These undisputed events can lead to no sound conclusion except that there is no merit in Hillel's claim that the recording date of his 2013 mortgage maintained its viability despite anything that happened in the Law Division matter and there is no merit in Hillel's assertion that the 2013 recordation date of that earlier mortgage governs his "race-notice" dispute with Lazarus. Lazarus's mortgage was recorded in 2017; Hillel's newly-modified mortgage was recorded in 2023. The 2013 recording of the Hillel mortgage that was superseded by Hillel's 2023 mortgage is of no moment. Lazarus is entitled to summary judgment declaring that their 2017 mortgage has priority over Hillel's 2023 mortgage.[11]

[11] Because all these peculiar circumstances have led the court to conclude that Hillel can no longer rely on the 2013 recorded mortgage in attempting to establish priority over Lazarus's mortgage, the court need not resolve or further consider Lazarus's equitable subrogation argument.

The court should also make mention that much of the legal arguments of Lazarus and Hillel focus on preclusion doctrines. There is certainly something to be said for Lazarus's position in that regard and the court agrees to the extent that the policies underlying these doctrines are offended by the notion that our courts should take up again – in the wake of a jury trial and a judgment resulting therefrom – some of the questions raised in this action. It is offensive to the fair and efficient administration of justice in our courts, see R. 1:1-2; Ragusa v. Lau, 119 N.J. 276, 283-84 (1990), to think that this court should now relitigate anything that was fully litigated and resolved in the earlier Law Division action.

In that regard, there is no reason to conclude from the stipulations filed by Tawil and Hillel in the Law Division action in both the trial court, under Rule 4:37-1, and the Appellate Division, under Rule 2:8-2, to suggest that the Law Division judgment had been vacated or somehow undone. Both stipulations, see Hillel Certification, Exhibit 19, only asserted that the parties had settled their disputes and were, therefore, "voluntarily dismiss[ing] and discontinu[ing]" the action and the appeal. Neither of these two pleadings stated that the parties had agreed to vacate the April 11, 2022 judgment, which found Tawil owed Hillel nothing and that Hillel's 2013 mortgage ought to be discharged. Id., Exhibit 11. The stipulations merely permanently stopped the legal proceedings between Tawil and Hillel at the place where they were found when the stipulations were

filed. That is, the parties agreed to "dismiss" and "discontinue"[12] the matter; their stipulation said nothing about undoing what had already transpired,[13] although the parties did agree to readjust their relationship rather than complete the litigation through a series of documents that can only be viewed, in light of all these circumstances, as a novation.[14]

Ultimately, the parties could not – without a franker expression in their stipulations of dismissal of their intentions – preserve for future litigation the same issues that the court had presided over – and the jury resolved – and have

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[12] "Discontinuance" is a word not commonly used in this jurisdiction – it's more a New York thing, see, e.g., NY CPLR 3217; Bank of Am., N.A. v. Kessler, 206 N.E.3d 1228, 1235 (N.Y. 2023); Emigrant Bank v. Solimano, 175 N.Y.S.3d 299, 305-06 (N.Y. App. Div. 2022) – but it is understood as connoting nothing more or less than "dismissal," see Black's Law Dictionary (11th ed.) at 584 (defining "discontinuance" as the "termination of a lawsuit by the plaintiff; a voluntary dismissal or nonsuit"), and, thus, its presence in the stipulations neither strengthens nor weakens the parties' arguments about the significance of these stipulations.

[13] Their settlement agreement also did not include a stipulation or an agreement that the judgment be vacated. The language relied on by Hillel – "Nothing in this Agreement shall constitute an admission that any Party to this Agreement committed the acts alleged in the [Law Division action]," Hillel Certification, Exhibit 37 (¶ 3) – suggests only what it states and not that the parties had, by their agreement, rendered the entire Law Division action a nullity. Indeed, if a vacation of the Law Division judgment was what was intended, then why didn't they just do that and assume their preexisting note and mortgage remained intact?

[14] A novation occurs when "a new contract or obligation" takes the place of "an old one which is thereby extinguished." Fusco v. City of Union City, 261 N.J. Super. 332, 336 (App. Div. 1993).

the court do over what had already been done. So, while the court has already observed, and held, that equitable principles require a consideration of the litigation in the first action as having actually caused a discharge of Hillel's 2013 mortgage, collateral estoppel and res judicata principles also buttress that conclusion, albeit for different reasons.

Lastly, although not initially cited by the parties,[15] the court is mindful of N.J.S.A. 46:9-8.2, which declares that "the priority of the lien of a mortgage loan which has undergone a modification, as defined by this act, shall relate back to and remain as it was at the time of recording of the original mortgage as if the modification was included in the original mortgage or as if the modification occurred at the time of recording of the original mortgage," a declaration that ostensibly favors Hillel's position.[16] But, putting aside the

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[15] Lazarus referred to this statute in their reply brief and Hillel referred to it for the first time during oral argument.

[16] Even under more normal circumstances, the "modification" here might not have been encompassed by N.J.S.A. 46:9-8.2. The word "modification" as used in N.J.S.A. 46:9-8.2 is limited by the definition of "modification" that appears in N.J.S.A. 46:9-8.1(d); that is, the former statute dictates the priorities of mortgages that have undergone "a modification, as defined by this act," N.J.S.A. 46:9-8.2 (emphasis added), and the precise meaning of the "modification" referred to in N.J.S.A. 46:9-8.2 is contained in N.J.S.A. 46:9-8.1(d). That limited understanding of what constitutes a "modification" for purposes of N.J.S.A. 46:9-8.2 may not Tawil's and Hillel's 2023 agreement. Since the impact of this statute has not been adequately presented in these motions, the court will not examine it further. And it really doesn't matter. The court chiefly rejects N.J.S.A. 46:9-8.2's application – that Hillel didn't urge as a basis for his priority

statute's other limitations, see n. 16, Tawil and Hillel may have labeled the newly-recorded mortgage as a "modification" of the earlier mortgage but it ain't necessarily so. Equity, as Judge Kilkenny recognized years ago, isn't governed by the labels parties employ but regards instead the substance of what they have done. See Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 348-49 (Ch. Div.), aff'd o.b., 33 N.J. 72 (1960); see also Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., LLC, 413 N.J. Super. 513, 523-24 (App. Div. 2010).

Given that the earlier litigation resulted in a judgment favorable to Tawil and called for a discharge of the 2013 mortgage, the parties' settlement agreement and their mutual desire to reinstate their relationship as creditor and debtor – whatever they executed – must be viewed in the eyes of equity as creating a new obligation and the document recorded must be viewed as a new mortgage. That is, as already mentioned, what occurred was a novation. Because this is how a court of equity should view what occurred between Tawil and Hillel when they reached their 2023 settlement agreement, it must be concluded that the 2023 recorded document, labeled as a modification, is not a modification,

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claim until orally arguing this motion – because, again, the 2013 mortgage cannot in these circumstances be deemed to have been "modified," for the other reasons given above. Their 2023 agreement is best understood as being a novation.

and N.J.S.A. 46:9-8.2 has no impact on the priority issues raised in these motions.

* * *

For these reasons, an order has been entered that: (1) grants Lazarus's motion to declare Tawil's answer as non-contesting; (2) grants Lazarus's motion for summary judgment that their mortgage has priority over Hillel's; (3) grants Hillel's cross-motion to declare Tawil's answer as non-contesting; (4) dismisses Hillel's claim against Lazarus about the priority of his mortgage; (5) denies Tawil's cross-motion to dismiss the complaint; (6) dismisses as moot Lazarus's motion to strike Tawil's answer for failure to provide discovery and other relief; (7) dismisses as moot Tawil's motion to dismiss the complaint for failure to provide discovery and other relief; and (8) refers the matter to the Office of Foreclosure for further processing.