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HSBC Bank USA, National Association : Superior Court of New Jersey
as Trustee for Merrill Lynch Alternative : Hudson County: Chancery Division
Note Asset Trust, Series 2007-A2 : Docket No. HUD-F-17184-12

Plaintiff,

Civil Action

vs.

OPINION

Zulema Roman, Mr. Roman, Husband
Of Zulema Roman

Defendants.

Date of Hearing: August 18, 2017

Date of Decision: August 30, 2017

Parker McCay, PA

Attorney for Plaintiff HSBC Bank USA
(Brian Caine, Esq. appearing)

Northeast New Jersey Legal Services, Inc.

Attorney for Defendant Zulema Roman
(Gregory G. Diebold, Esq. appearing)

SARKISIAN, P.J.CH.

Introduction

Presently before the Court is Plaintiff HSBC Bank USA, National Association As Trustee for Merrill Lynch Alternative Note Asset Trust, Series 2007-A2's (hereinafter "Plaintiff") motion for reconsideration of the Court's July 17, 2017 order denying Plaintiff's motion to extend time to file final judgment, which effectively was a motion to reinstate the case pursuant to R. 4:64-8. In this opinion, the Court is called upon to resolve an issue that has confronted judges throughout the Chancery Division of this state in foreclosure actions that have been pending in the court system for years - what are the standards by which the Court should have the right to implement R. 4:64-8's denial authority by finding that the Plaintiff has not shown "good cause," but, at the same time, honoring the directive under the Rule that the dismissal be without prejudice, by allowing a new complaint to be filed under reasonable terms and conditions.

By way of background, this case is the subject of a tortured procedural history. Five (5) years ago, on August 23, 2012, Plaintiff initiated this foreclosure complaint against Defendant Zulema Roman (hereinafter "Defendant") for defaulting on the terms of note and mortgage. On December 4, 2012, Defendant filed an answer to the foreclosure complaint. On July 30, 2013, my predecessor, Judge Velazquez, dismissed the complaint, without prejudice, due to Plaintiff's failure to attend depositions. On August 29, 2013, the Court ordered Plaintiff to pay sanctions and attorney's fees to Defendant, in the amount of \$2,730.00, for failing to attend the depositions. Thereafter, on October 21, 2013, Plaintiff received a loss mitigation package from Defendant, which was ultimately denied by Plaintiff on May 23, 2014. On June 18, 2014, approximately ten (10) months after the Court's order of August 29, 2013, Plaintiff sent Defendant's counsel \$2,730.00. On August 4, 2014, Plaintiff filed a motion to reinstate the case, which was granted on September 9, 2014.¹

Thereafter, over one (1) year later, on October 14, 2015, the Court granted Plaintiff's motion for summary judgment. Another year later, on October 22, 2016, the Court sent Plaintiff a notice that the case would be dismissed for lack of prosecution if final judgment was not sought within thirty (30) days. Subsequently, on November 26, 2016, the case was dismissed for lack of prosecution.

On January 11, 2017, Plaintiff filed a motion to reinstate the case, and argued that the delay in prosecuting this action was the result of Plaintiff's inability to obtain judgment figures from their servicer, which Plaintiff contends were not provided until November 17, 2016. Plaintiff, in support of its motion to reinstate, stated, via certification dated January 10, 2017, "Plaintiff is now prepared to file for final judgment upon reinstatement."

On February 6, 2017, this Court granted Plaintiff's motion to reinstate the case, on the condition that Plaintiff was to file its motion for final judgment by June 6, 2017, four (4) months later. Plaintiff failed to move for final judgment by June 6, 2017.

On July 17, 2017, this Court entered an order denying Plaintiff's motion to extend time to file final judgment, which was effectively a motion to reinstate the case pursuant to R. 4:64-8. Plaintiff now seeks reconsideration of the Court's July 17, 2017 order.

In support of its motion, Plaintiff argues that the Court was mistaken in its belief that Plaintiff benefited from several prior extensions and it will be prejudicial for Plaintiff to have to commence a new foreclosure action when Plaintiff has already prevailed on the merits and its failure to file for final judgment was due to a mistake in calendaring the Court's deadline.

¹ The September 2, 2014 order correctly noted that an August 25, 2014 order, which reinstated the case as a R.4:64-8 dismissal, was procedurally incorrect as Plaintiff was requesting reinstatement for a dismissal for failure to provide discovery.

In opposition, Defendant argues that nothing in Plaintiff's motion for reconsideration demonstrates that the Court's reasoning in their July 17, 2017 order was palpably mistaken.

Discussion

Motion for Reconsideration

Under New Jersey Court Rule 4:49-2, a party may move for a rehearing or reconsideration to alter or amend a judgment or order, stating with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. A motion to vacate a judgment may be characterized as a motion to alter or amend a judgment under this rule. Baumann v. Marinaro, 95 N.J. 380, 390 (1984).

Reconsideration is a matter within the sound discretion of the Court to be exercised in the interest of justice. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). It should be utilized only for cases which fall into the narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider or failed to appreciate the significance of probative, competent evidence. Cummings, *supra*, 295 N.J. Super. at 384. If a litigant wishes to bring new or additional information to the Court's attention, which could not have been provided on first application, the Court should, in the interest of justice, and in the exercise of sound discretion, consider such evidence. *Id.* However, reconsideration cannot be used to expand the record and reargue a motion. Capital Fin. Co. of Delaware Valley, Inc. v. Asterbaj, 398 N.J. Super. 299 (App. Div. 2008).

Here, Plaintiff argues that the Court's order of July 17, 2017 was based on a mistaken belief that Plaintiff benefited from several extensions and it will be prejudicial for Plaintiff to have to commence a new foreclosure complaint when Plaintiff has already prevailed on the merits. The Court concedes that this matter was dismissed once for lack of prosecution on November 26, 2016. However, the dilatory nature of Plaintiff's failure to prosecute this action is pervasive throughout the record and does not support its position that there is a good cause to reinstate this case.

As chronicled above, and as referenced in the Court's order of July 17, 2017, Plaintiff filed its complaint for foreclosure back on August 23, 2012, nearly five (5) years ago. Plaintiff obtained summary judgment in its favor on October 14, 2015. Thereafter, over a year later, and over four (4) years from the date that Plaintiff initially filed their foreclosure complaint, the case was dismissed for lack of prosecution on November 25, 2016 after Plaintiff failed to file a motion for final judgment.

Subsequently, in Plaintiff's January 11, 2017 motion to reinstate, Plaintiff represented to the Court that, "Plaintiff is now prepared to file for Final Judgment upon reinstatement."²

² See paragraph 16 of Plaintiff attorney's certification dated January 10, 2017.

Paragraph 18 of the same certification reads as follows:

In the event Plaintiff's Motion to Reinstate is granted, Plaintiff will promptly move for Final Judgment and proceed to Sheriff's sale, again as the issues impacting the Certificate of Amount of Due have been addressed and corrected.

On February 6, 2017, Judge Sarkisian granted Plaintiff's motion to reinstate the case. The Court's order of February 6, 2017 provided crystal clear instructions that Plaintiff was to file its motion for final judgment by a firm June 6, 2017 deadline.

The body of the Court's order of February 6, 2017 read as follows:

1. If Plaintiff files a motion for Final Judgment of Foreclosure with the office of Foreclosure by June 6, 2017, the within matter shall simultaneously be reinstated.
2. This is a 2012 docket #, which is the subject of several extensions. This is the last extension.
3. If Plaintiff fails to reinstate the action, Plaintiff will be required to file a new lawsuit.

Plaintiff failed to file its motion for final judgment by June 6, 2017.

On June 16, 2017, ten (10) days after the June 6, 2017 deadline, Plaintiff filed its second motion seeking reinstatement of the action and, effectively, an extension of the June 6, 2017 deadline.

Plaintiff's counsel, as provided in its certification in support of Plaintiff's motion for reconsideration, indicates that it did not start the process of requesting judgment figures from its client in order to file their motion for final judgment until on or about February 27, 2017, which is over twenty (20) days from the date the Court entered the February 6, 2017 order. Further, Plaintiff admits that it took over three months from the Court's February 6, 2017 order to complete a final certification of amount due, which was received by Plaintiff's counsel on June 13, 2017, over a week after the Court's June 6, 2017 deadline. This flurry of activity in February through June 2017 contradicts Plaintiff's affirmation regarding the status of file readiness set forth in counsel's prior certifications.

The Court finds that the reasoning set forth in the Court's order of July 17, 2017, as now expanded upon in this opinion, was not based on a palpably incorrect or irrational basis.

R. 4:64-8 which governs dismissal, for lack of prosecution on foreclosure actions, provides as follows:

Except as otherwise provided by rule or court order, when a foreclosure matter has been pending for twelve months without any required action having been taken

therein, the Clerk of the Superior Court shall issue written notice to the parties advising that the matter as to any or all defendants will be dismissed without prejudice 30 days following the date of the notice unless, within said period, proof of service of process has been filed, or an answer or other response by way of motion or acknowledgement has been filed, or an affidavit or certification has been filed with the Clerk of the Superior Court asserting that the failure of filing or taking the next required action is due to exceptional circumstances. If the plaintiff fails to respond as herein prescribed, the court shall enter an order of dismissal without prejudice as to any named party defendant who has not been served or has not answered and shall furnish the plaintiff with a copy thereof. Reinstatement of the matter after dismissal may be permitted only on motion for good cause shown. The court may issue the written notice herein prescribed in any matter pending on the effective date of this rule amendment, and this rule shall then apply.

Rule 1:13-7(a) provides for dismissal of non-foreclosure actions for lack of prosecution and also provides for reinstatement under the good cause standard under certain circumstances. Therefore, the Court will look to case law discussing the good cause standard under that rule in determining whether Plaintiff, in this case, has demonstrated "good cause." Specifically, the Appellate Division in the case of Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007), defined good cause as follows:

"Good cause" is an amorphous term, that is, it "is difficult of precise delineation. Its application requires the exercise of sound discretion in light of the facts and circumstances of the particular case considered in the context of the purposes of the Court Rule being applied." Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232 (App. Div. 2002). Rule 1:13-7(a) is an administrative rule "designed to clear the docket of cases that cannot, for various reasons, be prosecuted to completion." Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263, 267 (App. Div. 1989). Dismissals under the rule are "without prejudice." R. 1:13-7(a). Accordingly, the right to "reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later."

Rivera v. Atl. Coast Rehab. Center, 321 N.J. Super. 340, 346 (App. Div. 1999).

In Ghandi v. Cespedes, the Appellate Division reversed and remanded the trial court's denial of plaintiff's motion to reinstate and held that a plaintiff's motion to restore to the trial calendar under R. 1:13-7(a) had to be viewed with great liberality, absent a finding of fault by the plaintiff and prejudice to the defendant. Id. at 197. The Appellate Division reasoned that the trial judge "found the delay in moving to restore was attributable to certain transgressions of plaintiff's counsel, not the plaintiff themselves concluding that the motion judge mistakenly exercised his discretion in denying the motion." Id. at 197.

Here, the facts before this Court can be distinguished from those in Ghandi v. Cespedes. The delays by the Plaintiff, not its attorney, in the prosecution of this action

are clear from the procedural history of this case and a facile reading "between the lines" of Plaintiff attorney's certifications. More specifically:

1. Plaintiff waited over one (1) year to restore a case that had been dismissed for discovery sanctions and to pay the Court-imposed sanctions.
2. Plaintiff failed to move for a final judgment after prevailing on its motion for summary judgment on October 14, 2015 for over a year, resulting in the case being dismissed for lack of prosecution on November 25, 2016.
3. Six (6) weeks later on January 11, 2017, Plaintiff filed a motion to reinstate the case, indicating in its moving papers that it was "now prepared to file for final judgment upon reinstatement." Despite the Court's grant of this order on February 6, 2017, which clearly indicated, in the Court-ordered instructions, that the motion for final judgment had to be filed not later than June 6, 2017, four (4) months later, the Plaintiff failed to file its motion for final judgment within that deadline.

In conclusion, the Court finds that the fault, primarily of the Plaintiff and not Plaintiff's counsel, in not diligently prosecuting this action is pervasive throughout the record. Plaintiff's argument that the mis-calendaring of the deadline provided in the Court's order of February 6, 2017 by ten (10) days is excusable under the good cause standard would have this Court ignore all the other delays fostered by the Plaintiff in its actions or inactions in this five (5) year old case.

The Court, implicit in the Rules for dismissal for lack of prosecution by a plaintiff, has the power to find, under the facts presented, that good cause does not exist to reinstate the complaint. Without such discretion imparted to the Court, the good cause standard would be meaningless. Plaintiff's additional argument that the Defendant has shown no prejudice, if the complaint was reinstated again, avoids the Court's role in ensuring that cases placed on the Court's docket are diligently prosecuted under its Rules.³

³ See also R. 4:37-2 (a) which states in pertinent part:

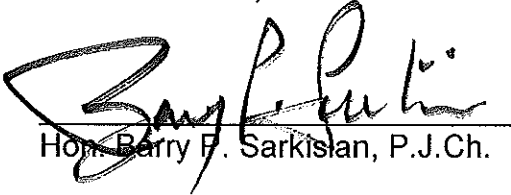
Failure of the plaintiff ... to comply with these rules or any order of court, the court in its discretion may on defendant's motion dismiss an action or any claim against the defendant. Such a dismissal shall be without prejudice unless otherwise specified in the order.

Even without a court rule, which imparts the authority, herein invoked by the Court under Rule 4:64-8, it is firm in our jurisprudence that a "court may proceed, in the absence of [a] rule, in any manner compatible with purposes of securing a just determination, simplicity in procedure, fairness in administration and elimination upon justifiable expense and delay." Audubon Volunteer Fire v. Church Const. Co., 206 N.J. Super. 405, 407 (App.Div.1986) (citing R. 1:1-2); See also Rabboh v. Lamattina, 312 N.J. Super. 487, 493, certif. denied, 160 N.J. 88, 733 A.2d 493 (1999).

Conclusion

For the aforementioned reasons, Plaintiff's motion for reconsideration of the Court's July 17, 2017 order is hereby denied, without prejudice to Plaintiff filing a new foreclosure complaint within ninety (90) days of the order accompanying this decision.

SO ORDERED,



Hon. Barry F. Sarkisian, P.J.Ch.