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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-0105-16T4

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE
FOR HOLDERS OF THE GSAA
HOME EQUITY TRUST 2007-5
ASSET-BACKED CERTIFICATES
SERIES 2007-5,

Plaintiff-Respondent,

v.

ALICIA M. GUERRERO and MR. GUERRERO,
husband of Alicia M. Guerrero,

Defendants/Third-Party
Plaintiffs-Appellants,

v.

NATIONSTAR MORTGAGE and BANK OF
AMERICA, N.A., f/k/a Countrywide
Home Loans,

Third-Party Defendants/
Respondents.

Submitted December 5, 2017 – Decided December 27, 2017

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
F-014589-14.

Law Offices of Joseph A. Chang, attorneys for Alicia M. Guerrero and Julian Guerrero (Joseph A. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

Winston & Strawn, LLP, attorneys for Deutsche Bank National Trust Company, Bank of America and Nationstar Mortgage (Heather E. Saydah, on the brief).

PER CURIAM

Defendants Alicia and Julian Guerrero¹ appeal from a July 31, 2015 Chancery Division order granting summary judgment in favor of plaintiff Deutsche Bank National Trust Company (Deutsche Bank) and third-party defendant Bank of America (BOA). On appeal, defendants challenge the motion court's rejection of their claim that they were the victims of predatory lending, in violation of the New Jersey Consumer Fraud Act (CFA). We affirm.

I

In 2003, defendants purchased a home on 70th Street in Guttenburg. In 2006, they contacted Countrywide Home Loans (Countrywide), n/k/a BOA, regarding their possible purchase of another home on 71st Street in Guttenburg. Countrywide advised defendants not to sell the 70th Street home, but to refinance the

¹ For ease of reference, we refer to Alicia and Julian Guerrero collectively as defendants; when referring to them as individuals, we use Ms. Guerrero and Mr. Guerrero.

loan on that home and use the proceeds as a down payment to purchase the 71st Street home.

In 2007, Ms. Guerrero executed a purchase money mortgage in favor of Countrywide for \$639,000 to purchase the 71st Street home. Ms. Guerrero signed documents acknowledging her understanding of the terms of the loan.

Ms. Guerrero alleges in her complaint that Countrywide subsequently informed her she "would get a high rate of interest[,] . . . the loan had an adjustable interest rate and it was an interest only loan." However, she stated during her deposition that the interest rate she received – 6.875% – was the only interest rate quoted, and she questioned it because she thought it was too high. Ms. Guerrero further contends Countrywide told her she would be able to refinance the loan after one year, which would lower the payment and switch to a fixed interest rate. However, Ms. Guerrero failed to apply for refinancing after one year. She did attempt a modification after two or three years.

Ms. Guerrero signed the loan documents in her own name. At the time Countrywide issued the loan, Ms. Guerrero earned approximately \$30,000 per year. The 71st Street home contained three separate units; the unit in which the Guerreros lived, plus two rental units. Ms. Guerrero believed at the time she bought the home and took out the loan, she would be able to make the loan

payments using the rental income. Ms. Guerrero also expected her husband to help with the loan payments.

Defendants made the loan payments initially, but struggled when the recession hit, and defaulted in January 2011. Ms. Guerrero stated she stopped making the payments because of the recession, a resulting loss of rental income, and a reduction in her work hours.

In 2014, Deutsche Bank received an assignment of the mortgage and then filed a foreclosure complaint. Defendants filed an answer, asserting the CFA violation as a defense against the Deutsche Bank foreclosure action. Defendants also filed a third-party complaint against BOA, Countrywide's successor, alleging a violation of the CFA. The Chancery Division rejected the CFA claims and granted summary judgment to both BOA and Deutsche Bank.

II

Summary judgment must be granted if the court determines "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor

of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). "[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)).

Our analysis begins by determining whether there are any material facts in dispute within the record. The determination of a fact's materiality necessarily involves examining the nature of the underlying CFA claim itself. The CFA authorizes a suit by "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act" N.J.S.A. 56:8-19. Thus, "[t]o prevail on a CFA claim, a plaintiff must establish three elements: '1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss.'" Zaman v. Felton, 219 N.J. 199, 222 (2014) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)).

The CFA defines an "unlawful practice" as "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment,

suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate" N.J.S.A. 56:8-2. An "unconscionable commercial practice" suggests a standard of conduct lacking in "good faith, honesty in fact and observance of fair dealing." Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994) (quoting Kugler v. Romain, 58 N.J. 522, 544 (1971)). "Advertisement" is defined as "the attempt . . . to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan." N.J.S.A. 56:8-1(a).

Predatory lending may constitute an unconscionable commercial practice under the CFA. See Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 267, 278-80 (App. Div. 2001).

Predatory lending is:

a mismatch between the needs and capacity of the borrower In essence, the loan does not fit the borrower, either because the borrower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan.

[Nowosleska v. Steele, 400 N.J. Super. 297, 305 (App. Div. 2008) (quoting Troup, 343 N.J. Super. at 267).]

Defendants argue that extending a \$639,000 loan to a person earning \$30,000 per year constitutes unconscionable conduct on its face. However, defendants admit the 71st Street property contains three units in total, with two units to be rented to pay the loan. In addition, defendants were able to make the payments for the first four years before defaulting due to the recession.

BOA's actions were not unconscionable, nor did they constitute predatory lending. BOA disclosed all loan terms to Ms. Guerrero, and Ms. Guerrero was aware of the monthly loan payment and believed she could afford it using rental income. Furthermore, there was no mismatch between the needs and capacity of the borrower because defendants were able to make the loan payments using the rental income for four years. The only possible unconscionable behavior would be the alleged false promise to refinance after one year; however, Ms. Guerrero failed to attempt to refinance after one year. Therefore, defendants failed to prove unlawful conduct in satisfaction of the first element of the CFA.

Defendants also argue BOA engaged in the predatory lending practice of equity stripping. Equity stripping involves "lending based on the value of the asset securing the loan rather than a borrower's ability to repay" Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000). The lender

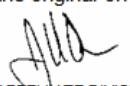
profits through obtaining the property when the borrower defaults rather than through loan payments. Id. at 20-21. Here, although BOA encouraged defendants to use the equity in the 70th Street home to purchase the 71st Street home, defendants were able to use the rental income from the 71st Street home to make the loan payments. Therefore, BOA loaned defendants the money for the 71st Street home based on expected rental income, not based on the equity in that home.

Even if BOA's conduct was unlawful under the CFA, that conduct did not cause defendants' default. Defendants made the loan payments for the first four years and testified that the reason for the default was the economic recession and resulting loss of rental income, not the terms of the loans. Therefore, defendants fail to meet the third element of the CFA as well.

Ms. Guerrero was aware of the terms of the loan, believed she could make the loan payments, and successfully made the loan payments for four years before defaulting. These facts support the trial court's conclusion that defendants failed to prove the first element of the CFA. Accordingly, the motion court correctly entered summary judgment.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION