SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0456-16T3

JP MORGAN CHASE BANK,
NATIONAL ASSOCIATION,

Plaintiff-Respondent,

v.

MAGDY F. ANISE,

Defendant-Appellant,

and

LAURA L. ANISE and STATE OF
NEW JERSEY,

Defendants.

Submitted October 4, 2017 – Decided December 21, 2017

Before Judges Koblitz and Suter.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-021743-14.

Magdy F. Anise, appellant pro se.

Buckley Madole, PC, attorneys for respondent (Richard P. Haber and Evan Sampson, on the brief).

PER CURIAM

Defendant Magdy F. Anise appeals the August 19, 2016 order, denying his motion to vacate an order that reinstated a foreclosure complaint regarding certain residential real estate. We affirm.

In June 2007, defendant executed a $2.6 million dollar note with Washington Mutual Bank, F.A. (WAMU) on a residential property in Sea Bright. He and his wife[1] signed a mortgage with WAMU that then was recorded. Defendant defaulted on the note in January 2012. In 2013, the note and mortgage were assigned to plaintiff J.P. Morgan Chase Bank, N.A. (plaintiff).

Plaintiff filed a foreclosure complaint on May 30, 2014. The complaint alleged that a notice of intention (NOI) to foreclose was sent to defendant at the Sea Bright address thirty days before filing the complaint. The complaint was served by publication following an unsuccessful search for defendant's current address. Defendant did not answer it, and a default was entered. Shortly after in December 2015, the complaint was dismissed without prejudice under Rule 4:64-8 for lack of prosecution.

Plaintiff sought to reinstate the complaint, serving the reinstatement motion by regular and certified mail to defendant's address in Sea Bright. The motion was unopposed. On March 18, 2016 (March 18 order), the complaint was reinstated "for the

[1] She is no longer a party.

reasons set forth in the moving papers." Thereafter, on July 19, 2016, plaintiff obtained a final foreclosure judgment and a writ of execution.

Shortly after, defendant filed a motion to vacate the March 18 order, claiming he learned about the foreclosure when he retained an attorney to handle the sale of the property. Defendant acknowledged being "delinquent" in payments. He claimed the property was "uninhabitable due to Super Storm Sandy" and that since November 2012, plaintiff was aware he could not live at the residence and mailed his statements to his post office box address. Defendant denied receiving notice of plaintiff's intent to foreclose or the foreclosure complaint. In response, plaintiff's certification included a skip trace showing its efforts to locate defendant's address.

Following oral argument, the court's August 19, 2016 order (August 19 order) denied defendant's motion to vacate. The court found that defendant did not notify plaintiff of the change in address to Aberdeen and reviewed plaintiff's efforts to locate defendant. These included making two separate post office inquiries. A skip trace located an address in Jersey City but the first address was a vacant business and the second was a bank. There were multiple unsuccessful attempts to serve defendant at

an address in Aberdeen. The Tax Collector in Sea Bright did not have a current address for the tax bills. The court found that personal service could not be accomplished, concluding that service by publication was proper and that it was "proper" to vacate the order that dismissed the case for lack of prosecution. The court denied defendant's motion to vacate the March 18 order.

Defendant appeals only the August 19 order. He contends the court erred in entering the August 19 order because Rule 1:5-1(a) required plaintiff to have personally served him with the motion to reinstate, the court did not provide reasons for the order contrary to Rule 1:7-4(a), and it did not rule on his claim that he did not receive a NOI.

We review the trial court's order, denying defendant's motion to vacate the order that reinstated the foreclosure complaint, under an abuse of discretion standard. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). There was no abuse of discretion here.

Citing to Rule 1:5-1(a), defendant contends that plaintiff's motion to reinstate the complaint should have been served on him personally because he was in default. This motion, filed in February 2016, was served by regular and certified mail at the address of the property under foreclosure. Defendant did not respond. The March 18 order reinstated the complaint.

Defendant waived any ability to challenge service of this motion because he did not appeal the March 18 order. Defendant's notice of appeal only referenced the August 19 order. See W.H. Industries, Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review.").

In any event, defendant misreads Rule 1:5-1(a). That Rule provides in part,

> [i]n all civil actions, . . . written motions (not made ex parte) . . . shall be served upon all attorneys of record and upon parties appearing pro se; but no service need be made on parties who have failed to appear except that pleadings asserting new or additional claims for relief against such parties in default shall be served upon them in the manner provided for service of original process.

Reinstatement of the same complaint after dismissal for lack of prosecution is not a new claim. "A dismissal without prejudice

is not an adjudication on the merits and does not bar reinstitution of the same claim in a later action." Consultants v. Chemical & Pollution SCIS, Inc., 105 N.J. 464, 472 (1987) (citing Malhame v. Borough of Demarest, 174 N.J. Super. 28, 30-31 (App. Div. 1980)). Therefore, as a party in default, there was no requirement under the cited Rule to serve defendant in the same manner as original process.

Defendant is incorrect that the court failed to comply with Rule 1:7-4. In entering the August 19 order, the court's findings that plaintiff made diligent inquiry to locate defendant before serving the complaint by publication, that the foreclosure judgment had been entered and that there was no basis to vacate it, satisfied Rule 1:7-4.

Although we have no necessity to address the same argument regarding the March 18 order because defendant did not appeal it, the findings there also conformed with the Rule. The March 18 order was granted "for the reasons set forth in the moving papers." Even though the motion was unopposed and was interlocutory, "the clearly better practice [under Rule 1:7-4] is for the court to make its own statement[.]" Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2018). "The court should, however, make the fact of such reliance explicit, and its failure

to do so is tantamount to making no findings at all." Pressler & Verniero, cmt. 1 on R. 1:7-4 (citing Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 301 (App. Div. 2009)). Here, the March 18 order explicitly relied on the reasons in the unopposed motion. None of the facts was disputed.

Lastly, there is no merit to defendant's contention that the court should have considered his argument that he was not served with the NOI. The final foreclosure judgment has been entered and is not appealed. By not contesting the foreclosure, he waived this claim.

Affirmed.