

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
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-0507-15T1

U.S. BANK NATIONAL
ASSOCIATION as Trustee
for CSAB 2006-4,

Plaintiff-Respondent,

v.

ANSELMO FERREIRA,

Defendant-Appellant.

Submitted February 1, 2017 – Decided August 3, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Chancery Division, Essex County,
Docket No. F-28576-09.

Anselmo Ferreira, appellant pro se.

Reed Smith, LLP, attorneys for respondent
(Henry F. Reichner, on the brief).

PER CURIAM

In this residential foreclosure action, defendant Anselmo
Ferreira appeals from the August 21, 2015 Chancery Division order

denying his motion to vacate a sheriff's sale pursuant to Rule
4:65-5. We affirm.

The essential facts are largely undisputed and easily summarized. On September 13, 2006, defendant executed a note and non-purchase money mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for U.S. Mortgage Corporation of New Jersey, its successors and assigns, in the sum of \$412,000 encumbering residential property located on Delancy Street in Newark. On May 26, 2009, MERS assigned the mortgage to plaintiff, U.S. Bank National Association, as Trustee for CSAB 2006-4.

Defendant admits that he defaulted on his mortgage loan in 2009. Plaintiff initiated foreclosure proceedings on May 29, 2009, by filing a foreclosure complaint, and default judgment was entered on October 26, 2010. Defendant admitted that beginning in 2010, he submitted multiple loan modification applications to plaintiff's servicer, all of which were denied. A final judgment was entered on February 18, 2014.¹ In March 2014, defendant

¹ The delay was apparently occasioned by the necessity for plaintiff to comply with the New Jersey Fair Foreclosure Act's requirement that a Notice of Intention to Foreclose set forth the name and address of the lender, N.J.S.A. 2A:50-56, as prescribed in U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449 (2012).

tendered a settlement offer to plaintiff in the amount of \$240,000, which was rejected.

Between June 2014 and March 2015, sheriff's sales were scheduled and adjourned eight times by plaintiff to allow loss mitigation review of defendant's additional loan modification application. On November 28, 2014, defendant's June 2, 2014 loan modification application was denied. On December 9, 2014, defendant filed a formal appeal from the November 28, 2014 denial, which was also denied. Ultimately, on March 3, 2015, a Sheriff's sale was conducted and plaintiff was the successful bidder.

On May 4, 2015, defendant filed a motion to vacate the Sheriff's sale. Defendant argued that he was not notified before the sale that his appeal of the denial of his latest loan modification application had been denied. According to defendant, plaintiff thereby violated rules and regulations promulgated by the Consumer Financial Protection Bureau (CFPB) pursuant to the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§2601-2617. Defendant asserts that the CFPB rules impose a stay on any sale before he is notified of a final decision on his appeal.

In denying the motion, the trial court first determined that the motion was untimely because the sale occurred on March 3, 2015, and defendant's motion was filed two months later on May 4, 2015. Referencing Rule 4:65-5, the court noted that the motion

should have been filed ten days after the sale or before delivery of the conveyance.

The court also addressed defendant's claim substantively and, relying on Guillaume, supra, determined that defendant's multiple applications for modification did not halt the foreclosure process, particularly in the absence of any evidence of bad faith on the part of plaintiff in reviewing defendant's applications while repeatedly postponing the sale to accommodate such review. The court found no "factual or legal basis" to vacate the sale, noting that "[t]here's nothing remotely addressing an issue of fraud, accident, surprise, mistake or irregularity[.]"² In addition, the court pointed out that the mortgage had been in default for six years with "no demonstration [by defendant] of an ability to redeem[.]" The court entered a memorializing order on August 21, 2015, and this appeal followed.

On appeal, defendant argues that "[his] home should have never been sold while the loan modification application was still in process." Defendant asserts that by proceeding to sheriff's sale while his loan modification appeal was pending, plaintiff

² The court also rejected defendant's challenge to plaintiff's standing, finding that plaintiff's receipt of the assignment prior to the filing of the complaint conferred standing. See Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012).

violated equitable principles and the RESPA servicing rules promulgated by the CFPB.

"[F]oreclosure proceedings seek primary or principal relief which is equitable in nature[.]" U.S. v. Scurry, 193 N.J. 492, 502 (2008). "[A]n application to open, vacate or otherwise set aside a foreclosure judgment or proceedings subsequent thereto is subject to an abuse of discretion standard." Ibid. (citing Wiktorowicz v. Stesko, 134 N.J. Eq. 383, 386 (E. & A. 1944)). Accordingly, a trial judge's application or denial of equitable remedies should not be disturbed "unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999) (citing State v. Thompson, 59 N.J. 396 (1971)).

A motion to vacate a sheriff's sale is governed by Rule 4:65-5, which states that any objection to the sale must be served within the ten days following the sale or before delivery of the deed, whichever is later. "Examples of valid grounds for objection include fraud, accident, surprise, irregularity, or impropriety in the sheriff's sale." Brookshire Equities v. Montaguiza, 346 N.J. Super. 310, 317 (App. Div.) (citing Orange Land Co. v. Bender, 96 N.J. Super. 158, 164 (App. Div. 1967)), certif. denied, 172 N.J. 179 (2002).

Under Rule 4:65-5, the trial court retains discretion to set aside a sale if the defendant alleges a valid "independent ground for equitable relief." Crane v. Bielski, 15 N.J. 342, 346 (1954) (citing Karel v. Davis, 122 N.J. Eq. 526 (E. & A. 1937)). "Quite independent of statute or rule of court, the Court of Chancery has inherent power to order a sale of mortgaged premises and to control its process directed to that end, and this inherent power of the court has never been doubted." Id. at 346 (citing Fed. Title & Mortg. Guarantee Co. v. Lowenstein, 113 N.J. Eq. 200 (Ch. 1933)).

"[O]ur courts will set aside a sheriff's sale for fraud, accident, surprise, or mistake, irregularities in the conduct of the sale, or for other equitable considerations[.]" First Trust Nat. Ass'n v. Merola, 319 N.J. Super. 44, 50 (App. Div. 1999) (citing Karel, supra, 122 N.J. Eq. at 528). Therefore, a valid objection alleging one of these equitable bases will not be barred by the timing restriction of Rule 4:65-5, Union Cnty. Sav. Bank v. Johnson, 210 N.J. Super. 589, 598 (Ch. Div. 1986) (citing Mutual Life Ins. Co. v. Goddard, 33 N.J. Eq. 482 (Ch. 1881)), or by the doctrine of laches, id. at 600. However, despite the court's broad discretion to employ equitable remedies, this power should be "sparingly exercised" and "a sale so conducted shall be vacated only when necessary to correct a plain injustice." First Trust,

supra, 319 N.J. Super. at 52 (quoting Karel, supra, 122 N.J. Eq. at 529).

Applying these principles, we discern no abuse of discretion in the court's denial of defendant's motion and no "plain injustice" in need of correction. Defendant argues that plaintiff violated CFPB rules and regulations promulgated pursuant to RESPA by conducting the sale while his loan modification appeal was pending. Despite plaintiff's assertion to the contrary, defendant insists that he was never notified that his appeal was denied. We reject defendant's contention.

RESPA was enacted by Congress to protect consumers from abusive practices in the real estate settlement process. 12 U.S.C. §2601(a). The CFPB was authorized to prescribe rules and regulations in furtherance of RESPA's goals. 12 U.S.C. §2617(a). Here, defendant invokes violations of provisions of one such rule. Under 12 C.F.R. §1024.41(g), "[i]f a borrower submits a complete loss mitigation application" after the foreclosure process has begun "but more than [thirty-seven] days before a foreclosure sale, a servicer shall not . . . conduct a foreclosure sale, unless:"

[t]he servicer has sent the borrower a notice . . . that the borrower is not eligible for any loss mitigation option and the appeal process . . . is not applicable, the borrower has not requested an appeal within the

applicable time period for requesting an appeal, or the borrower's appeal has been denied[.]

[12 C.F.R. §1024.41(g)(1).]

Under 12 C.F.R. §1024.41(i),

[a] servicer must comply with [these procedural] requirements . . . for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements . . . for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application.

The CFPB's final rule and official interpretations regarding the loss mitigation regulations provide relevant insight to the prohibition against multiple applications:

The Bureau believes that it is appropriate to limit the requirements in §1024.41 to a review of a single complete loss mitigation application. Specifically, the Bureau believes that a limitation on the loss mitigation procedures to a single complete loss mitigation application provides appropriate incentives for borrowers to submit all appropriate information in the application and allows servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options.

[Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) 78 Fed. Reg. 10696, 10836 (February 14, 2013).]

Borrowers have a private right of action to enforce the procedural requirements set forth in 12 C.F.R. § 1024.41. However, violations of § 1024.41 are enforced under RESPA, 12 U.S.C. § 2605(f)(1)(A), which authorizes monetary damages only.


Here, defendant acknowledged that he "submitted multiple modification applications" since his 2009 default, all of which were denied. He invokes CFPB rule violations in connection with his latest loan modification appeal. However, regardless of whether or not he was notified that his appeal was denied prior to the sale, the procedural requirements of 12 C.F.R. §1024.41 only apply to a review of a single complete loss mitigation application. Therefore, defendant's latest application was not entitled to the protections of 12 C.F.R. §1024.41(g) pursuant to 12 C.F.R. §1024.41(i). Moreover, defendant's sole recourse for a violation of 12 C.F.R. §1024.41 is monetary damages, not equitable relief.

As we have observed elsewhere, "[i]n foreclosure matters, equity must be applied to plaintiffs as well as defendants." Angeles, supra, 428 N.J. Super. at 320. This mortgage loan went into default in 2009, three years after inception. The sheriff's sale did not occur until six years later. Under these circumstances, we cannot find that the trial court abused its discretion in denying defendant's motion, made two months after

the sheriff's sale. See Omer v. Liu, 419 N.J. Super. 431, 437-38
(App. Div.), certif. denied, 208 N.J. 369 (2011).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION