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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-0891-15T1¹
A-2989-15T3

CUSTOMERS BANK,

Plaintiff-Respondent,

v.

JOSEPH PACITTI, PENNSYLVANIA
AVENUE LAND DEVELOPMENT, LP,
PRA WALLINGFORD, LLC, O.E.
ORANGE, LP, O.E., LP,
FRONT STREET DEVELOPMENT
ASSOCIATES, LP,

Defendants-Appellants.

Argued March 21, 2017 – Decided October 12, 2017

Before Judges Messano, Suter and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County, Docket
No. L-3985-10.

Daniel D. Haggerty argued the cause for
appellants (Kang Haggerty & Fetbroyt LLC,
attorneys; Mr. Haggerty and Jason E. Powell,
on the briefs).

Thomas B. O'Connell argued the cause for
respondent (Saldutti Law Group, attorneys; Mr.

¹ These are back-to-back appeals consolidated for the purpose of
this opinion.

O'Connell and Robert T. Lieber, Jr., of
counsel and on the briefs).

The opinion of the court was delivered by
SUTER, J.A.D.

In appeal A-0891-15, defendants Joseph Pacitti, Pennsylvania Avenue Land Development; PRA Wallingford, LLC; O.E. Orange, LP; O.E., LP; Front Street Development Associates, LP (defendants) appeal the September 14, 2015 order that denied their motion to enforce litigants rights and for other relief. In appeal A-2989-15, defendants appeal the February 10, 2016 order² that determined the "total amount outstanding, due and owing" by defendants to Customers Bank (plaintiff) based on a 2010 docketed judgment and ordered other relief in aid of execution of the judgment. We dismiss A-0891-15 because the September 14, 2015 order was interlocutory and defendants did not request leave to appeal. See R. 2:5-6(a). In A-2989-15, we affirm in part, reverse in part and remand for proceedings consistent with this opinion. We determine herein that plaintiff and defendants are collaterally estopped from contesting the fair market value credit that was included in the Connecticut deficiency judgment, which credit applies to the amount due and owing on the 2010 judgment.

² This order was amended on March 15, 2016 to correct a computation error. Defendants amended their notice of appeal to include the March 15th order.

I.

A. The New Jersey Judgment

In 2006, defendant Pennsylvania Avenue Land Development, LP (PALD) executed a promissory note for \$4,500,000 to Interstate Net Bank (Interstate). The loan was secured by a commercial security agreement and UCC financing statement executed by PALD as well as a note and mortgage on a parcel of property in Pennsylvania. Under the note, PALD agreed to repay any and all amounts "expended or advanced by lender relating to any collateral securing the note." The other defendants, including defendant Joseph Pacitti (Pacitti), who was a general partner of PALD, executed commercial guarantees where they "unconditional[ly] guarantee[d]" to pay Interstate if PALD defaulted. Under that agreement, the collateral that had secured the note was replaced. In 2008, the loan was modified and reduced to \$1,500,000 through a change in terms agreement. As of May 2009, the loan was secured by a mortgage on real property located at 1181 Barnes Road in Wallingford, Connecticut (the Connecticut Property) owned by defendant PRA Wallingford, LLC (PRA). Pacitti signed the note and mortgage as PRA Wallingford's authorized member.

PALD defaulted on the note, and in 2010, Interstate filed suit against defendants in the Camden County Superior Court, Law Division, seeking a monetary judgment. On November 4, 2010, a

default judgment in the amount of \$1,540,867.53 was entered against Pacitti and most of the other defendants³ and a writ of execution issued shortly thereafter. That judgment was docketed in January 2012. It has been reduced by two turnover orders, one in 2011 for \$2965.98 and another in 2014 for \$13,781.42.

B. The Connecticut Foreclosure

In May 2011, plaintiff⁴ filed a foreclosure complaint in the Superior Court of Connecticut, Judicial District of New Haven at Meridian requesting to foreclose on the Connecticut property. It requested a judgment of strict foreclosure and a deficiency judgment, including attorney's fees and other costs. Pacitti does not dispute that he was served with this foreclosure complaint and that no answer was filed. Defendants were defaulted in the Connecticut action.

Plaintiff obtained an appraisal of the fair market value of the Connecticut property, which as of January 31, 2013, was

³ A judgment against defendant Front Street Development Associates, LP was entered on February 23, 2011 in the amount of \$1,567,426.12.

⁴ Customers Bank is the successor in interest to Interstate having been transferred the note and mortgage by the FDIC as receiver of Interstate. Customers Bank assigned its interest in the note and mortgage to Devon Service Connecticut, LLC in June 2012. Although Customers received permission by the trial court to substitute Devon as plaintiff, these appeals remain captioned in the name of Customers Bank. Because the parties did not distinguish the two, we simply refer to both as plaintiff.

\$1,175,000. The appraisal specifically noted that it assumed "environmental compliance" on "the date of valuation" for the property in "as in" condition. An order of strict foreclosure was entered on June 20, 2013, which set forth defendants "debt" as \$2,119,292.70 and included other fees. This showed the fair market value of the property to be \$1,175,000.

Plaintiff next filed a motion against defendants requesting the entry of a deficiency judgment in the Connecticut action. Plaintiff's application relied on the appraisal of the property, reflecting a fair market value of \$1,175,000. The fair market value set forth in the plaintiff's appraisal was credited against the defendants' debt.⁵ The deficiency judgment was entered on October 2, 2013, in the amount of \$1,086,645.36, which reflected a credit for the property's \$1,175,000 fair market value. The deficiency judgment also included interest at the contract rate, interest at the default rate, real estate taxes, late charges, miscellaneous charges, and appraisal and environmental fees.

C. Proceedings in New Jersey

From then through early 2014, plaintiff sought enforcement of the New Jersey judgment, successfully levying an additional

⁵ The "debt" started with the amount of the docketed judgment in New Jersey less the \$2965.98 levy which already had occurred.

\$13,781.42. Plaintiff issued information subpoenas, deposition notices, and obtained an ex parte order requiring Pacitti to appear for a deposition with his financial records.⁶ In 2015, in response to plaintiff's motion to compel Pacitti's deposition, Pacitti cross-moved to vacate the New Jersey judgment, requested reconsideration of the deposition order and asked for a hearing on the fair market value credit for the Connecticut property. On April 28, 2015, the trial court ordered depositions and otherwise denied defendants' requests to stay discovery regarding Pacitti's assets. The court denied without prejudice the request to vacate the judgment or to conduct a fair market value hearing. It directed plaintiff to "provide an accurate accounting of monies due."⁷

Plaintiff followed up by sending the court a "breakdown of damages," enclosing the "final proposed calculation of deficiency" that was filed in Connecticut. This detailed the deficiency judgment in Connecticut for a "proposed total deficiency" as of October 2, 2013, of \$1,086,645.36, then added an additional \$175,073 for "note interest" for a total of \$1,261,718.36 accruing at the per diem amount of \$301.85.

⁶ Plaintiff requested to record the Connecticut deficiency judgment as a foreign judgment under N.J.S.A. 2A:49A-25.

⁷ The trial court also granted plaintiff's request to amend the caption to substitute Devon Service LLC as plaintiff in the Law Division action.

D. The September 14, 2015 Order

The parties returned to court on defendants' motion to enforce litigant rights shortly thereafter. Defendants contended the plaintiff's accounting was not accurate, that plaintiff made a submission to the IRS, reporting the amount of the outstanding debt was \$342,142, which should be binding on plaintiff, and defendants renewed their request for a fair market value hearing. Plaintiff requested sanctions for non-compliance with discovery.

The trial court issued an order dated September 14, 2015 that denied much of the requested relief. The request for a fair market value hearing was denied because of the proceedings that occurred in Connecticut where there was "extensive" consideration given "to the establishment of a value" and defendant "was noticed of that proceeding." Because defendant "overlooked th[e] opportunity" to challenge the appraisal, he was foreclosed from doing so now. The trial court rejected defendants' argument that plaintiff should be bound by its representation to the IRS because reporting was "evidentiary but . . . not conclusive." The court determined that the \$1,540,867.53 New Jersey judgment was the controlling judgment and from that figure the court would deduct the amount of the turnover orders. The judge left as an open question what deduction was appropriate for the fair market credit and whether there were "any other costs that the bank could claim that were not determined

at the time of the judgment in 2010." The court would not stay discovery. Defendants have appealed this order under A-0891-15.

E. The February 20, and March 15, 2016 Orders

The parties returned to court in November 2015 because plaintiff requested an order to appoint a rent receiver, to sell a property owned by Pacitti in Wildwood, and for a charging order. The trial court heard oral argument on November 6, 2015, but adjourned the matters because it first wanted "a finite number" presumably referencing the outstanding issue about the fair market value credit.

When the parties returned, defendants were requesting a fair market credit of at least \$1,175,000 or higher; plaintiff was requesting a credit of only \$470,000, reflecting the amount it obtained from the actual sale of the Connecticut property. In its March 15, 2016 order, the trial court found the amount due and owing on the 2010 judgment was \$1,199,556.09, taking into consideration the original amount of the judgment, the two levies and a fair market value credit of \$470,000 which represented the proceeds from the February 26, 2015 sale of the Connecticut property. The court used the \$470,000 figure, because this is "what a willing buyer and willing seller would buy and sell a property at arms length agreement." Also included were \$119,234.03 in fees and costs incurred by plaintiff in obtaining the

foreclosure judgment, but this figure excluded contractual interest or late fees. The amount due and owing also included \$26,192.93 in statutory post-judgment interest on the principal amount of the judgment as of December 4, 2015. The court ordered the sale of the Wildwood property and denied plaintiff's requests for a receiver or a rent receiver. Plaintiff withdrew its request for a charging order. Defendants appeal this order under A-2989-15.

II.

In A-0891-15, defendants contend they are entitled to a fair market credit for the Connecticut property as of the time plaintiff recovered it in foreclosure, that plaintiff should be estopped from obtaining any value other than its appraised value of \$1,175,000, that plaintiff should be bound to the amount of the New Jersey judgment, that defendants' rights as litigants have been violated, and that execution should be stayed until the fair market value credit is determined.

In A-2989-15, defendants contend the trial court erred in the manner it determined fair market value because they were entitled to a credit on the value of the property as of June 20, 2013, and that plaintiff should be estopped from claiming a lesser value, that the court's calculation of the amount of the indebtedness is contrary to New Jersey law and should be \$317,142.90, which is the

figure that the plaintiff reported to the IRS. Defendants also contend the court erred in authorizing the sale of Wildwood property.

III.

We begin by dismissing appeal A-0891-15 as interlocutory. That appeal is from the September 14, 2015 order, which was interlocutory in that it did not resolve how much was due and owing on the 2010 judgment, including the fair market credit. Defendants' appeal was filed without having first obtained leave to appeal contrary to Rule 2:5-6(a). See Parker v. City of Trenton, 382 N.J. Super. 454, 458 (App. Div. 2006) (explaining that "if we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and parties will not feel there is a need to seek leave to appeal from interlocutory orders."). To the extent A-0891-15 raises issues about the amount of the judgment, those issues are fully addressed in appeal A-2989-15.

A central issue on appeal is the trial court's determination of the amount due and owing by defendants on the 2010 judgment. Because the trial court's decision was based entirely on the judge's application of legal standards to undisputed facts, our standard of review is de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). We do not owe any deference to the trial court's

legal interpretation or application of a legal standard to undisputed facts. Zabilowicz v. Kelsey, 200 N.J. 507, 512-513 (2009).

The issue about the fair market value credit arose from plaintiff's efforts to enforce the docketed judgment and defendants' efforts to oppose and clarify the amount of the judgment. We pause first to observe what was not before the trial court. The court was not asked to enter a deficiency judgment following foreclosure or to enforce the deficiency judgment from Connecticut. Therefore, we agree with the trial court that the appropriate starting place in its analysis was with the docketed judgment in New Jersey and not the deficiency judgment in Connecticut.

In 2010, a judgment for \$1,540,867.53 was entered in favor of plaintiff against defendants. After it was docketed as a statewide judgment, there were two levies; one for \$2956.98 and another for \$13,781.42. Defendants do not contest that the trial judge was correct in deducting the amount of those levies from this judgment. The trial judge also determined that "statutory post-judgment interest" in the amount of \$26,192.93 was due on the amount of the outstanding judgment as of December 4, 2015. Defendants do not dispute that finding or calculation.

At the core of these appeals is whether defendants were entitled to a fair market credit for the property that was foreclosed in Connecticut and if so, the amount of the credit. The trial court applied the actual sale price of the property not its appraised value at the time of the strict foreclosure.

There is a "statutory right to a fair market value credit to be given to certain obligors upon notes whose properties are lost through foreclosure." Resolution Trust Corp. v. Berman Indus., Inc., 271 N.J. Super. 56, 63 (Law Div. 1993); see N.J.S.A. 2A:50-3. However, N.J.S.A. 2A:50-2.3 exempts "proceedings to collect a debt evidenced by a note and secured by a mortgage . . . [w]here the debt secured is for a business or commercial purpose"

We have extended the fair market value credit under principles of general equity to deficiency actions involving commercial transactions where the interests of justice so require. In Citibank, N.A. v. Errico, 251 N.J. Super. 236, 247 (App. Div. 1991), we ordered a hearing to determine the amount of a deficiency judgment following a bank's foreclosure in New Jersey on a mortgage and security agreement arising from a commercial loan. The foreclosure judgment and sale of the commercial property was stayed by the bankruptcy of the co-signers. The bank offered a fair market appraisal of the property in the bankruptcy matter which exceeded the amount the bank was entitled to from the foreclosure

sale based on a consent order. When the property actually sold at auction, the only bid was for less than the consent order. "Errico did not object to the auction price." Id. at 240.

The bank then sued Errico for the deficiency between the auction price and the consent order. Errico moved to dismiss, claiming that under New York law, the fair market value should be based on the bank's appraisal. The bank moved for summary judgment. We held the bank's argument "that there is no entitlement to a fair market value credit in a deficiency action in New Jersey on a note where business or commercial property is involved is not a correct statement of our law." Id. at 246-47. Indeed we found that nothing in N.J.S.A. 2A:50-2.3 "precludes a court from applying equitable principles to impose a fair market value credit [for business or commercial properties] to prevent a windfall or where circumstances require equitable relief in the interests of justice." Id. at 247. "An equity court has the inherent power to prevent a potential double recovery or windfall to a judgment creditor." Ibid. (citing Morsemere Federal Savings & Loan Ass'n v. Nicolau, 206 N.J. Super. 637, 645 (App. Div. 1986)). We held that the same "ability to fashion equitable remedies" existed in the Law Division under our constitution. Ibid. See N.J. Const. art. VI, § 3, ¶ 4. As such, we held that "New Jersey law allows a deficiency hearing to preclude a windfall

under general equitable principles" and we remanded for a hearing. Id. at 248.

Here, the trial judge was not asked to determine a deficiency judgment in a foreclosure case. That issue was resolved in Connecticut and a fair market value credit was given for the defendants' benefit based on an appraisal by the plaintiff bank. There is no question that Pacitti and the other defendants who are involved in this appeal were defendants in the Connecticut foreclosure and the subsequent deficiency action. The plaintiff in Connecticut is the same plaintiff before the trial court here. None of the parties contend that the Connecticut court was without jurisdiction when it granted foreclosure or when it determined the amount of the deficiency judgment. We conclude that both parties are collaterally estopped from challenging the appraisal's fair market value figure.

The benefits of the doctrine of collateral estoppel are "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005) (citing Hackensack v. Winner, 82 N.J. 1, 32-33 (1980)). "If an issue between the parties was fairly litigated and

determined, it should not be relitigated." First Union National Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

Collateral estoppel requires that:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[In re Estate of Dawson, 136 N.J. 1, 20 (1994) (citations omitted).]

All of these elements are present here.

The Connecticut court that entered the deficiency judgment determined the fair market value credit as of the time the property was transferred to plaintiff. The amount of this credit is the identical question raised here. Plaintiff placed the issue of the fair market value credit squarely before the Connecticut court by filing a motion seeking a deficiency judgment.

The defendants had the ability to contest the bank's appraisal in the Connecticut case and did not. In First Union, supra, the Court rejected the argument that an issue was not "actually litigated" where the party seeking preclusion "had ample opportunity to contest the complaint," and "d[id] not claim prejudice as a result of a default judgment." 190 N.J. at 354.

The fair market value credit was essential to determining the amount of the deficiency. The parties in the Connecticut litigation were the same as the parties in the New Jersey litigation. The Connecticut court entered a final judgment finding the fair market value as of August 2013 when the plaintiff's strict foreclosure was granted and the time for redeeming had passed. We are not aware that any party appealed the Connecticut deficiency judgment. Therefore, we agree with the trial court that defendants are not entitled to a fair market value hearing because that issue was resolved in Connecticut.

However, we find error in the trial judge's inconsistent decision that plaintiff was not also bound. Plaintiff relied on the appraisal that it commissioned. Plaintiff was as much a participant in the deficiency proceeding in Connecticut as the defendants. Indeed, the Connecticut court made its determination based on an application brought by plaintiff. Although there is some superficial appeal to the bank's argument that defendants may obtain a windfall if the actual sale price of \$470,000 were not used, the appraisal used by the bank had a clear reservation that the property was not reviewed for environmental issues. Presumably, plaintiff could have waited until it sold the property to ask for the deficiency judgment but chose to proceed based on its appraisal. Thus on the facts of this case, we conclude that

plaintiff and defendants were collaterally estopped from contesting the fair market value credit that was determined by the Connecticut court and that \$1,175,000 is the credit to be used herein.

In determining the amount of the judgment, the trial court included \$119,234.03 in fees and costs incurred by plaintiff in pursuing the foreclosure judgment, excluding contractual interest or late fees.⁸ Defendants dispute the inclusion of these amounts within the amount due and owing on the judgment, claiming the amount of the judgment could not be increased, citing to First Union, supra. We discern no error by the trial court.

In First Union, the Court determined that "to the extent the note and mortgage provide for the same categories of damages, the amount determined in the first action is binding in the subsequent action." 190 N.J. at 344-45. However the Court also added that "[e]xcept for amounts accruing after the first judgment and for different categories of damages, the amount of the judgment entered in each action should be identical." Id. at 345. On this basis we see no error by the trial court's inclusion of additional

⁸ The court determined not to add certain expenses incurred by the bank after they gained ownership of the property or the contract or default interest rates. Plaintiff did not file a cross-appeal and thus has not contested the exclusion of those amounts from the judgment.

amounts incurred by plaintiff in obtaining the collateral through the foreclosure action.⁹

We remand to the trial judge for application of the fair market valuation credit as we have determined to the 2010 judgment, along with the inclusion of \$119,234.03 in fees and costs incurred by plaintiff in pursuing the foreclosure judgment, excluding contractual interest or late fees. A recalculation of the statutory post-judgment interest is also required.

IV.

We briefly address other issues raised in this appeal. Defendants challenge the order granting plaintiff's application to sell the Wildwood property. The sale of real property to satisfy a judgment is permitted "[i]f the debtor's personal property is insufficient or cannot be located." R. 4:59-1(d)(1).

Here, counsel for plaintiff certified that Pacitti "ha[d] not disclosed any goods or chattels subject to execution," that his wife refused entry to execute on any property at the marital home, and that defendant "ha[d] not attempted to satisfy the Judgment since it was entered against him" As we said in Borromeo v. DiFlorio, 409 N.J. Super. 124, 137 (App. Div. 2009) (quoting

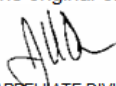
⁹ Defendants have not contested the actual amount of these charges, just the fact of their inclusion. They are precluded from further contesting the amount. See Muto v. Kemper Reinsurance Co., 189 N.J. Super. 417, 420-21 (App. Div. 1983).

In re Mariano, 339 B.R. 344, 350 (Bankr D.N.J. 2006), "the test is not whether all possible measures to locate personalty have been undertaken, but [whether] the judgment creditor exerted 'reasonable efforts' in good faith to locate personal property." We find no error in the order to sell the Wildwood property based on the trial court's finding that reasonable efforts were made to secure defendants' personal property.

After carefully reviewing the record and the applicable legal principles, we conclude that defendants' further arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part; reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION