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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-2675-15T3

BANK OF AMERICA, N.A.,

Plaintiff-Respondent,

v.

DERRICK C. WASHINGTON and
ADIYLAH WASHINGTON,

Defendants-Appellants.

Submitted March 6, 2017 – Decided April 7, 2017

Before Judges Sabatino and Currier.

On appeal from the Superior Court of New
Jersey, Chancery Division, Bergen County,
Docket No. F-44247-14.

Montell Figgins, attorney for appellants.

KML Law Group, P.C., attorneys for respondent
(Jaime R. Ackerman, on the brief).

PER CURIAM

In this residential foreclosure action, defendants Derrick and Adiyilah Washington appeal the June 25, 2015 order striking their counterclaim and the subsequent February 2, 2016 final judgment. After a review of the contentions in light of the applicable legal principles, we affirm.

We discern the following facts and procedural history from the record on appeal. On May 23, 2008, defendants executed a Note to Atlantic Home Loans, Inc. (Atlantic) for \$346,835 and a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) to secure the note.

Atlantic indorsed and transferred the note to Countrywide Bank, FSB; Countrywide was subsequently acquired by plaintiff Bank of America, N.A. On July 11, 2011, MERS assigned the mortgage to BAC Home Loans Servicing, LP (BAC) FKA Countrywide Home Loans Servicing LP. The assignment was recorded on July 21, 2011. BAC was also acquired by plaintiff.

Defendants defaulted on the loan on March 1, 2010. A complaint for foreclosure was filed on October 22, 2014. Defendants filed an answer and counterclaim in December 2014. The counterclaim alleged violations of the Consumer Fraud Act (CFA). N.J.S.A. 56:8-1 to -20.

Plaintiff moved for summary judgment, attaching copies of the note and mortgage as exhibits. On June 26, 2015, defendants' counterclaim was stricken, summary judgment was granted and the matter was referred to the foreclosure unit. In a written statement of reasons, the judge found that the note and mortgage had been assigned to plaintiff prior to the filing of the complaint.

In considering the counterclaim, the judge found that defendants had failed to plead a CFA claim with the required specificity but instead were relying on "vague conclusory statements." The judge stated:

In their brief, Defendants assert that fraud occurred at the origination of the loan, but in their Answer, Defendants allege fraud in Plaintiff's refusal to offer a loan modification or a short sale. Defendants fail to attach any supporting evidence to any of these claims including the loan application listing the borrowers' income, a modification application, a denial letter or any correspondence with Plaintiff. A CFA claim cannot be sustained on mere allegations unsupported by specific facts or evidence.

Final judgment was entered on February 2, 2016.

On appeal, defendants argue that (1) plaintiff lacked standing to foreclose; (2) summary judgment was erroneously granted as defendants were entitled to further discovery; and (3) the counterclaim was improperly dismissed.

In order to have standing, the "party seeking to foreclose a mortgage must own or control the underlying debt." Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011) (quoting Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010)). Standing is conferred by "either possession of the note or an assignment of the mortgage that predated the original complaint." Deutsche Bank Tr. Co. Ams. v. Angeles, 428

N.J. Super. 315, 318 (App. Div. 2012) (citing Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011)). Without ownership or control, a plaintiff cannot "proceed with the foreclosure action and the complaint must be dismissed." Wells Fargo Bank, supra, 418 N.J. Super. at 597 (quoting Bank of N.Y., supra, 418 N.J. Super. at 357-59).

Here, we are satisfied that plaintiff established a prima facie case for foreclosure. Plaintiff clearly demonstrated its standing to foreclose on the property based on the assignment of the mortgage from BAC, which predated the October 22, 2014 filing of the foreclosure complaint. Upon that assignment and underlying transfer of possession, plaintiff became the holder of the instrument. In addition, plaintiff provided a copy of the note and mortgage as exhibits in its summary judgment motion. Defendants argue plaintiff cannot substantiate its possession of the note but provide no documentary evidence in support of their argument.

Defendants also contend in this appeal that the originator of the loan violated the CFA by misrepresenting that the home was a four-bedroom residence, and that this erroneous appraisal led to an enhanced home value requiring defendants to procure a higher loan amount. They further assert that plaintiff violated the CFA in its misrepresentation that defendants had to be in arrears on

their mortgage payments for three months in order to qualify for review for a loan modification.

To state a claim under the CFA, a private litigant must allege specific facts that, if proven, would establish the following: "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss." Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div.) (quoting N.J. Citizen Action v. Schering-Plough, Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)), certif. denied, 185 N.J. 265 (2005).

In addressing defendants' contentions regarding the appraisal, these are allegations lodged against plaintiff's predecessor. In O'Loughlin v. National Community Bank, 338 N.J. Super. 592, 606 (App. Div. 2001), we considered, and rejected, the issue of assignee liability in this context. As in O'Loughlin, defendants do not assert any conduct on the part of plaintiff that violated the CFA regarding the appraisal of the property that took place prior to the assignment of the mortgage and note. Defendants have not presented any factual assertions in their counterclaim that plaintiff was involved in any fraudulent conduct regarding the original appraisal of their property. It is not alleged that plaintiff was a party to that allegedly fraudulent conduct, and

therefore, a violation of the CFA by plaintiff cannot be supported on those grounds. We do not address whether defendants would have a viable cause of action against other parties, under the CFA or otherwise, stemming from the original appraisal.

The counterclaim also alleged, as a breach of the CFA, that when defendants contacted plaintiff about the possibility of a loan modification, they were advised that they needed to be ninety days in arrears in order to be considered for a modification. As a result, defendants state they did not make payments for ninety days; a subsequent loan modification was denied.

As the judge noted, foreclosure defendants are not entitled to a modification. See Nat'l Cmty. Bank of N.J. v. G.L.T. Indus., 276 N.J. Super. 1, 4 (App. Div. 1994). He also noted the lack of any specificity provided as to the ascertainable loss and any causal relationship between the alleged unlawful conduct and the ascertainable loss.

Defendants stated the inquiry of plaintiff occurred in August 2009. The default was not until March 2010. Without more specificity in the pleadings, the causal relation cannot be gleaned from the sparse facts. Specific facts have not been pled to allow a fact-finder to draw conclusions as to a causal relationship and an ascertainable loss. We are satisfied, in according all favorable inferences to defendants as we must, that the trial

court correctly found that defendants failed to allege sufficient facts to avoid the dismissal of their CFA counterclaim. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c).


We briefly address defendants' contention that they were denied full discovery, and therefore, summary judgment was prematurely entered. In response to the summary judgment motion, defendants filed a motion to compel discovery. Defendants have not provided us with any information as to what they were seeking whether it be documentation, depositions or some other discovery material. We, therefore, cannot properly review whether the requested discovery might have been material to the trial court's determination. There is no argument in defendants' brief as to what discovery might have made a difference to the judge's consideration of the case and his decision. Summary judgment may not be defeated because of incomplete discovery if such further discovery will not patently change the outcome. Badiali v. N.J. Mfrs. Ins., 220 N.J. 544, 555 (2015) (citations omitted) (A motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action."). See also R. 4:46-5(a).

We note that the case management order entered in this matter required the parties to handle all discovery disputes by way of correspondence to the trial court, which would entertain a telephone conference to resolve the dispute. Under the terms of that order, the court's permission was required to file a discovery motion. This procedure was not followed by defendants. The motion judge noted that no relief was sought here by defendants prior to the presentation of the motion. We, therefore, do not disturb the judge's discretion to deny the motion for discovery. Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 513-14 (1995).

We are satisfied that there was no genuine issue of material fact presented and that the grant of summary judgment to plaintiff was appropriate. Defendants have not established they are entitled to relief from the final 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