SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2846-14T1

CAPITAL ONE, N.A.,

Plaintiff-Respondent,

v.

GIL RICARDO,

Defendant-Appellant,

and

DEBORA RICARDO and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC.,

Defendants.

Argued September 20, 2016 – Decided March 8, 2017

Before Judges Koblitz and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-005380-14.

Nicholas A. Stratton argued the cause for appellant (Denbeaux & Denbeaux, attorneys; Mr. Stratton, on the brief).

Danielle Weslock argued the cause for respondent (McCarter & English, L.L.P., attorneys; Joseph Lubertazzi, Jr., of counsel and on the brief; Ms. Weslock, on the brief).

PER CURIAM

In this residential mortgage foreclosure action, defendant Gil Ricardo appeals from the Chancery Division's June 20, 2014 order granting summary judgment in favor of plaintiff Capital One N.A., striking defendant's pleadings, deeming the dispute an uncontested foreclosure, and returning the matter to the Office of Foreclosure for entry of final judgment. On appeal, defendant argues that the case was not ripe for summary judgment because discovery was necessary to ascertain facts to rebut Capital One's prima facie case that the loan was transferred rather than securitized. We conclude there is no merit to defendant's argument and affirm, substantially for the reasons expressed in Judge Patricia Del Bueno Cleary's thorough oral decision.

I.

We glean the following facts from the record. On December 27, 2004, defendant executed to Countrywide Home Loans, Inc. (Countrywide) a promissory note for $367,000 to purchase a home in the Borough of Eatontown. On the same day, to secure payment of the note, he and his wife, Debora Ricardo,[1] executed a mortgage

[1] Debora defaulted in March 2014, and she did not oppose the motion for summary judgment and entry of final judgment to foreclose. Thus, although the Notice of Appeal and brief in support of appeal

on the residence, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Countrywide. The mortgage, which incorporated the note, was originally recorded on January 3, 2005, in the Monmouth County Clerk's office.

On December 8, 2008, MERS assigned the mortgage to Countrywide, which recorded it a few days later and endorsed the original note in blank. Sometime thereafter, Countrywide changed its name to BAC Home Loans Servicing, LP. (BAC), and merged with Bank of America, N.A. On February 14, 2012, Bank of America sold and assigned the mortgage to ING Bank, F.S.B. (ING). After the mortgage was subsequently recorded, Capital One later merged with ING, and became successor to the note and mortgage as of November 1, 2012.

In February 2014, Capital One, with physical possession of the original note, filed a foreclosure action against the Ricardos because they had not paid monthly mortgage payments and the property's real estate taxes since July 1, 2008. Defendant filed a pro se answer with affirmative defenses but Debora defaulted in March 2014.

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identifies her as an appellant, we consider Gil Ricardo as the only appellant.

On May 15, Capital One filed a motion for summary judgment to strike defendant's answer, deem the foreclosure uncontested, and have the matter returned to the Office of Foreclosure for an entry of final judgment. Four days later, Judge Cleary conducted a case management conference which resulted in an order setting forth a discovery period ending November 25, and scheduling a July 6, 2015 trial date. The order also provided a deadline for defendant's opposition to Capital One's summary judgment motion.

At the motion's argument on June 20, Capital One contended that defendant's pro se opposition had no merit, and he had been living in a home without paying his mortgage and real estate taxes for six years. In particular, Capital One argued that: (1) it had standing to foreclose because it had possession of the original note, which was shown to defendant at the case management conference; (2) it sent defendant a notice of intent to foreclose via certified and regular mail in October 2013, prior to filing the foreclosure action, and defendant has not rebutted that presumption;[2] (3) there was no merit to the defendant's position that the certification of due diligence by Capital One's Home

[2] The regular mail was not returned undeliverable, and the certified mailed notice was claimed in February 2014, approximately four months after Capital One asserted it was sent to defendant.

Loans Authorized Signer, Stephen Witkop, attached to the complaint, setting forth the transactional history of the note and mortgage was not based on personal knowledge; and (4) there was no evidence that the loan was ever securitized because there was no assignment of mortgage into any trust.

Defendant did not contest the execution of the loan documents or the subsequent default. Rather, he contended that he needed discovery to support his belief that there were genuine issues of material facts which could prevent the issuance of summary judgment. Specifically, he argued that there was a violation of the New Jersey Fair Foreclosure Act, N.J.S.A. 2A:50-56, by not serving a notice of intent to foreclose until after the filing of the foreclosure complaint, and challenged Capital One's proof of ownership of the note and mortgage. As noted, he also contended that the mortgage was securitized.

Following argument, Judge Cleary placed her decision on the record and entered an order granting summary judgment striking defendant's answer and affirmative defenses because his opposition did not rebut Capital One's prima facie case. In particular, the judge found that, based upon Witkop's affidavit, Capital One was the present holder of the note, as evidenced by its possession of the original note, and that defendant defaulted by failing to make his mortgage payments and pay real estate taxes for the property

since July 1, 2008. The judge further found that Capital One served its notice of intent to foreclose upon defendant in October 2013, and Countrywide had also served defendant with notice of intent back in 2008. Relying upon Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952), the judge found that "when a mortgagee establishes the execution of the mortgage, the recording of the mortgage[,] and the existence of default, it has a prima facie right to foreclosure."

Defendant, now represented by counsel, filed a motion for reconsideration. The motion was decided on the papers, and Judge Cleary rendered an oral decision on October 23, affirming her earlier decision. The judge rejected defendant's sole argument that summary judgment should not have been granted because he was not given an opportunity to conduct discovery. Citing Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 450-51 (2007), the judge determined the lack of discovery was not an obstacle to granting summary judgment as there was no material fact in dispute. In addition, the judge found that defendant did not satisfy Rule 4:49-2, by stating how the court acted in an arbitrary or capricious manner in granting summary judgment. An order was entered October 24, denying defendant's motion for reconsideration.

On November 20, final judgment of foreclosure was entered. This appeal followed.

II.

A trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Ibid.; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On appeal, we apply the same standard that governs the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015).

A mortgagee's "right to foreclose is an equitable right inherent in the mortgage." Chase Manhattan Mortg. Corp. v. Spina, 325 N.J. Super. 42, 50 (Ch. Div. 1998), aff'd, 325 N.J. Super. 1 (App. Div. 1999). The mortgagee has the right to insist upon strict observance of the obligations that are contractually owed to it, including timely payment. See Kaminski v. London Pub, Inc., 123 N.J. Super. 112, 116 (App. Div. 1973). When there is

proof of execution, recording and non-payment of the note and mortgage, a mortgagee has established a prima facie right to foreclose. Thorpe, supra, 20 N.J. Super. at 37.

There are limited defenses to foreclosure actions. A mortgagor opposing summary judgment has a duty to present facts that controvert the mortgagee's prima facie case. Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div.), certif. denied, 37 N.J. 229 (1962). Here, defendant does not contest the execution of the loan documents or the subsequent default. Instead, he contends the trial judge erred by granting summary judgment prior to the expiration of the discovery deadline given that the parties had demanded discovery. Moreover, he argues that Capital One did not have standing, as there was a genuine issue of material fact regarding the validity of the transfers of ownership of the mortgage, the date the indorsement occurred, and possession of the note. Additionally, defendant argues the judge "blindly accepted" Capital One's "hearsay statements" establishing its prima facie right to foreclose. We are unpersuaded.

Plaintiff's status as holder of the note was established by Witkop's affidavit. The trial court properly found that Witkop's knowledge was sufficient. Our foreclosure rules require that,

> [t]he affidavit shall be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's

> knowledge of the plaintiff's business records kept in the regular course of business, or by an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business.
>
> [R. 4:64-2(c).]

See also Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011) (noting that the relevant facts showing holder status may be established by a certification if based on "personal knowledge" as required by Rule 1:6-6).

Where, as here, the mortgage was assigned to several financial entities and ultimately to Capital One on November 1, 2012, as a result of its acquisition of ING., it was sufficient that Witkop, employed by Capital One, attested to his knowledge of "the books and records concerning the [n]ote and [m]ortgage" executed by defendant. R. 4:64-2(c). Importantly, defendant failed to proffer any affidavit or certification contradicting the assignment of the loan documented in the properly admitted loan documents and affirmed in Witkop's certification. "[C]onclusory claims" without explanation and "[b]ald assertions are not capable of . . . defeating summary judgment." Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014). Defendant does not establish that discovery would have revealed facts that would have disputed Capital One's ownership and possession of the note. In

fact, the information pertinent to Capital's One's standing is a matter of public record and accessible to defendant. See Liberty Surplus, supra, 189 N.J. at 450-51.

The competent proofs in the summary judgment record establish that plaintiff had physical possession of the note at the time of filing the foreclosure complaint. Thus, plaintiff had standing at the time it filed the complaint. See Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (stating that standing is conferred by "either possession of the note or an assignment of the mortgage that predate[s] the original complaint") (citing Deutsche Bank National Trust Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011)).

As for defendant's reconsideration motion, Judge Cleary did not abuse her discretion in denying the motion. Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div.), certif. denied, 174 N.J. 544 (2002). The judge did not express her summary judgment decision "based upon a palpably incorrect or irrational basis, or . . . either did not consider, or failed to appreciate the significance of probative, competent evidence." Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (citation omitted).

In sum, Judge Cleary correctly determined that defendant's pleadings were unsupported by credible evidence, therefore she

properly struck the answer, entered default, and referred the matter to the Office of Foreclosure for entry of judgment. See R. 4:64-1(c)(2), (d)(1). We see no reason to disturb the outcome of this case.

Affirmed.