SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3640-15T2

MACWCP IV, LLC,

Plaintiff-Appellant,

v.

MOTIVA ENTERPRISES, LLC, and STATE OF NEW JERSEY,

Defendants,

and

LIBERTY REALTY AND MANAGEMENT, LLC,

Defendant/Intervenor-Respondent.

Argued October 23, 2017 – Decided December 8, 2017

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-019855-12.

Adam D. Greenberg argued the cause for appellant (Law Offices of Honig & Greenberg, LLC, attorneys; Adam D. Greenberg, on the briefs).

Mark A. Wenczel argued the cause for respondent (Gaccione Pomaco, PC, attorneys; Mark A. Wenczel, on the brief).

Robert W. Keyser argued the cause for amicus curiae National Tax Lien Association, Inc. (Taylor and Keyser, attorneys; Robert W. Keyser and Jeffrey B. Datz, on the brief).

PER CURIAM

Plaintiff MACWCP IV, LLC, appeals from the General Equity Part's orders granting the motion of intervenor Liberty Realty & Management, LLC ("Liberty") to vacate a final default judgment of foreclosure on a tax sale certificate, and partially denying attorneys' fees.[1] Having reviewed the parties' arguments in light of the record and applicable principles of law, we reverse.

I.

On August 28, 2008, Liberty purchased commercial property located at 74 East Passaic Avenue in Nutley from defendant Motiva Enterprises, LLC ("Motiva"). Liberty intended to convert use of the property from an abandoned gas station to a two-story building with stores on the first floor and apartments on the second floor.

[1] Plaintiff's notice of appeal generally indicates it is appealing the January 29, 2016 order. Although plaintiff has a point heading in its reply brief claiming Liberty's motion to intervene was untimely, the issue was not substantively briefed by plaintiff on appeal, and therefore, is waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2017). We also generally decline to consider an issue raised for the first time in a reply brief that does not present a matter of great public interest. Goldsmith v. Camden Cty. Surrogate's Office, 408 N.J. Super. 376, 387 (App. Div.), certif. denied, 200 N.J. 502 (2009).

In support of its motions, Liberty's managing member, Navin H. Darji, certified the deed was not recorded because of an error by either Liberty's closing attorney or the county registrar. Darji certified further, a copy of the deed was provided to the township's tax assessor and tax collector "and [they] were thus aware of the transaction, [but] they were apparently waiting for a copy of the recorded [d]eed before updating the tax records."

In December 2009, the municipal tax collector held a sale for unpaid taxes that accrued on the property in 2008 ("first tax sale"). In December 2010, the township held a sale for unpaid taxes that accrued on the property in 2009 and 2010 ("second tax sale").

Darji certified Liberty did not receive the first tax sale notice, but received the second tax sale notice from Motiva. On December 17, 2010, Liberty paid the lien from the second tax sale in full. Darji believed payment of this lien satisfied the tax certificate, and that the tax collector's records were revised to reflect Liberty's ownership of the property.

In June 2011, Liberty received a code enforcement violation, reflecting Liberty as owner of the property. Darji assumed the township considered him the record owner of the property. He later learned, although the township's code enforcement office

records were updated to reflect Liberty's ownership, the tax collector's records were not updated.

Plaintiff acquired the first tax sale certificate by assignment in September 2011. When redemption was not made, plaintiff conducted a title search of the property which revealed a recorded deed held by Motiva. On August 3, 2012, plaintiff sent pre-foreclosure notices to Motiva at: (1) its address listed on the deed, which was returned as "undeliverable;" and (2) the property address, which was returned as "vacant [-] unable to forward." Because Liberty had not recorded its deed, plaintiff was not aware of Liberty's ownership. As such, plaintiff did not send a pre-foreclosure notice to Liberty.

On September 12, 2012, plaintiff filed a foreclosure complaint against Motiva. On October 3, 2012, plaintiff filed a notice of lis pendens and served Motiva. On January 4, 2013, default was entered. Following service of the complaint, an order was entered setting April 22, 2013 as the deadline to redeem. Redemption was not made. On January 6, 2015, final judgment was entered.

In June 2015, Liberty inadvertently discovered entry of the final judgment when Darji noticed a fence on the property was changed without his approval. Liberty's counsel then contacted the township and obtained the final judgment of foreclosure.

With the exception of payment of the tax lien for the 2009 and 2010 taxes, Liberty had not paid any taxes on the property, including the unpaid 2008 taxes which form the basis of the present foreclosure action.[2]

Liberty's attorney then contacted plaintiff in an attempt to redeem the lien and pay costs incurred in pursuing foreclosure, totaling more than $111,000. Plaintiff rejected Liberty's offer, prompting Liberty to file a motion to intervene and vacate final judgment in August 2015.

On December 4, 2015, the court held oral argument and reserved decision. On January 29, 2016, the court rendered an oral decision and entered an order granting Liberty's motions to intervene and vacate final judgment, finding Liberty had acted in good faith and was entitled to relief under Rule 4:50-1. Further, by order entered April 1, 2016, the court awarded plaintiff partial attorneys' fees and costs incurred for acquisition of the tax sale certificate and entry of final judgment. This appeal followed.

On appeal, plaintiff contends, in essence, the court erred in applying equitable principles to usurp the plain application of the law; Liberty failed to meet the requirements of Rule 4:50-

[2] Plaintiff's merits brief was filed on June 27, 2016. As of that date, Liberty had not paid taxes through 2015.

1; and the court failed to make findings of fact and conclusions of law supporting its decision to reduce fees and costs.

II.

Our standard of review is well-settled. As the Court noted in US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012), a "party seeking to vacate [a default] judgment" in a foreclosure action must satisfy Rule 4:50-1, which states in pertinent part that

> [o]n motion, with briefs and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; . . . or (f) any other reason justifying relief from the operation of the judgment or order.

The determination whether to grant a motion to vacate a default judgment is "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993). "[A]buse of discretion occurs when a decision is 'made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.'" Deutsch Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012) (quoting Guillaume, supra, 209 N.J. at 467-68). Further, "[a] 'trial court's

interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A motion to vacate a default judgment implicates two often competing goals: the desire to resolve disputes on the merits, and the need to efficiently resolve cases and provide finality and stability to judgments. "The rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 120 (1977). The movant bears the burden of demonstrating its entitlement to relief. Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003), certif. denied, 179 N.J. 309 (2004).

A court must read together the four grounds for relief under Rule 4:50-1(a) — mistake, inadvertence, surprise, or excusable neglect. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 262 (2009). "[W]hen read together . . . [they] reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." Ibid. (emphasis added). "'Excusable neglect' may be found when the

default was 'attributable to an honest mistake that is compatible with due diligence or reasonable prudence.'" Guillaume, supra, 209 N.J. at 468 (quoting Mancini, supra, 132 N.J. at 335). "Mistakes" under Rule 4:50-1(a) are "litigation errors that a party could not have protected against." DEG, LLC, supra, 198 N.J. at 263 (internal quotation marks and citation omitted). An applicant claiming excusable neglect must also demonstrate a meritorious defense. Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div.), aff'd, 43 N.J. 508 (1964).

Furthermore, courts have the authority to grant relief under subsection (f), that is, "any other reason justifying relief from operation of the judgment or order," where it "is necessary to achieve a fair and just result." In re R.D., 384 N.J. Super. 61, 66 (App. Div. 2006) (citing Manning Eng'g, Inc., supra, 74 N.J. at 122). However, "because of the importance of the finality of judgments, relief under subsection (f) is available only when 'truly exceptional circumstances are present.'" In re Guardianship of J.N.H., 172 N.J. 440, 473 (2002) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1993)). To obtain relief under Rule 4:50-1(f), an applicant must show that enforcement of the order would be "unjust, oppressive or inequitable." Johnson v. Johnson, 320 N.J. Super. 371, 378 (1999).

Moreover, New Jersey has a strong public policy underlying the sale of tax certificates because government is partially funded through the collection of real estate taxes, and the sale of certificates advances those payments. Municipal governments depend on real estate taxes as a primary source of revenue. The Tax Sale Law[3] aids in converting liens "into a stream of revenue by encouraging the purchase of tax certificates on tax-dormant properties." Simon v. Cronecker, 189 N.J. 314, 318 (2007); see also N.J.S.A. 54:5-19, -31 to -32; Varsolona v. Breen Capital, 180 N.J. 605, 620 (2004) ("The Legislature created the [Tax Sale Law] as a framework to facilitate the collection of property taxes.").

The Tax Sale Law also furthers other policy goals, including the creation of marketable titles and the availability of redemption opportunities to owners. As a remedial statute, it should "be liberally construed to effectuate [its] remedial objects." N.J.S.A. 54:5-3. First and foremost, "[t]he Tax Sale Law serves as a framework to facilitate the collection of property taxes." In re Princeton Office Park L.P. v. Plymouth Park Tax Servs., LLC, 218 N.J. 52, 61 (2014) (internal quotation marks and citation omitted). One of its "essential objectives" is "to quickly return to the tax rolls . . . property on which [unpaid

[3] N.J.S.A. 54:5-1 to -137.

property taxes] have remained in default." Navillus Grp. v. Accutherm Inc., 422 N.J. Super. 169, 182 (App. Div. 2011) (alteration in original)(internal quotation marks and citation omitted), certif. denied, 209 N.J. 232 (2012).

Another of the Tax Sale Law's goals is "to expedite and encourage the conclusion of [foreclosure] proceedings." Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 171 (App. Div. 2005). For this reason, its provisions permitting equitable suits to foreclose the right of redemption "shall be liberally construed as remedial legislation" to promote the securing of marketable titles. N.J.S.A. 54:5-85. At the same time, "[a]lthough the primary purpose of the Tax Sale Law is to encourage the purchase of tax certificates, another important purpose is to give the property owner the opportunity to redeem the certificate and reclaim his land." Cronecker, supra, 189 N.J. at 319.

However, under the Tax Sale Law, "[i]n any action to foreclose the right of redemption in any property sold for unpaid taxes or other municipal liens, all persons claiming an interest in . . . [the] property, by or through any conveyance," which could be recorded but is not recorded "at the time of the filing of the complaint in such action shall be bound by the proceedings in [foreclosure] actions so far as the property is concerned, in the

same manner as if he had been made a party to and appeared in such action." N.J.S.A. 54:5-89.1.

Applying these principles, we are constrained to reverse the trial court's application of equitable principles granting Liberty the opportunity to redeem the property. While the court correctly found Liberty was under the mistaken impression that: the deed was recorded; payment of its 2009 and 2010 taxes satisfied the tax lien; and the township had updated the property's ownership records, those mistakes do not obviate Liberty's statutory obligations to record the deed and pay real estate taxes. Equity cannot "create a remedy that is in violation of [the] law." IMO Estate of Shinn, 394 N.J. Super. 55, 67 (App. Div.), certif. denied, 192 N.J. 595 (2007). Rather, a decision is incorrect when the court overlooks "the maxim that 'equity follows the law.'" Id. at 67. "Although it is true that equity abhors a forfeiture, equity's jurisdiction in relieving against a forfeiture is to be exercised with caution lest it be extended to the point of ignoring legal rights." Dunkin' Donuts of America v. Middletown Donut Corp., 100 N.J. 166, 182 (1985).

Moreover, in matters concerning real property, "where a loss must be borne by one of two innocent parties[,] equity will impose the loss on that party whose act first could have prevented the loss." Monsanto Emps. Fed. Credit Union v. Harbison, 209 N.J.

Super. 539, 542 (App. Div. 1986). Here, to the extent plaintiff and Liberty can both be viewed as innocent parties, the loss could have been prevented first by Liberty, had it properly recorded its deed any time between 2008 and 2015, or requested its tax bills and paid its taxes. Its failure to do so is not an "honest mistake" where, as here, Liberty is a corporate entity whose property was not exempt from real estate taxes.

Indeed, it is axiomatic "[e]verybody knows that taxes must be paid." Bron v. Weintraub, 42 N.J. 87, 91 (1964). Yet, Liberty did not pay taxes on the property until it received notice of the second tax lien for 2009 and 2010, and Liberty failed to pay taxes on the property for any other years. Thus, Darji's contention that he thought the township had updated its tax records to reflect Liberty as the record owner lacks merit and does not provide a compelling basis for relief.

Nor did Liberty do anything to ascertain that its deed was recorded. As a direct result of Liberty's inaction, plaintiff's title search did not, because it could not, reveal Liberty's unrecorded deed. Compare M&D Assocs. v. Mandara, 366 N.J. Super. 341 (App. Div.) (requiring additional diligent inquiry to serve one of the owners whose name appeared on the recorded deed), certif. denied, 180 N.J. 151 (2004). A deed "shall be of no effect against . . . subsequent bona fide purchasers . . . for valuable

consideration without notice and whose conveyance . . . is recorded, unless that conveyance is evidenced by a document that is first recorded." N.J.S.A. 46:26A-12(c). A principal purpose of the recording statute is to protect bona fide purchasers "against the assertion of prior claims to the land based upon any recordable, but unrecorded instrument." Cox v. RKA Corp., 164 N.J. 487, 507 (2000) (internal quotation marks and citation omitted). Thus, "subsequent purchaser[s are] bound only by those instruments which can be discovered by a 'reasonable' search of the particular chain of title." Palamarq Realty Co. v. Rehac, 80 N.J. 446, 456 (1979).

Under these circumstances, Liberty's inactions disfavor relief. "Obviously the greater the negligence involved, or the more willful the conduct, the less 'excusable' it is." Manning Eng'g, Inc., supra, 74 N.J. at 125 n.5 (internal quotation marks and citation omitted). Liberty's failure to pay taxes on the property is not "an honest mistake that is compatible with due diligence or reasonable prudence." Mancini, supra, 132 N.J. at 335. Nor is the failure to record the deed by Liberty's real estate attorney or the county registrar a "litigation error" as contemplated by Rule 4:50-1(a). See DEG, LLC, supra, 198 N.J. at 263 (recognizing that Rule 4:50-1(a) "is intended to provide relief

from litigation errors that a party could not have protected against.") (internal quotation marks and citation omitted).

Underscoring Liberty's inexcusable mistakes is its sophistication. Unlike the applicant in Bergen-Eastern Corp. v. Koss, 178 N.J. Super. 42 (App. Div.), certif. granted, 87 N.J. 351, appeal dismissed as improvidently granted, 88 N.J. 499 (1981), cited by the trial court, Liberty is a corporate entity and not an elderly applicant with a history of psychiatric hospitalizations. Further, Liberty purchased the property for investment purposes. Indeed, Darji certified that after purchasing the property, Liberty retained land use counsel to seek approval from the township to construct a two-story, residential and commercial building to replace the long-abandoned gas station use.

Finally, Liberty failed to demonstrate "truly exceptional circumstances" entitling it to relief pursuant to Rule 4:50-1(f). Hous. Auth., supra, 135 N.J. at 286. Although the court relied on M&D Assocs., supra, 366 N.J. Super. at 341 for its rationale that chancery courts "in such foreclosure cases should be alerted . . . that a significant windfall might result if adequate scrutiny . . . is not undertaken[,]" we are satisfied there is ample support in the record that Liberty's own inactions prevented it from receiving timely notice of the foreclosure action.

The trial court's January 29, 2016 order granting Liberty's motion to intervene and vacate final judgment "departed from established" principles. Deutsch Bank Trust, supra, 428 N.J. Super. at 319. Because "relief under subsection (f) is available only when 'truly exceptional circumstances are present[,]'" we must find the trial court abused its discretion in vacating the entry of final judgment. J.N.H., supra, 172 N.J. at 473.

In view of our disposition of this appeal, we need not address plaintiff's remaining argument concerning fees. In so doing, we note the April 1, 2016 order incorporated by reference the January 29, 2016 order that provided for attorneys' fees and costs "as a condition to the redemption of the [t]ax [s]ale [c]ertificate." Because we reverse the trial court's January 29, 2016 order vacating entry of final judgment, Liberty cannot redeem the property. Thus, Liberty is not liable for fees and costs in this action.

We reverse the trial court's January 29, 2016 order vacating the entry of final judgment, and vacate the April 1, 2016 order awarding fees to plaintiff.