SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3980-15T3

TD BANK, NA,

Plaintiff-Respondent,

v.

UNIVERSITY IMAGING CENTER, LLC; NAJAM KAZMI and SURAYYA KAZMI,

Defendants-Appellants,

and

CENTURY SAVINGS BANK; COLONIAL BANK FSB; UNITED STATES OF AMERICA; BANK OF AMERICA, NA; SIEMENS FINANCIAL SERVICES, INC.; ENTERPRISE ZONE DEVELOPMENT CORP. OF VINELAND AND MILLVILLE; SUSQUEHANNA BANK; COASTAL LEASING, INC.; STATE OF NEW JERSEY; HARBOR PAVILION CONDOMINIUM ASSOCIATION; CUMBERLAND PROFESSIONAL CAMPUS CONDOMINIUM ASSOCIATION T/A CUMBERLAND PROFESSIONAL CAMPUS, INC.,

Defendants.

Argued May 31, 2017 – Decided September 25, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Chancery Division, Cumberland County, Docket No. F-036135-10.

Michael Confusione argued the cause for appellants (Hegge & Confusione, LLC, attorneys; Mr. Confusione, of counsel and on the brief).

Kyle Eingorn argued the cause for respondent (Dembo, Brown & Burns LLP, attorneys; Mr. Eingorn, on the brief).

PER CURIAM

Defendants appeal the denial of their motion to vacate a final judgment of foreclosure. Plaintiff-mortgagee TD Bank, NA, foreclosed on a commercial condominium owned by defendant-mortgagor University Imaging Center, LLC, a medical imaging company of which defendant Najam Kazmi, M.D., serves as principal and sole member. As we discern no abuse of the trial court's discretion, we affirm.

On February 28, 2006, the company executed a note promising to repay a $665,000.00 loan from Commerce Bank, NA, to which TD succeeded by merger. Dr. Kazmi and Surayya Kazmi guaranteed payment. The note was secured by a mortgage on the property where the company conducted its business.

Defendants first fell behind on payments in September 2009. They fell further behind over the subsequent months as TD required them to pay increasing charges to make up for their delinquency.

Defendants also failed to pay certain municipal taxes in 2008 and 2009. In May 2010, TD declared the loan to be in default and filed a complaint in the Law Division seeking payment of the entire balance of the loan. This was followed in July 2010 by a mortgage foreclosure complaint.[1]

Defendants' participation in the lawsuits was episodic. They did not participate in the Law Division action, and a final default judgment was entered in September 2010 in the amount of $652,145.55. By contrast, defendants filed an answer in the foreclosure action, asserting they had "tendered payment" to TD and were not "indebted" to TD. But, defendants took no discovery and did not oppose a motion for summary judgment, which was granted in March 2012, striking the answer and entering default. A final judgment of foreclosure, also unopposed, followed eighteen months later. The order affirmed that TD had presented the appropriate note, mortgage and "proofs . . . of the amount due . . . ."

While the foreclosure case was pending, defendants tried to settle their debt. They also sought and obtained several post-judgment stays of the sheriff's sale, which the court granted to

[1] The complaint named various private and public creditors who had obtained judgments against the company exceeding $3.5 million. Dr. Kazmi admitted that after he opened the company, he acquired other unprofitable radiological facilities, and he "drained" the company's funds to support those acquisitions.

allow settlement negotiations to continue. The extra time was fruitless, as defendants were unable to secure financing to pay amounts TD required.

On March 31, 2015, the sheriff's sale proceeded, and the property was sold to COBA, Inc.[2] Nevertheless, the company continued to possess the property and operate there. Over six months later, the court issued a writ of possession, ordering the company to vacate the property. Two months after that, the sheriff notified the company that it would be removed if it did not vacate by January 19, 2016.

Defendants twice unsuccessfully sought a stay of the removal. In its order denying the second application, the court noted that "multiple stays of the Sheriff's Sale were granted to allow Defendant the opportunity to obtain new financing and on the condition that Defendant pay the real estate taxes[,]" but it did neither. The court further noted, "Despite not owning the property for the past approximately ten months, Defendant continues to operate its business at the foreclosed premises."

[2] Defendants assert this company is affiliated with TD bank, but provided no competent evidence in support.

In March 2016, defendants filed the motion to vacate the foreclosure judgment that is the subject of this appeal.[3] Dr. Kazmi contended "new information [had come] to light," consisting of the company's own bank statements, which he alleged demonstrated that TD overcharged the company on the loan, and the company had not defaulted in its payments. Defendants also challenged TD's standing. In opposition, TD argued defendants' payment defense was too late; and, in any event, defendants defaulted not only by failing to make loan payments, but also by failing to pay taxes. TD also contended that its standing was unassailable; no formal assignment was required because Commerce Bank and TD merged.

The court denied the motion, highlighting that defendants had "many opportunities to defend," but defaulted in the Law Division action, and failed to oppose TD's summary judgment motion and application for entry of final judgment in the foreclosure action. The court added, "The bank records were available for more than 6 years. No new evidence has been presented." This appeal followed.

Defendants raise a single issue on appeal:

> The Chancery court erred in denying defendant[s'] motion for R. 4:50-1 relief seeking vacation of the final judgment of foreclosure.

[3] Defendants submitted a motion to vacate two months earlier, but it was not formally filed.

Our scope of review of the trial court's ruling on the Rule 4:50-1 motion is limited. As the Supreme Court observed in the foreclosure context, a trial court's decision under Rule 4:50-1 "warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat'l Assn. v. Guillaume, 209 N.J. 449, 467 (2012) (citations omitted). Applying this standard, we discern no basis to disturb the trial court's order.

Rule 4:50-1 balances "the strong interests in finality of judgments and judicial efficiency" with the equitable goal of avoiding unjust results. Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n, 74 N.J. 113, 120 (1977). At bottom, the decision whether to grant or deny a motion to vacate a judgment must be guided by equitable considerations. Prof'l Stone, Stucco & Siding Applicators, Inc. v. Carter, 409 N.J. Super. 64, 68 (App. Div. 2009). "[E]quity must be applied to plaintiffs as well as defendants." Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 320 (App. Div. 2012).

Defendants rely specifically on Rule 4:50-1(e), which permits relief from a judgment if "it is no longer equitable that the judgment or order should have prospective application," and Rule 4:50-1(f), which permits relief for "any other reason justifying relief from the operation of the judgment or order." Defendants

argue that TD improperly accelerated the monthly charge in 2009 after they failed to make their monthly payment. Defendants further protest that TD inappropriately refused to accept certain payments in the subsequent months. They also contend that the court never properly established TD's status as a mortgagee of the property. Last, they argue that TD acted in bad faith during the failed negotiations to settle the debt.

Only in rare circumstances will a court grant relief based on either of the two Rule subsections defendants invoke. As to Rule 4:50-1(e), our Supreme Court has set a "stringent standard." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 266 (2009). The movant must show both that circumstances have changed since entry of the order and that, "absent the relief requested, [its enforcement] will result in extreme and unexpected hardship . . . ." Ibid. (internal quotation marks and citation omitted). Similarly, as to Rule 4:50-1(f), the Supreme Court has emphasized that the provision should apply "only when truly exceptional circumstances are present[,]" Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994) (internal quotation marks and citation omitted), and when "such relief is necessary to achieve a fair and just result." Manning Eng'g Inc., supra, 74 N.J. at 122. See also Baumann v. Marinaro, 95 N.J. 380, 395-98 (1984).

We shall not disturb the trial court's determination that defendants failed to meet these demanding standards. Defendants articulate no change of circumstance or sudden exigency under Rule 4:50-1(e) that would render enforcement of the foreclosure order unjust. Nor do they establish the sort of exceptional, grievous circumstances warranting application of Rule 4:50-1(f). The status of defendants' account did not suddenly change after judgment was entered. The bank records that defendants offer in support of their claim that TD overcharged their account were available well before judgment was entered.

Their standing argument, and their claim that TD violated its obligation under Small Business Administration policy to negotiate a workout, lack sufficient merit to warrant comment. R. 2:11-3(e)(1)(E).[4]

Defendants also failed to present their motion within a "reasonable time" after entry of the judgment, as required by Rule

[4] We need not reach TD's argument that, based on the Law Division default judgment, res judicata barred defendants' motion. But see Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 182-85 (App. Div. 1993) (finding collateral estoppel does not bind party against whom default judgment was entered). Nor need we reach TD's argument that defendants' appeal was rendered moot by the sale of the mortgaged property. But see GMAC Mortgage, LLC v. Willoughby, ___ N.J. ___, ___ (2017) (slip op. at 31) (rejecting mootness argument and holding that even if home were sold to a bona fide, good faith purchaser, court could fashion a "suitable and equitable remedy" for mortgagee's breach of loan modification agreement after which it obtained foreclosure judgment).

4:50-2. Whether a party has moved timely rests in the court's sound discretion, guided by equity and the need to terminate litigation within a reasonable time to further the proper administration of justice. Garza v. Paone, 44 N.J. Super. 553, 558 (App. Div. 1957). Here, over three years after entry of summary judgment, over two years after entry of the final judgment of foreclosure, and almost a year after the sheriff's sale, defendants sought relief based on a payment defense – which they previously asserted and then abandoned – based on documents, their own bank statements, they should have discovered long ago. Defendants also raised new arguments without offering any excuse for their delay. The balance of equities – particularly "the strong interests in finality of judgments and judicial efficiency" – supported the denial of their motion. Manning Eng'g, Inc., supra, 74 N.J. at 120.

Affirmed.