SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4270-14T2

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-BC4,

Plaintiff-Respondent,

v.

LUZ SALINAS LARREA AND CARLOS LARREA,

Defendants-Appellants.

Submitted December 8, 2016 – Decided March 3, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-010989-13.

Falk & Flotteron, L.L.C., and Peter M. Zirbes (Peter M. Zirbes & Associates, P.C.) of the New York bar, admitted pro hac vice, attorneys for appellants (Kenneth B. Falk and Mr. Zirbes, on the briefs).

Reed Smith, L.L.P., attorneys for respondent (Siobhan A. Nolan and Henry F. Reichner, on the brief).

PER CURIAM

Defendants, Carlos and Luz Salinas Larrea, appeal from an April 9, 2015 order denying their request to vacate the entry of default judgment in this foreclosure matter, void the sheriff's sale, vacate entry of default, and permit a responsive pleading to be filed. We affirm.

We discern the following facts from the record. On September 1, 2006, defendant Luz Salinas Larrea borrowed $405,000 from BNC Mortgage, Inc., (BNC), secured by a mortgage on the family home. The mortgage was recorded by the County Clerk of Bergen County on September 18, 2006, and was subsequently assigned to plaintiff U.S. Bank National Association by Mortgage Electronic Registration Systems, Inc., as nominee for BNC, its successors, and assigns. The assignment was recorded by the County Clerk of Bergen County on November 2, 2011.

Defendants did not make their February 1, 2011 payment or any payments thereafter. Plaintiff mailed a notice of intention to foreclose to defendants, via certified and first-class mail, on April 16, 2012. A corrective notice of intention to foreclose was also mailed to defendants' home on June 11, 2012.

Plaintiff filed a foreclosure complaint on April 3, 2013. On April 15, 2013, a notice to residential tenants of rights during

foreclosure was mailed to defendants, via certified and regular mail, and signed by defendant Luz Salinas Larrea on April 19, 2013. After plaintiff filed an amended complaint on September 10, 2013, a process server personally delivered a copy of the summons and amended complaint to defendants' home on September 22, 2013.

Defendants did not answer the complaint or appear in court. Plaintiff requested entry of default on March 21, 2014. A copy of the request for default was mailed, via regular mail, to defendants on April 15, 2014. A notice of motion for entry of judgment, certification of proof of amount due and schedule, and certification of diligent inquiry, were filed by plaintiff. Copies of all three documents were mailed to defendants on May 29, 2014.

On July 29, 2014, the Office of Foreclosure entered final judgment in favor of plaintiff. A copy of the final judgment for foreclosure was sent to defendants, via certified and regular mail, on August 28, 2014. A notice of sheriff's sale was mailed to defendants on December 9, 2014, informing them the sale would take place on January 30, 2015. On January 29, 2015, defendants were mailed a letter informing them the sale was adjourned until February 27, 2015.

On February 26, 2015, defendants filed an order to show cause seeking relief from the final judgement pursuant to Rule 4:50-1 and a temporary restraining order staying the foreclosure sale.

Defendants asserted they were not properly served with pleadings and had no notice of the foreclosure until they received the notice of sheriff's sale. On April 9, 2015, the trial court denied defendants' request to stay the foreclosure sale and to vacate default. This appeal followed.

Defendants challenge the trial court's determination actual service was proven, asserting it erred making credibility determinations based on affidavits. We disagree.

Generally, 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. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Nat'l Bank Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2010)).

Rule 4:50-1 provides various avenues for relief from a judgment or order and, in relevant part, reads:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party . . . from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due

> diligence could not have been discovered . . . (c) fraud[,] . . . misrepresentation, or other misconduct . . . ; (d) the judgment or order is void; . . . or (f) any other reason justifying relief from the operation of the judgment or order.

"The rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have the authority to avoid an unjust result in any given case." Guillaume, supra, 209 N.J. at 467 (citations omitted).

Here, the trial judge reviewed plaintiff's detailed proofs of specific notices sent to defendants' home, some of which were signed by defendants, demonstrating they were, in fact, aware of the pending foreclosure. Plaintiff provided an affidavit of service from a process server, who certified service of process was successfully completed on September 22, 2012, at 11:00 a.m. when defendants' son, Carlos Larrea, Jr., received a package from plaintiff. The affidavit described defendant's son as age twenty-two, 5'8" tall, weighing 165 pounds, with "white skin color" and black hair.

Defendants' son submitted an affidavit denying he was served and stating he is twenty-three years old, 5'6" tall, weighing 150 pounds, with olive colored skin and black curly hair. The son certified he would not have introduced himself as Carlos Larrea,

Jr.; if asked his name, he would have said Carlos Adrian Larrea. Additionally, he described in detail his routine on the day he allegedly accepted service. He certified he was living in his parents' home on the day of the alleged service and it was his ritual to watch football games on Sunday afternoons. The son recounted being up early to have breakfast with his parents, went running at 9:00 a.m., and was taking a shower by 10:00 a.m. The son certified he was "definitely" home at 11:00 a.m., and no one came to the family home, and if someone came to give his parents legal papers, he would have called his parents.

The trial judge found defendants did not rebut plaintiff's specific proofs. The trial judge found the son's certification implausible. The trial judge also found defendants' claimed incognizance of the foreclosure process implausible, particularly because they engaged in a loan modification process as early as 2011.[1] Because defendants actually received notice of the foreclosure proceeding and did not demonstrate excusable neglect, the trial judge denied defendants' motion to vacate the entry of default judgment, void the sheriff's sale, vacate entry of default,

[1] Defendant Luz Salinas Larrea's affidavit certified she and her husband had been in contact with America's Service Company to work out a modification but had been unsuccessful. Additionally, she certifies America's Service Company did not notify her their home was in foreclosure.

and permit a responsive pleading to be filed. On appeal, defendants argue their submissions rebutted the presumption of valid service, entitling them to an evidentiary hearing. We disagree.

To obtain "in personam jurisdiction over a defendant[,]" a summons and complaint must be served "[u]pon a competent individual of the age of [fourteen] or over . . . to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of [fourteen] or over then residing therein . . . ." R. 4:4-4(a)(1). An affidavit of service "raises a presumption" of valid service. Resolution Tr. Corp. v. Associated Gulf Contractors, Inc., 263 N.J. Super. 332, 343 (App. Div.), certif. denied, 134 N.J. 480 (1993). However, that presumption may be rebutted by "clear and convincing evidence that the return [was] false." Id. at 344.

Defendants' self-serving certifications did not establish by clear and convincing evidence plaintiff's proof of service by first-class and certified mail, delivered eight months earlier was erroneous. See R. 1:5-3. By regular and certified mail, plaintiff delivered eight notices to defendants relating to the foreclosure action of their home, and defendants took no action until six months after entry of final judgment. The trial judge's

determinations are supported by the facts in the record and the denial of the motion falls within the bounds of the court's discretion.

Moreover, defendants did not establish a meritorious defense, sufficient to set aside a default judgment. See Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div. 1964). Defendants argue plaintiff lacked standing to bring the instant foreclosure action, as the assignment of mortgage must be deemed void. We disagree.

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)). Without ownership or control, a plaintiff cannot "proceed with the foreclosure action and the complaint must be dismissed." Ibid. Additionally, "either possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." 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)).

Plaintiff's standing to bring the foreclosure action was established by virtue of the assignment of mortgages in 2011,

which was properly recorded with the Bergen County Clerk. The assignment occurred before the filing of the initial complaint in April 2012. Defendants argue there was a defective chain of custody in the assignment of mortgage but provide no documentary evidence in support of their argument. Therefore, defendants have not established they are entitled to relief from final judgment pursuant to Rule 4:50-1(a).

Defendants remaining arguments lack sufficient merit to warrant further discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.