SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4540-14T1

WELLS FARGO BANK, N.A., AS TRUSTEE FOR WATERFALL VICTORIA MORTGAGE TRUST 2011-SBC1,

Plaintiff-Respondent,

v.

YOLANDA ALBANES and VICTOR ALBANES,

Defendants-Appellants,

and

MAX PLUMBING & HEATING, INC.,

Defendant.

Submitted January 25, 2017 – Decided March 15, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Chancery Division, Union County, Docket No. F-4916-14.

Yolanda and Victor Albanes, appellants pro se.

Saul Ewing, LLP, attorneys for respondent (Ryan L. DiClemente and Colleen Fox, on the brief).

PER CURIAM

Defendants Yolanda and Victor Albanes appeal from the entry of final judgment in this long-running mortgage foreclosure, contending the trial court erred in holding them collaterally estopped from relitigating plaintiff's standing to prosecute the action. Because we find no error in the General Equity judge's decision to apply collateral estoppel in the context of this case, we affirm.

The essential facts are easily summarized. Yolanda Albanes borrowed $227,500 from Greenpoint Mortgage Funding, Inc. in a refinance transaction on August 8, 2003. The loan was secured by a twenty-five-year mortgage given by both defendants on a commercial mixed-use property in Elizabeth. The building housed Victor Albanes' real estate office, Ace Realty, and three apartments, one of which served as defendants' residence.

Defendants fell victim to the economic downturn, and the loan went into default in September 2009. It was subsequently sold in September 2010 and the mortgage assigned to Citigroup Global Markets Realty Corp. On March 3, 2011, Citigroup assigned the mortgage to Waterfall Victoria Master Fund, Ltd., which assigned it to Waterfall Victoria Depositor, LLC on March 8, 2011. That same day, Waterfall Victoria Depositor, LLC assigned the mortgage to plaintiff Wells Fargo Bank, N.A., as

Trustee for Waterfall Victoria Mortgage Trust 2011-SBC1. All of those assignments were recorded on the same day, October 19, 2011, almost four weeks after Wells Fargo filed its first complaint for foreclosure.

Defendants answered the complaint and asserted several defenses challenging Wells Fargo's standing to prosecute the foreclosure and the lender's failure to have negotiated in good faith over a loan modification. Wells Fargo moved for summary judgment supported by a certification attesting to both the assignment history and its possession of the note executed by Yolanda Albanes, with an allonge which tracked the assignments of the mortgage, ending in a specific endorsement to Wells Fargo. Defendants filed opposition contending the assignments were fraudulent and that Wells Fargo was not a holder entitled to enforce the note and mortgage.

Judge Malone heard argument in March 2012, and granted the motion for summary judgment. The judge observed the record made "pretty clear that the plaintiff had the note [and] had the mortgage assigned to it" six months prior to having commenced the action, which assignments were now recorded in the county clerk's office. Based on the record before him, Judge Malone determined Wells Fargo had presented a prima facie case for foreclosure, see Thorpe v. Floremoore Corp., 20 N.J. Super. 34,

37 (App. Div. 1952), and that defendants had not raised any genuine issue as to its right to prosecute the action. The judge likewise denied defendants' motion for reconsideration. We denied defendants' subsequent motion for leave to appeal.

When Wells Fargo moved for final judgment, however, the Office of Foreclosure refused to process the motion because of the absence of a notice of intent (NOI) to foreclose. New counsel for Wells Fargo moved for leave to cure by serving defendants with an NOI, contending one was not originally sent because the mortgaged property was commercial, not residential, notwithstanding that defendants resided in one of the apartments. Although the Supreme Court had already decided U.S. Bank National Association v. Guillaume, 209 N.J. 449, 470 (2012), holding that dismissal without prejudice was not the exclusive remedy for failing to serve an NOI in compliance with N.J.S.A. 2A:50-56c(11), overruling our decision in Bank of New York v. Laks, 422 N.J. Super. 201, 212 (App. Div. 2011), Judge Grispin denied the motion and granted defendants' cross-motion to dismiss the complaint without prejudice on October 25, 2013.

Wells Fargo served defendants with an NOI the following month and filed a new foreclosure complaint on February 10, 2014. Defendants filed a motion to dismiss and for sanctions in lieu of answer, which was denied by Judge DuPuis, on May 28,

2014. Judge DuPuis found Wells Fargo's NOI conformed to the statute and deemed its certification of diligent inquiry likewise compliant with Rule 4:64-1(a)(2) and (a)(3).

Defendants thereafter filed an answer in June, interposing the same defenses that plaintiff lacked standing to prosecute the foreclosure but asserting new counterclaims of consumer fraud and misrepresentation and seeking declaratory relief in the form of a quiet title action. Defendants now contended that not only did they not owe any money to Wells Fargo on account of the mortgage note, they did not owe any money to anybody. Specifically, defendants maintained that because Greenpoint "did not provide the funding (consideration) for the subject loan; therefore, the true original lender is not identified on any of the mortgage documents," making the Greenpoint mortgage they signed void ab initio.

Wells Fargo moved for summary judgment in July 2014. Relying on Judge DuPuis' prior ruling as to the validity of the NOI and Judge Malone's prior ruling as to the validity of the note and mortgage, Wells Fargo argued defendants were collaterally estopped from relitigating those issues and that summary judgment was thus appropriate. Judge DuPuis heard oral argument in October and reserved decision.

The judge issued a written opinion on November 20, 2014, denying the motion for summary judgment on account of an inadequate certification to support service of the NOI but deciding to apply collateral estoppel to the remaining issues. The judge found all the elements of collateral estoppel as to plaintiff's standing to prosecute the foreclosure, with the exception of entry of a final judgment, were satisfied. See Fama v. Yi, 359 N.J. Super. 353, 359 (App. Div.), certif. denied, 178 N.J. 29 (2003). The issues as to plaintiff's control of the note and mortgage decided in the prior action were identical to the ones defendants raised in the new action; those issues were actually litigated in the prior action; Judge Malone's decision as to those issues led him to enter summary judgment in plaintiff's favor; and the parties were exactly the same. See Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006).

Although Judge DuPuis found application of collateral estoppel following a dismissal without prejudice to be an unsettled question in New Jersey, she determined its application in this instance was compelled by defendants' "full and fair opportunity to be heard on the issue in the prior proceeding." See Weiner v. Cnty. of Essex, 262 N.J. Super. 270, 289 (Law Div. 1992). Because the parties had already litigated the factual

issue of Wells Fargo's standing in the foreclosure action before Judge Malone, who decided the issue in plaintiff's favor, the judge concluded that issue had already been "fully and fairly litigated" and that defendants were barred from relitigating it anew in the second action. See Harbor Land Dev. Corp. v. Mirne, Nowels, Tumem, Magee & Kirschner, 168 N.J. Super. 538, 541 (App. Div. 1979).

Wells Fargo renewed its motion for summary judgment on the remaining issue of service of the NOI and to strike defendants' answer. Defendants opposed the motion and cross-moved for reconsideration of Judge DuPuis' decision on collateral estoppel. Those motions were heard by Judge Perfilio. After hearing oral argument, the judge issued an order on January 9, 2015 granting plaintiff's motion for summary judgment, denying defendants' motion for reconsideration and striking defendants' contesting answer and severing and dismissing defendants' non-germane counterclaims.

In a cogent and comprehensive opinion from the bench, Judge Perfilio reviewed the procedural history of the case and the substance of the summary judgment motion litigated before Judge Malone. Relying on Deutsche Bank Trust Company Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012), in which we reiterated "that either possession of the note or an assignment

of the mortgage that predated the original complaint conferred standing," the judge concluded there was no basis to reconsider either Judge Malone's or Judge DuPuis' rulings regarding plaintiff's standing to prosecute the foreclosure. He also found the certification of service of the NOI and defendants' concession they received it established conclusively plaintiff's compliance with N.J.S.A. 2A:50-56c(11). Defendants' motion for reconsideration was denied on March 11, 2015.

The Office of Foreclosure entered final judgment of foreclosure on May 22, 2015. Defendants' motion to stay the sheriff's sale was denied on October 28, 2015, and after granting defendants' application to file an emergent motion for stay, we denied stay relief on November 4, 2015.

Defendants appeal, raising the following issues:

> 1. THIS COURT MUST DECIDE IF DEFENDANTS WERE ENTITLED TO DISPUTE AND REQUEST VALIDATION OF THE DEBT PRIOR TO THE COMMENCEMENT OF THE FORECLOSURE ACTION.
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> 2. THIS COURT MUST DECIDE IF THE CHANCERY COURT ERRED WHEN IT RULED THAT DEFENDANTS ARE PRECLUDED FROM CHALLENGING THE FORECLOSURE ACTION BASED UPON A PREVIOUS FORECLOSURE ACTION AGAINST DEFENDANTS WHEREBY WELLS FARGO OBTAINED A SUMMARY JUDGMENT BUT EVENTUALLY WAS DISMISSED WITHOUT PREJUDICE.
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> a. Rather Than Attempt To Reinstate The Dismissed Foreclosure Action, Wells Fargo "Slept On Its Rights" And Chose To File A

New Foreclosure Complaint, And Therefore Should Not Be Entitled To Any Relief In The Form Of Precluding Defendants From Contesting The Action.

b. Defendants Are Not Barred From Contesting The Foreclosure Action As The Claim Preclusion Elements Are Not Met.

c. Defendants' Challenges To The Assignments Of Mortgage Should Be Allowed As They Seek To Render Those Assignments As Void.

3. EVEN IF THE DEFENDANTS ARE PRECLUDED FROM CHALLENGING THE FORECLOSURE ACTION, THE APPELLATE COURT MUST DECIDE IF WELLS FARGO'S PROOFS WERE ADEQUATE TO SUPPORT THE GRANTING OF SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR.

a. Allowing A Law Firm to "Step Into The Shoes Of The Lender" And Send A Notice Of Intention To Foreclose Does Not Satisfy The Intent Of The Fair Foreclosure Act, And Effectively Makes A Foreclosing Party's Counsel A Witness, Which Is Forbidden Under The Rules Of Court And Professional Conduct Where The Issue Is Contested, As Is The Case At Bar.

b. The Alleged Copy Of The Note Attached To Wells Fargo's Complaint Is Not [E]ndorsed To Wells Fargo, And Contains No Allonges.

4. THE APPELLATE COURT MUST DECIDE IF THE CHANCERY COURT ERRED WHEN IT DETERMINED THAT DEFENDANTS' CROSS-MOTION FOR RECONSIDERATION AND TO VACATE, DID NOT WARRANT THE COURT'S NOVEMBER 20, 2015 ORDER TO BE VACATED; OR AT THE VERY LEAST, ACCORD DEFENDANTS AN OPPORTUNITY TO CONDUCT LIMITED DISCOVERY.

a. The Court Erred When It Applied Claim Preclusion Doctrines To The Defendants When The Facts Show They Did Not Have A Full And

Fair Opportunity To Be Heard On Their Issues Raised In The Previous Foreclosure Action.

b. In Ruling Incorrectly That The Defendants Are Precluded From Challenging Wells Fargo's Standing, The Court Improperly Refrained From Addressing Defendants' Evidence Which Refutes The Validity Of Certain Assignment Of Mortgages, And Ultimately Wells Fargo's Standing.

c. Defendants' Newly Discovered Evidence Submitted Seeks To Render One Of The Subject Assignments Of Mortgage Void, And Therefore The Court Should Have Given Sufficient Due Process To The Proffered Evidence, And At The Very Least Address Its Quality.

The only issue that merits any discussion in a written opinion, see Rule 2:11-3(e)(1)(E), is whether Judges DuPuis and Perfilio were correct to apply collateral estoppel to the standing issues on which Wells Fargo was granted summary judgment in the first action, before that action was dismissed without prejudice for failure to serve an NOI. Having considered the question, we find no error.

We agree with both judges who considered this issue that defendants were provided a full and fair opportunity to litigate the standing issues in the first foreclosure action. See Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012). "Both collateral estoppel and law of the case are guided by the 'fundamental legal principle . . . that once an issue has been fully and fairly litigated, it ordinarily is not

subject to relitigation between the same parties either in the same or in subsequent litigation.'" State v. K.P.S., 221 N.J. 266, 277 (2015) (quoting Morris Cnty. Fair Hous. Council v. Boonton Twp., 209 N.J. Super. 393, 444 n.16 (Law Div. 1985)). "[T]he question to be decided is whether a party has had his day in court on an issue." McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962).

We are, of course, aware of the general rule that a dismissal without prejudice adjudicates nothing. See Malhame v. Borough of Demarest, 174 N.J. Super. 28, 30-31 (App. Div. 1980); Pressler and Verniero, Current N.J. Court Rules, comment 1.2 on R. 4:37-1 (2017). And because a court has the inherent power to modify any interlocutory order until entry of final judgment, see Lombardi v. Masso, 207 N.J. 517, 535 (2011), giving collateral estoppel effect to a summary judgment in a dismissed action would be the exception, not the rule. Cf. Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 658-59 (1996) (discussing possibility of collateral estoppel or issue preclusion arising from EEOC determination in Title VII litigation, although the EEOC determination in such cases is not "final and enforceable").

But a court of equity has broad discretion to determine whether application of collateral estoppel, including offensive

collateral estoppel, is appropriate. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 99 S. Ct. 645, 651, 58 L. Ed. 2d 552, 562 (1979). Although the doctrine "is designed to protect litigants from relitigating identical issues and to promote judicial economy," a court in exercising its discretion must "weigh economy against fairness." Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002). "Fundamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, an underlying confidence the result was substantially correct. The premise is that properly retried, the outcome should be the same." Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162, 166 (App. Div. 1988) (citing Restatement (Second) of Judgments § 29 comment f (1982)).

Having reviewed the record, we are convinced that Judge DuPuis carefully weighed the parties competing claims in determining to give collateral estoppel effect to Judge Malone's prior resolution of the standing issues. Given the circumstances, including the narrowness of the issues in a foreclosure action, see Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994), the now well-settled principle that either possession of the note or an assignment predating the filing of the foreclosure complaint confers standing on the plaintiff, see

Angeles, supra, 428 N.J. Super. at 318, that Judge Malone had determined Wells Fargo was in possession of the note specifically endorsed to its order at the time it filed its original complaint, see Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 330 (Ch. Div. 2010), and that it had been assigned the mortgage when it received the note, six months prior to the filing of the first complaint,[1] which assignment was recorded in the county clerk's office well before the second complaint was filed, and that defendants were raising the same issues Judge Malone had already rejected, we cannot conclude Judge DuPuis abused her considerable discretion in determining that application of collateral estoppel was just and fair. See Kortenhaus, supra, 228 N.J. Super. at 166.

Although there is no doubt defendants had their day in court on the standing issue, there remains the question of whether, notwithstanding, Judge Grispin's subsequent order dismissing the first foreclosure action without prejudice on an unrelated issue precluded application of the doctrine of

[1] Although defendants contend Judge Malone erred in relying on the certification submitted by Wells Fargo to support those findings, they have not included the certification in their appendix. Accordingly, we are in no position to assess the merits of that claim and thus decline to address it. See Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177 (App. Div. 2002); R. 2:6-1(a)(1)(I); R. 2:6-3.

collateral estoppel. Stated another way, we must consider whether by applying collateral estoppel, the judges in the second action properly respected Judge Grispin's order denying Wells Fargo's request to cure and instead requiring the bank to file a new action, as the law of the case. We conclude that in applying collateral estoppel to the standing issues, the judges in the second action did not transgress the law of the case doctrine.

As Justice Long explained in Lombardi, "[t]he law of the case doctrine teaches us that a legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case.'" 207 N.J. at 538 (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)). Like collateral estoppel, "[i]t is a non-binding rule intended to 'prevent relitigation of a previously resolved issue.'" Ibid. (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008) (citing Pressler, Current N.J. Court Rules, comment 4 on R. 1:36-3 (2008))). The doctrine is "only triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue." Id. at 539.

The question is whether by determining that defendants were precluded from relitigating the standing issues in the second foreclosure, the judges in the second case were effectively

permitting Wells Fargo to cure by serving a new NOI, contrary to Judge Grispin's order. Leaving aside that the law of the case doctrine is discretionary, and could even be argued inapplicable to the new action, we consider it applicable under the circumstances here and not violated.

As we noted in Laks, the Fair Foreclosure Act entitles a residential borrower to service of a conforming NOI before the lender can accelerate the amount due and file a foreclosure action. 422 N.J. Super. at 212; N.J.S.A. 2A:50-56a. The NOI allows the borrower thirty days to cure the default and reinstate the mortgage as if the default had never occurred. Ibid. A cure nullifies any acceleration and prevents the filing of a foreclosure action, sparing the borrower the obligation to pay the lender's counsel fees and costs. N.J.S.A. 2A:50-56c(7); N.J.S.A. 2A:50-57b(3). "Dismissal without prejudice ensures that defendants are not deprived of those non-waivable rights and that a plaintiff who has not fulfilled its duty under the Act will not reap a benefit from its noncompliance." Laks, supra, 422 N.J. Super. at 212; N.J.S.A. 2A:50-56a.

In overruling Laks, the Supreme Court in Guillaume made clear that dismissal without prejudice was not required for failure to serve a conforming NOI. Guillaume, supra, 209 N.J. at 476-79. Instead, a trial court has the discretion to

"dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy appropriate to the circumstances of the case." Id. at 476. The Chancery judges presiding over foreclosure matters are charged in such circumstances with fashioning "equitable remedies that address the unique setting of each case." Ibid.

Because defendants failed to include the transcript of the hearing in which Judge Grispin placed his reasons on the record for ordering a dismissal without prejudice, we cannot say with certainty why he chose the remedy he did. It is safe to assume, however, that those reasons related to providing defendants their statutory right to notice and an opportunity to cure and not any concern about plaintiff's standing to prosecute the foreclosure. Accordingly, we look at both Judge Grispin's order and the subsequent orders of Judges DuPuis and Perfilio as carefully chosen, non-mutually exclusive equitable remedies tailored to the circumstances of the case before them. By allowing defendants an opportunity to cure without consequences, we cannot assume that Judge Grispin intended to also allow defendants to relitigate claims already fully and fairly adjudicated.

As we have noted in another context, "[i]n foreclosure matters, equity must be applied to plaintiffs as well as

defendants." Angeles, supra, 428 N.J. Super. at 320. This loan went into default in September 2009, almost seven-and-a-half years ago. Not only have defendants not paid their mortgage in the ensuing years, they have made the lender responsible for their taxes and insurance during those years as well. Judge Grispin's order dismissing the first foreclosure without prejudice provided defendants another two years to remain in their home, effect a cure, enter into a loan modification or sell the property. We do not conclude it also entitled defendants to relitigate issues on which they had already had their day in court.

Affirmed.