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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4662-15T2

U.S. BANK TRUST, N.A., AS TRUSTEE
FOR LSF8 MASTER PARTICIPATION TRUST,

Plaintiff-Respondent,

v.

NICOLE THOMAS and VINCENT A. THOMAS,

Defendants-Appellants,

and

MR. THOMAS, HUSBAND OF NICOLE THOMAS;
3641 CONSULTING INC., and
MIDATLANTIC NEONATOLOGY,

Defendants.

Argued September 12, 2017 – Decided September 21, 2017

Before Judges Yannotti and Carroll.

On appeal from the Superior Court of New
Jersey, Chancery Division, Ocean County,
Docket No. F-20139-15.

Grant S. Ellis argued the cause for appellants
(Archer Law Office, LLC, attorneys; Mr. Ellis,
on the briefs).

Douglas J. McDonough argued the cause for
respondent (Fein, Such, Kahn & Shepard, PC,
attorneys; Joshua B. Sears, on the brief).

PER CURIAM

In this mortgage foreclosure case, defendants Nicole Thomas and Vincent A. Thomas, husband and wife, appeal from a December 4, 2015 order denying their motion to vacate default and dismiss the complaint, and a February 19, 2016 order denying reconsideration. Defendants also appeal the June 1, 2016 final judgment that followed. Relying on Associates Financial Services Company of New Jersey v. Bozzarello, 168 N.J. Super. 211 (App. Div. 1979) (Bozzarello II), defendants contend that because LSF8 Master Participation Trust (LSF8) has not filed an activities report, as required by the Corporation Business Activities Reporting Act (the Reporting Act), N.J.S.A. 14A:13-14 to -23, its assignee, plaintiff U.S. Bank Trust, N.A., as Trustee for LSF8, is precluded from bringing this action. We disagree and affirm the orders and judgment on appeal.

The pertinent facts are undisputed and are outlined in the trial court's December 4, 2015 oral opinion. On December 2, 2005, defendant Nicole Thomas executed a note and purchase money mortgage to secure payment of an \$849,648 loan from Washington Mutual Bank, FA. Defendant Vincent Thomas joined Nicole in executing the mortgage, which was then duly recorded.

In September 2008, JP Morgan Chase Bank acquired all the assets and liabilities of Washington Mutual, including the subject

loan, which went into default two months later. In May 2009, JP Morgan filed a foreclosure complaint against Nicole, who thereafter filed a non-contesting answer.

The action was stayed for several years until Nicole was granted leave to file an amended answer and counterclaim in April 2014. JP Morgan assigned the mortgage to LSF8, a Delaware trust, in July 2014. LSF8 filed an amended foreclosure complaint the following month, substituting itself as plaintiff and adding Vincent Thomas as a defendant.

On November 7, 2014, the court ruled on the parties' respective motions for summary judgment. After hearing oral argument, the court rejected defendants' argument that LSF8 lacked standing to foreclose. Consequently, the court denied defendants' motion and simultaneously entered summary judgment in favor of LSF8.

On March 12, 2015, defendants moved to dismiss LSF8's complaint based on their contention that LSF8 is a corporation within the purview of the Recording Act and thereby required to file a business activities report. The trial court agreed, and on March 22, 2015, it entered an order staying defendants' motion to dismiss for ninety days, and required LSF8 to submit proof that it filed the activities report. On April 2, 2015, the action was dismissed without prejudice by stipulation of the parties.

On March 31, 2015, LSF8 assigned the mortgage to plaintiff U.S. Bank Trust, N.A., as Trustee for LSF8. On May 8, 2015, plaintiff filed the present foreclosure action. Defendants filed a motion to dismiss the complaint on July 24, 2015, which they assert the court dismissed due to an administrative error. On September 24, 2015, default was entered against defendants for failure to file an answer or other responsive pleading.

Defendants thereafter moved to vacate default and restore their dismissal motion. Relying on Bozzarello II, defendants argued plaintiff was precluded from bringing the new foreclosure action until LSF8 fulfilled its reporting requirements. Plaintiff countered that, as a federally chartered national banking association, it was exempt from the filing requirements of the Reporting Act. The trial court agreed, citing American Bank & Trust Company of Pennsylvania v. Lott, 99 N.J. 32, 40 (1985). Accordingly, the court entered an order denying the motion on December 4, 2015. Defendants filed a motion for reconsideration, which the court denied on February 19, 2016. The court entered a final judgment of foreclosure on June 1, 2016. This appeal followed.

Defendants argue, as they did before the trial court, that plaintiff is barred from maintaining this action until its assignor, LSF8, files a business activities report in compliance

with the Recording Act. Defendants again rely on Bozzarello II in support of their position.

Pursuant to the Recording Act, "[e]very foreign corporation which during any calendar or fiscal accounting year . . . carried on any activity or owned or maintained any property in [New Jersey], unless specifically exempted under [N.J.S.A. 14A:13-16], shall be required to file a notice of business activities report[.]" N.J.S.A. 14A:13-15. Failure to comply "shall prevent the use of the courts in this State for all contracts executed and all causes of action that arose at any time prior to the end of the last accounting period for which the [foreign] corporation failed to file a required timely report." N.J.S.A. 14A:13-20.

In Bozzarello, a Pennsylvania loan company, Associates Consumer Discount Company, initially brought suit against New Jersey resident defendants for defaulting in payments on a promissory note. Bozzarello II, supra, 168 N.J. Super. at 212. That suit was dismissed because the nonresident corporate plaintiff failed to comply with the filing requirements of the Reporting Act. Assocs. Consumer Disc. Co. v. Bozzarello, 149 N.J. Super. 358 (App. Div. 1977) (Bozzarello I). Thereafter, the unsuccessful corporate plaintiff assigned the note to Associates Financial Services Co. of New Jersey, Inc., a New Jersey corporation, which brought a new action against defendants on the

note. Bozzarello II, supra, 168 N.J. Super. at 212. In affirming the trial court's dismissal of the second action, we held that the prohibition against a foreign corporation suing on a note, where it had failed to file the required business activities report, could not be evaded by assigning the note or the cause of action to a New Jersey corporation. Id. at 213-14.

Subsequently, our Supreme Court in Lott confronted the issue of whether a foreign bank may maintain a mortgage foreclosure action in New Jersey Superior Court, notwithstanding its failure to comply with the filing requirements of the Reporting Act. Lott, supra, 99 N.J. at 33. In affirming the denial of defendants' motion to dismiss, the Court noted: "Neither the terms of the Reporting Act nor its legislative history suggests that the Legislature intended to include foreign banks within the definition of 'corporation' contained in N.J.S.A. 14A:13-17b. Furthermore, the statutory scheme reveals the Legislature's intention to treat foreign banks differently from foreign business corporations." Id. at 35. The Court added, "the Reporting Act was designed to facilitate the collection of corporate taxes, an endeavor that has no application to a foreign bank such as American." Id. at 40.

Like the trial court, we find the reasoning in Lott persuasive. Simply put, under Lott, the Reporting Act does not

apply to foreign banks filing foreclosure actions in New Jersey. Id. at 40-41. Defendants concede the Act is equally inapplicable to federally-chartered national banking associations, such as plaintiff. Defendants' motion to dismiss was therefore properly denied.

The trial court also properly denied reconsideration, as defendants did not present any new information that was previously unavailable or demonstrate the court's earlier decision was based on a palpably incorrect or irrational basis. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Defendants also challenge the trial court's denial of their motion to vacate default. In support of the motion, defense counsel certified that defendants wished to renew their motion to dismiss based on the Recording Act, which constituted a "meritorious defense" to the foreclosure action and "good cause" to vacate default.

Rule 4:43-3 authorizes a court to set aside an entry of default "[f]or good cause shown." "[A]n application to vacate default 'should be viewed with great liberality and every reasonable ground for indulgence is tolerated to the end that a just result is reached.'" N.J. Div. of Youth and Family Servs. v. P.W.R., 410 N.J. Super. 501, 508 (App. Div. 2009) (citations

omitted), rev'd on other grounds, 205 N.J. 17 (2011). The standard for setting aside an entry of default is less stringent than the standard for setting aside a default judgment. US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 466-67 (2012) (citation omitted).

A party seeking to set aside default may establish good cause by demonstrating "the presence of a meritorious defense worthy of judicial determination . . . and the absence of any contumacious conduct[.]" O'Connor v. Altus, 67 N.J. 106, 129 (1975). "[T]he showing of a meritorious defense is a traditional element necessary for setting aside both a default and a default judgment" Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:43-3 (2017).

That element is required because, like a motion to vacate a default judgment, when a party has no meritorious defense, "[t]he time of the courts, counsel and litigants should not be taken up by such a futile proceeding." Guillaume, supra, 209 N.J. at 469 (quoting Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953)). We review the denial of a motion to vacate default under an abuse of discretion standard. Cf. id. at 467.

Applying these principles, we conclude the trial court did not abuse its discretion in denying defendants' motion. We note defendants' standing argument was rejected and summary judgment entered them in the prior action. We have found defendants'

argument that plaintiff is not permitted to pursue this action by virtue of the strictures of the Recording Act equally unavailing. Defendants do not deny execution of the note and mortgage, and have made no mortgage payment since 2008.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION