SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5575-15T1

U.S. BANK, N.A., AS LEGAL TITLE TRUSTEE FOR TRUMAN 2013 SC4 TITLE TRUST,

Plaintiff-Respondent,

v.

LUBICA VILCEKOVA,

Defendant-Appellant,

and

MR. VILCEKOVA, husband of LUBICA VILCEKOVA, HOWARD K. PFEFFER, ESQ., and FOREST JUNCTION CONDOMINIUM ASSOCIATION,

Defendants.

Submitted September 20, 2017 – Decided October 13, 2017

Before Judges Simonelli and Haas.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-047074-14.

Law Offices of Joseph A. Chang, LLC, attorneys for appellant (Mr. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

Romano Garubo & Argentieri, attorneys for respondent (Emmanuel J. Argentieri, on the brief).

PER CURIAM

In this foreclosure matter, defendant Lubica Vilcekova appeals from the March 7, 2016 Chancery Division order, which granted summary judgment to plaintiff U.S. Bank, N.A. as legal title trustee for Truman 2013 SC4 Title Trust, and struck defendant's answer with prejudice. Defendant also appeals from the July 12, 2016 final judgment. For the following reasons, we affirm.

I.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to defendant. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

On July 22, 2007, defendant signed an application for a residential adjustable rate mortgage loan in the amount of $225,600 from World Savings Bank (WSB), and listed her monthly income as $6880. Defendant represented and acknowledged "the information provided in this application is true and correct . . . and that any intentional or negligent misrepresentation of the information

contained in this application may result in civil liability, including monetary damages . . . and/or criminal penalties[.]"

On July 27, 2007, defendant executed a thirty-year adjustable rate mortgage note to WSB in the amount of $225,600, with an annual interest rate of 7.060%. To secure payment of the note, defendant executed a mortgage to WSB on her property located in Kearny. At the time of closing, defendant executed and received a federal Truth-in-Lending Disclosure Statement and notice of right to cancel the loan transaction. Defendant used the loan proceeds to pay off an existing mortgage on the property and closing costs, and received a balance of $7,284.74 for personal use. The mortgage was recorded in the Hudson County Clerk's Office on August 15, 2007.

On December 31, 2007, WSB amended its charter to change its name to Wachovia Mortgage, FSB (Wachovia). On July 12, 2009, defendant executed a loan modification agreement with Wachovia in the amount of $232,550.81, wherein she admitted that $232,550.81 was due under the original note and mortgage. The loan modification agreement reduced the annual interest rate to 3.60% with a periodic rate step-up capped at 6.5%.

On November 1, 2009, Wachovia converted to a national bank known as Wells Fargo Bank Southwest, NA, and merged into Wells Fargo Bank, NA (Wells Fargo). On April 15, 2011, defendant

defaulted on the note and mortgage. The default was due to her loss of employment.

On December 19, 2013, plaintiff acquired the mortgage and original note and held same since that date until it released the documents to its attorney for this litigation. On March 4, 2014 Wells Fargo assigned all of its rights, title, and interest in the mortgage to plaintiff, as legal title trustee for Truman 2013 SC4 Title Trust. On March 17, 2014, the assignment was recorded with the Hudson County Registrar. Thus, as of March 17, 2014, plaintiff was the holder of the original note and assignment of the mortgage.

On August 7, 2014, plaintiff, through its servicing agent, mailed defendant a notice of intention to foreclose. Defendant failed to cure her default. As a result, on November 10, 2014, plaintiff, as legal title trustee for Truman 2013 SC4 Title Trust, filed a foreclosure complaint against defendant. Defendant filed an answer, admitting to executing the note, mortgage, and loan modification agreement, and asserting twelve affirmative defenses, including plaintiff's lack of standing and predatory lending in violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-2 to -20.

During discovery, plaintiff produced a copy of the original note and invited defendant to inspect the document in plaintiff's attorney's office, which neither defendant nor her attorney

accepted or scheduled. Plaintiff also produced a copy of defendant's original loan application. On October 1, 2015, defendant served plaintiff with a notice to depose an authorized representative.

On October 6, 2015, plaintiff filed a motion for summary judgment, and on October 22, 2015, filed a motion to quash the notice of deposition. On November 13, 2015, defendant filed a cross-motion to compel discovery.

In opposition to plaintiff's summary judgment motion, defendant argued, in part, that plaintiff lacked standing to foreclose because its noncompliance with a Pooling and Servicing Agreement (PSA) established it did not own or possess the note. Defendant argued she was a third-party beneficiary of the PSA and had standing to challenge plaintiff's noncompliance. Defendant also argued summary judgment was not appropriate because plaintiff violated the CFA and discovery was not complete.

In a March 7, 2016 order, the motion judge granted plaintiff's summary judgment motion; in two separate April 1, 2016 orders, the court granted plaintiff's motion to quash defendant's notice of deposition and denied defendant's cross-motion to compel discovery. In an April 1, 2016 written opinion, the judge found plaintiff's proofs established a prima facie right to foreclose, and defendant failed to demonstrate how further discovery would

rebut that right or have any impact on the court's decision. The judge found there was no factual support for most of defendant's affirmative defenses. The judge also found plaintiff has standing to foreclose because it's proofs established it had possession of the note and assignment of the mortgage prior to filing the complaint. On July 12, 2016, the court entered final judgment. This appeal followed.

II.

On appeal, defendant contends her CFA defense based on predatory lending was not subject to dismissal on summary judgment. She argues that plaintiff committed an unconscionable commercial practice under the CFA because it extended the adjustable rate note to her with reckless unconcern as to her ability to pay. This argument lacks merit.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation omitted). Thus, we consider, as the trial judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). "[S]mmary judgment [must] be

granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Templo Fuente, supra, 224 N.J. at 199 (quoting R. 4:46-2(c)). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying these standards, we discern no reason to reverse the grant of summary judgment in favor of plaintiff.

Defendant executed the note on July 27, 2007, and did not assert the CFA defense until June 15, 2015, when she filed her answer. The defense, therefore, is time-barred by the six-year statute of limitations. N.J.S.A. 2A:14-1; DiIorio v. Structural Stone & Brick Co., Inc., 368 N.J. Super. 134, 142 (App. Div. 2004) (citation omitted).

Defendant's CFA defense also fails on the merits. In United State Bank National Ass'n. v. Curcio, 444 N.J. Super. 94 (App. Div. 2016), we rejected predatory lending as an affirmative defense to foreclosure, stating:

> Defendant also argues that plaintiff engaged in predatory lending by extending a mortgage she could not afford, and tricking her into accepting an adjustable rate mortgage. However, she does not provide evidence nor published New Jersey cases to support her argument. Thus, "[w]e will not consider" defendant's entirely unsupported and "conclusionary statement." In any event, we note defendant signed documents which made clear she was agreeing to an adjustable rate mortgage.
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> [Id. at 114 (alteration in original) (citing Miller v. Reis, 189 N.J. Super. 437, 441 (App. Div. 1983)).]

Defendant provided no evidence to support her defense of predatory lending. To the contrary, the evidence confirms defendant was not extended a mortgage plaintiff knew she could not afford or tricked into accepting the adjustable rate mortgage. Defendant represented on the loan application she had sufficient monthly income to pay the mortgage loan and signed documents that made clear she was agreeing to an adjustable rate mortgage in the amount of $225,600. Defendant paid the mortgage for nearly four years, and defaulted because she lost her employment, not because of predatory lending.

III.

Defendant next contends that because plaintiff violated the PSA, the judge erred in holding plaintiff had standing.[1] Relying on Bank of New York v. Ukpe, A-2209-11 (App. Div. Aug. 20, 2014), and Yvanova v. New Century Mortgage Corp., 365 P.3d 845 (Cal. 2016), plaintiff argues she had standing to assert a violation of the PSA and is a valid third-party beneficiary of the PSA. However, unpublished opinions, such as Ukpe, do not constitute precedent and are not binding on us. Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36-3. Further, we are not bound by opinions from other jurisdictions.[2] See Lipkowitz v. Hamilton Surgery Ctr., LLC, 415 N.J. Super. 29, 36 (App. Div. 2010); Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 622 (App. Div.), certif. denied, 149 N.J. 408 (1997).

Nevertheless, neither Ukpe nor Yvanova support defendant's position. In Ukpe, we did not discuss whether a borrower may challenge compliance with a PSA, let alone hold or even suggest

[1] We decline to address defendant's public policy argument that banks and lending institutions created and developed a complex securitization scheme of contemporary banking behind which they should not be permitted to "hide."

[2] Defendant also relies on opinions from other jurisdictions to argue that recent trends in those jurisdictions provide strong support for her position. However, as we have already stated, we are not bound by opinions from other jurisdictions.

that a borrower has standing to do so. In Yvanova, the Supreme Court of California merely held that a borrower who suffered a non-judicial foreclosure could sue for wrongful foreclosure when an assignment is void, as opposed to voidable. Yvanova, supra, 365 P.3d at 848. The Supreme Court of California repeatedly stressed it was expressing no opinion on whether a mortgage assignment made after the closing date of a New York securitized trust was void or voidable. Id. at 853. Thus, regardless of whether plaintiff complied with the PSA in this case, defendant lacked standing to advance such a challenge.

IV.

In the alternative, defendant contends that she is entitled to a limited remand for findings of fact and conclusions of law on her predatory lending and PSA affirmative defenses. Lastly, defendant argues summary judgment was premature because discovery was not complete.

We have considered these contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we make these brief comments.

"As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt." Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 222 (App. Div.

2011) (citations omitted). "[E]ither possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (citing Mitchell, supra, 422 N.J. Super. at 216, 225). "[S]tanding is not a jurisdictional issue in our State court system and, therefore, a foreclosure judgment obtained by a party that lacked standing is not 'void' within the meaning of Rule 4:50-1(d)." Deutsche Bank Nat'l Trust Co. v. Russo, 429 N.J. Super. 91, 101 (App. Div. 2012). The judgment is "voidable" unless the plaintiff has standing from either possession of the note or an assignment of the mortgage that predated the original complaint. See Angeles, supra, 428 N.J. Super. at 319-20.

Here, plaintiff had both possession of the original note and an assignment of the mortgage prior to filing the foreclosure complaint. Accordingly, the court correctly determined that plaintiff had standing in this matter, and properly granted summary judgment. No further discovery could change this result.

Affirmed.