SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0636-16T2

WELLS FARGO BANK, N.A.,

Plaintiff-Respondent,

v.

DOMENIC MAGRO a/k/a DOMENICK MAGRO; JACQUALINE MAGRO a/k/a JACQUELINE MAGRO, his wife,

Defendants-Appellants,

and

UNITED STATES OF AMERICA; STATE OF NEW JERSEY; ST. BARNABAS MEDICAL CENTER; NEW JERSEY ANESTHESIA ASSOCIATES; NEW CENTURY FINANCIAL SERVICES; POST & LINTEL ARCHITECTURAL; SLOMINS INC.; POLO FINANCIAL CONSULTING & TA,

Defendants.

Submitted January 17, 2018 – Decided February 23, 2018

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-038765-09.

Law Offices of Joseph A. Chang, attorneys for appellants (Joseph A. Chang, of counsel; Jeffrey Zajac, on the brief).

Reed Smith, LLP attorneys for respondent (Henry F. Reichner, of counsel; Brian P. Matthews, on the brief).

PER CURIAM

Defendants Domenic and Jacqueline Magro (defendants) appeal from an October 6, 2016 final judgment of foreclosure[1] and from an April 20, 2016 order denying their motion to vacate entry of a default. We affirm both orders.

I

In 2006, Domenic Magro[2] executed a $442,500 note to World Savings Bank (World) to refinance a residential property in Fairfield, New Jersey. He and Jacqueline Magro also executed a mortgage to World, which mortgage subsequently was recorded. World changed its name to Wachovia Mortgage, FSB (Wachovia) in 2007 and then, Wachovia was acquired by and merged into Wells Fargo Bank N.A. in November 2009. Suser v. Wachovia Mortg., FSB, 433 N.J. Super. 317, 321 (App. Div. 2013).

[1] Defendants refer to an August 12, 2016 final judgment, but the record copy is dated October 6, 2016.

[2] For clarity, we use the parties' first names where necessary because they share the same last name.

Defendants defaulted on the mortgage payments in August 2008. They do not contest the default.

A foreclosure complaint was filed in July 2009.[3] Defendants did not answer the complaint. On January 20, 2010, a default was entered under Rule 4:43-1. Defendants attempted to file an answer two years later, but in May 2012, the trial court deemed the answer to be "void and of no effect pending the filing and determination of a motion before [the] court to vacate the default entered." That order is not challenged on appeal. The case was returned to the Office of Foreclosure to proceed as an uncontested matter. The parties unsuccessfully mediated the case in June 2013.

In May 2015, plaintiff was granted permission to file an amended complaint that added six new judgment creditors as defendants and a federal tax lien. In July 2015, defendants attempt to file an answer to the amended complaint was rejected. In February 2016, defendants filed a motion to vacate the default that had been entered in January 2010.

In support of the motion, Dominic certified that he had owned the property since December 2006. He "was aware that [he] would be unable to afford [the] mortgage" and tried to obtain a loan modification but never received one. He stated that he "assumed

[3] Wells Fargo was substituted as plaintiff by order dated May 20, 2014.

and expected" the case was abandoned because it had not been prosecuted by plaintiff since July 2015. Defendants' proposed answer alleged thirteen separate affirmative defenses, including an alleged violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20 (Fourth Affirmative Defense) and the defense of recoupment based on an alleged violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1638 (Eighth Affirmative Defense).[4]

The trial court denied defendants' motion to vacate default. Citing to O'Connor v. Altus, 67 N.J. 106, 129 (1975), the court stated that in order to vacate the default, there needed to be a "demonstration of absence of contemptuous conduct and a meritorious defense." The court did not find anything "contemptuous" about defendants' conduct. However, the court found that defendants' proposed answer did not plead their consumer fraud claim with the "specificity necessary" and was "time barred anyway." The court denied the motion, finding it would be prejudicial to vacate the default based on the record and the age of the case.

[4] We consider defendants to have waived any other claimed affirmative defenses because they were not raised in their merits brief. See Drinker Biddle & Reath LLC v. N.J. Dep't of Law & Pub. Safety, Div. of Law, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (noting that claims not addressed in merits brief are deemed abandoned); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2018).

A final judgment of foreclosure was entered on October 6, 2016. Defendants did not object prior to its entry.

Defendants contend that the note was a pick-a-payment loan product. Pick-a-payment loans were the subject of a federal class action commenced in 2007, in United States District Court for the Northern District of California. In re Wachovia Corp. "Pick-a-Payment Mortg. Mktg. & Sales Practices Litig., No. M:09-CV-2015-JF, 2010 U.S. Dist. LEXIS 139691 (N.D. Cal. Dec. 16, 2010). Defendants are Class C members as "borrowers who still hold their loans and are in default." They do not allege that they opted out of the class.

The class action settlement was approved on May 17, 2011. Under the settlement, class members released their claims "fully, finally, and completely" and "forever discharge[d] the [a]lleged [c]laims and any and every actual or potential known or unknown claim, . . . right, demand, suit, matter, obligation, damage, loss or cost, action or cause of action, of every kind and description." Further, the settlement agreement defined "[a]lleged [c]laims" as "including, but not limited to, claims that the [d]efendants . . . violated TILA . . . and state consumer protection laws." The federal court retained jurisdiction to interpret and enforce the settlement agreement.

On appeal, defendants allege that the trial court erred by denying their motion to vacate the entry of default. They claim the proposed answer alleged a meritorious claim of predatory lending under the CFA because the pick-a-payment loan product was inherently predatory. They argue the defense of recoupment for "counsel fees and costs" under the CFA and "unauthorized and excessive fees" under TILA is meritorious. Defendants contend the court committed plain error by holding their affirmative defenses were time barred.

II

We review the denial of a motion to vacate under an abuse of discretion standard. US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571, (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

A showing of good cause is all that is necessary to vacate the entry of a default. See R. 4:43-3 (providing that "[f]or good cause shown, the court may set aside an entry of default"). Good cause can mean "the presence of a meritorious defense . . . [and] the absence of any contumacious conduct." O'Connor v. Altus, 67

N.J. 106, 129 (1975). The required showing of good cause is less stringent than that required to set aside a default judgment. N.J. Mfrs. Ins. Co. v. Prestige Health Grp., 406 N.J. Super. 354, 360 (App. Div. 2009). "[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 & Family Servs. v. P.W.R., 410 N.J. Super. 501, 508 (App. Div. 2009) (quoting Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964)).

Here, we discern no abuse of discretion by the court in denying defendants' motion to vacate default. Domenic's certification did not explain why he took no action until February 2016 regarding the default that was entered in January 2010. His certification alleges he thought the foreclosure was abandoned after July 2015, but it did not explain his lack of action for six years before that.

Further, defendants never disputed that they were class members of the federal class action or that the settlement agreement released their claims and defenses under TILA and under the State's consumer protection law.

We give full faith and credit to a class action judgment of another court, where the "class members in that action . . . have been afforded 'the minimum procedural requirements'" of due

process. Simmermon v. Dryvit Sys., Inc., 196 N.J. 316, 330 (2008) (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982)). These minimum procedural requirements include:

> notice plus an opportunity to be heard and participate in the litigation. The notice must be the best practicable, reasonably calculated, under all the circumstances to apprise [class members] of the pendency of the action and afford them an opportunity to present their objections. The notice should also describe the class members' rights in the action and provide them an opportunity to remove [themselves] from the class by executing and returning an opt out or request for exclusion form to the court.
>
> [Ibid. (citations omitted).]

Defendants do not allege the denial of due process. The settlement gave defendants ample notice and opportunity to be heard and to opt out. As class members under the settlement, defendants waived all claims regarding the pick-a payment loan, including claims under TILA and the State's consumer protection laws.

"[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, cmt. on R. 4:43-3 (2018). It would not make practical sense to vacate a default for claims that lack merit.

We disagree with defendants' argument that their affirmative defense of recoupment was meritorious. Defendants do not dispute that affirmative claims under TILA or the CFA based on the 2006 note and mortgage would be time-barred. See Mirra v. Holland Am. Line, 331 N.J. Super. 86, 90 (App. Div. 2000) (applying six-year statute of limitations to CFA claims); Zaman v. Felton, 219 N.J. 199 (2014) (applying one-year statute of limitations to TILA claims). Defendants admit that the recoupment claim is based on the CFA and TILA. However, they waived these claims through the class action settlement. Thus, even if the recoupment claim were not time barred, see Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 271-72 (App. Div. 2001) (holding the statute of limitations on a defense of recoupment is not barred so long as the main action itself is timely), it was rendered without merit by defendants' waiver of the underlying claims.

Affirmed.