SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1647-16T1

U.S. BANK TRUST, N.A., as Trustee for LSF9 Master Participation Trust,

Plaintiff-Respondent,

v.

ALESSANDRA LANZETTA; MR. LANZETTA, unknown spouse of Alessandra Lanzetta; AUGUSTINE R. LANZETTA; MRS. LANZETTA, unknown spouse of Augustine R. Lanzetta,

Defendants-Appellants,

and

BANK OF AMERICA, N.A., successor by merger to Fleet National Bank; and MIDLAND FUNDING, LLC,

Defendants.

Submitted November 9, 2017 – Decided January 25, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-041088-15.

Lombardi & Lombardi, PA, attorneys for appellants (Michael F. Lombardi, on the brief).

Stern & Eisenberg, PC, attorneys for respondent (Salvatore Carollo, on the brief).

PER CURIAM

Defendants Alessandra Lanzetta and Augustine R. Lanzetta (collectively, defendants[1]) appeal a July 11, 2016 order granting summary judgment to plaintiff U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust, striking the contesting answer filed by defendants, and entering default judgment against defendants; and a November 18, 2016 final judgment in favor of plaintiff. We affirm.

The following facts are taken from the record. On July 8, 2003, Augustine executed a note made payable to Fleet National Bank (Fleet) in the principal amount of $150,000. On the same date, defendants executed a mortgage to Fleet National Bank to secure the note. The mortgage affected defendants' home in South Plainfield, which they jointly owned as tenants by the entirety. The mortgage was recorded on September 9, 2003. In 2011, defendants defaulted on the note and failed to cure the default.

Defendant Bank of America, N.A., is the successor by merger to Fleet. On February 23, 2015, Bank of America assigned the note

[1] Other defendants will be referred to by name in this opinion.

and mortgage to plaintiff. The assignment was recorded on March 23, 2015.

On October 9, 2015, plaintiff sent a Notice of Intent to Foreclose to defendants in accordance with the requirements of the Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -73. On December 21, 2015, plaintiff commenced a foreclosure action in the Chancery Division. On February 9, 2016, defendants filed a contesting answer, but not a counterclaim. In their answer, defendants asserted plaintiff lacked standing to foreclose because it was not in possession of the note and mortgage when the foreclosure action was commenced. They further asserted that plaintiff's predecessor, Fleet, committed predatory lending for which plaintiff was liable.

Defendants' predatory lending allegations involve transactions that occurred in 2003, more than eleven years before the assignment of the note and mortgage to plaintiff. Specifically, defendants allege that when they first applied for the 2003 loan, Fleet advised them that their credit was too poor to justify approving the loan application. They further allege a Fleet representative told them that Alessandra should not be an applicant on the loan because her credit was even worse than her husband's. Fleet approved the loan with Augustine as the sole

borrower on the note, but with both defendants executing the mortgage as mortgagors.

In 2004, defendants applied for a Home Equity Loan in the amount of $90,000, secured by a second mortgage on their home. Despite their poor credit, Fleet approved the application. The new loan closed on December 9, 2004.

Defendants contend that these transactions constituted predatory lending because "an already bad situation was compounded" by the additional loan, which they "could not possibly repay."

The parties engaged in pretrial discovery including interrogatories, requests for production of documents, and requests for admissions. On February 23, 2016, the trial court entered a case management order setting a May 31, 2016 discovery end date and an August 15, 2016 trial date. Neither party moved to extend discovery.

Both parties raise discovery issues. Defendants did not answer the interrogatories propounded by plaintiff. Defendants contend plaintiff's discovery responses were partially non-responsive because plaintiff failed to provide: the underwriting documents related to the 2003 loan; the underwriting documents related to the subsequent 2004 loan; the LSF9 Master Participation Trust agreement; and the identities of the bank officers involved

in underwriting the 2003 loan. Defendants' attorney wrote to plaintiff's counsel demanding more specific discovery responses. Plaintiff's counsel responded to the letter, setting forth reasons why defendants were not entitled to the additional documents and information they sought. Defendants did not move to compel more responsive answers to discovery. Neither party moved for discovery sanctions.

On June 1, 2016, plaintiff moved for summary judgment. Defendants opposed the motion. Following oral argument, the trial court issued a July 11, 2016 order and statement of reasons granting summary judgment to plaintiff, striking the contesting answer filed by defendants, entering default against defendants, and transferring the case to the Office of Foreclosure to proceed as an uncontested matter.

The trial court determined plaintiff had standing by virtue of receipt and recordation of the mortgage assignment prior to the commencement of the foreclosure action. In response to defendants' claim that plaintiff was liable for the alleged fraud and predatory lending committed by Fleet in 2003, the court held that plaintiff, as a holder in due course, is immune from liability for any wrongful conduct of the original lender. Finally, the court rejected defendants' claim that discovery was not complete,

finding defendants had not demonstrated further discovery would supply necessary information. The court explained:

> Plaintiff, as a subsequent mortgage assignee is a holder in due course and does not possess any of the discovery items that Defendants are requesting. In addition, Fleet Bank no longer exists as they were succeeded by Bank of America in a well known merger that took place in 2004. Defendants may be able to pursue a separate Law Division action against Bank of America for their fraud claims stemming from the loan origination, but they are certainly not entitled to any additional discovery from Plaintiff in these foreclosure proceedings.

On appeal, defendants raise the following arguments: (1) plaintiff lacked standing to prosecute the foreclosure action; (2) genuine issues of material fact existed regarding whether defendants' predecessor, Fleet, violated state and federal lending regulations in loaning money to defendants; and (3) the trial court erred in granting summary judgment without providing defendants the opportunity to obtain discovery on their predatory lending defenses.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). Summary judgment is appropriate when "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." R. 4:46-2(c). When making this determination, the court must examine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). Accordingly, we must first "decide whether there was a genuine issue of material fact, and if none exists, decide whether the trial court's ruling on the law was correct." Henry v. N.J. Dep't. of Human Servs., 204 N.J. 320, 330 (2010) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)). . We afford no special deference to legal determinations of the trial court. Templo Fuente, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The right to foreclose arises upon proof of execution and recording of a mortgage and note, and default on payment of the note. Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). Defendants do not dispute that Augustine executed the

note and received the loan proceeds, the execution and recording of the mortgage, or their failure to remit payment since 2011.

We first address defendants' defense that plaintiff lacked standing to foreclose. Standing to foreclose is established through either possession of the note or an assignment of the mortgage that predated the original complaint. 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)). Here, the note and mortgage were assigned to plaintiff on February 23, 2015. The assignment was recorded on March 23, 2015, almost nine months before plaintiff initiated this foreclosure action. Consequently, plaintiff has standing.

We next address defendants' argument that summary judgment was inappropriate because there are issues of material fact in dispute; namely, whether defendants' predecessor, Fleet, violated unidentified state and federal lending regulations in loaning money to defendants. In their appellate brief, defendants cite the Truth in Lending Act, 15 U.S.C.A. §§ 1601 to -1667; the Real Estate Procedures Act, 12 U.S.C.A. §§ 2601 to -2617; and the New Jersey Home Ownership Security Act, N.J.S.A. 46:10B-22 to -35. Defendants fail to provide any factual basis or analysis in support of their claim that Fleet violated the unidentified lending

regulations or the cited statutes. It is their responsibility to provide an adequate record for our review, see Rules 2:5-3, 5-4, 6-1, and the failure to match their argument with the record not only undermines their argument, but also hampers our review.

Moreover, defendants do not provide any specific authority for the legal contentions upon which they rely. This omission, compounded by the failure to provide factual support for the arguments they raise, is tantamount to failing to brief the issue asserted. The consequence of failing to brief an issue is waiver of that issue on appeal. Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266-67 (App. Div.), certif. denied, 165 N.J. 677 (2000); Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 2:6-2 (2018). Because the applicability and impact of the regulations and statutes were not properly briefed, they are waived.

We will, however, address defendants' argument that there are material facts in dispute regarding their defenses of alleged fraud and predatory lending committed by Fleet. This requires us to determine whether defendants can assert those personal defenses against a holder in due course. We start by recognizing N.J.S.A. 46:9-9 permits mortgagors to raise personal defenses against an assignee where the mortgage is given to secure a non-negotiable instrument, such as a bond. However, N.J.S.A. 46:9-9 does not

apply to mortgages given to secure a debt embodied in a negotiable instrument. Carnegie Bank v. Shalleck, 256 N.J. Super. 23, 44, (App. Div. 1992) (stating that "N.J.S.A. 46:9-9 was always intended to be limited to non-negotiable instruments, such as a mortgage bond, rather than negotiable instruments, such as a promissory note.").

To be sure, the 2003 note is a negotiable instrument as it meets each requirement imposed by N.J.S.A. 12A:3-104(a). Therefore, N.J.S.A. 46:9-9 does not apply to the 2003 note.

We next consider if plaintiff is a holder in due course of the 2003 note and mortgage. "Holder in due course" is defined by the Uniform Commercial Code as meaning:

> the holder of an instrument if:
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> (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) the holder took the instrument for value, in good faith, without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument described in 12A:3-306, and without notice that any party has a defense or claim in recoupment described in subsection a. of 12A:3-305.

[N.J.S.A. 12A:3-302.]

The record demonstrates plaintiff is a holder in due course of the note. Defendants have presented no evidence that plaintiff had knowledge of any fraud in the inducement or predatory lending committed by Fleet during the loan origination process. As a holder in due course, plaintiff holds the note and mortgage free and clear of any personal defenses the mortgagors may have against the assignor. Shalleck, 256 N.J. Super. at 44-45.

Finally, we address defendants' contention that summary judgment was improper because discovery was not complete. Defendants did not move to compel or extend discovery. The motion for summary judgment was filed after the discovery end date. In general, "summary judgment is inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003). Nonetheless,

> [a] party challenging a motion for summary judgment on grounds that discovery is as yet incomplete must show that there is a likelihood that further discovery would supply . . . necessary information to establish a missing element in the case. The party must show, with some specificity, the nature of the discovery sought and its materiality to the issues at hand.
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> [Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div.

2012) (alteration in original) (citations omitted).]

See also Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) (explaining that a party raising an incomplete discovery defense has "an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.").

Here, discovery of Fleet's conduct during the origination of the 2003 and 2004 loans is not material given plaintiff's immunity from liability for such conduct as a holder in due course. Accordingly, the discovery defendants sought would not supply necessary information that is material to the issues presented.

In addition, "discovery must proceed in a timely fashion." J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996). Despite having adequate opportunity to do so, defendants did not undertake timely discovery regarding whether plaintiff took the assignment for value, in good faith, and without notice of any personal defenses or claims in recoupment. "[A] claim of incomplete discovery will not defeat a summary judgment motion when the party opposing the motion has not sought discovery within the time prescribed by [Rule] 4:24-1[.]" Pressler & Verniero, supra, comment 2.3.3 on R. 4:46-2 (citing Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436,

450-51 (2007); Schettino v. Roizman Development, Inc., 310 N.J. Super. 159, 165 (App. Div. 1998), aff'd, 158 N.J. 476 (1999)). Defendants presented no evidence demonstrating that plaintiff is not a holder in due course.

Defendants' remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.