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This opinion shall not "constitute precedent or be binding upon any court."  
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-2144-16T3

DITECH FINANCIAL, LLC,

Plaintiff-Respondent,

v.

ANTHONY P. DICHIARA, KATHRYN  
L. DICHIARA, CAPITAL ONE BANK,  
and STATE OF NEW JERSEY,

Defendants,

and

JAMES DICHIARA,

Defendant-Appellant.

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Submitted January 22, 2018 – Decided March 8, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,  
Chancery Division, General Equity, Monmouth  
County, Docket No. F-028728-14.

John J. Hopkins, III, attorney for  
appellant.

Pluese, Becker & Saltzman, LLC, attorneys  
for respondent (Robert F. Thomas, on the  
brief).

PER CURIAM

In this residential mortgage foreclosure action, defendant James DiChiara appeals from a January 20, 2017 order denying his motion to stay the sheriff's sale, as well as any other action against the property. We affirm.

I

We glean the following facts from the record. Defendant Kathryn L. DiChiara (Kathryn) and James DiChiara (James) were married in 2000.<sup>1</sup> In 2001, Kathryn and James' father, defendant Anthony P. DiChiara (Anthony), purchased a residential home (home) for \$164,000 as tenants in common. At about that time, Kathryn and Anthony borrowed \$162,704 from and executed a mortgage in favor of Ivanhoe Financial, Inc., (Ivanhoe), using the home as collateral. Kathryn and James lived in the home as their principal marital residence until they divorced in 2012. Anthony never lived in the home.

In 2004, Kathryn and Anthony refinanced the loan from Ivanhoe and borrowed \$263,200 from Mortgage Electronic Registration Systems, Inc. (MERS), executing a mortgage in MERS' favor and using the home as collateral. The loan from Ivanhoe was paid off with the loan from MERS. There is no dispute James was aware of and approved of both mortgages; in fact, he and

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<sup>1</sup> Because of the common surname, we address the parties by their first names. We intend no disrespect by employing this informality.

Kathryn made the monthly mortgage payments on both loans. In 2008, MERS assigned the mortgage to GMAC Mortgage LLC (GMAC). In 2011, the last payment toward the mortgage was made.

In March 2012, James and Kathryn divorced. In the property settlement agreement (PSA), Kathryn conveyed her interest in the home to James. The PSA stated the judgment of divorce operated as a deed to convey Kathryn's interest in the home to James, although Kathryn was required to execute any documents necessary to transfer ownership of the home to James, which was to include providing a bargain and sale deed or a quitclaim deed, in addition to other documents. The PSA also reflected James had exclusive use of the home. In addition, the PSA acknowledged the GMAC mortgage and required James to make all of the monthly mortgage payments.

In April 2014, GMAC assigned the mortgage to Greentree Servicing LLC (Greentree). In July 2014, Greentree filed a complaint in foreclosure. Later that month James was personally served with the complaint, as well as a notice to tenants. Like the other defendants, he did not file an answer or any other responsive pleading to the complaint. In October 2014, default was entered against all defendants.

In his brief before us, James notes Anthony "changed the password on the on-line mortgage payment," which precluded James

from paying the mortgage. James does not state when Anthony changed the password. More important, James does not state why he could not have made the monthly mortgage payments by simply sending a check to the mortgagee. Finally, James claims he made efforts to contact Greentree to reinstate and modify the mortgage, but Greentree refused to respond to him on the ground he was not a mortgagor.

On April 21, 2015, the Federal Trade Commission and the Consumer Fraud Protection Bureau filed a complaint against Greentree in the United States District Court, District of Minnesota, alleging, among other things, that Greentree had engaged in deceptive and aggressive collection tactics, and had failed to adequately advise borrowers of loss mitigation options. Two days later, on April 23, 2015, the court issued a permanent injunction against Greentree and ordered it to pay a fine of forty-eight million dollars.

In addition to other measures, the court ordered Greentree to implement a plan to provide "affected consumers" with loss mitigation options. In the interim, Greentree was ordered to suspend any pending foreclosure sales to the extent necessary to permit such consumers to be solicited and considered for loss mitigation. The order of injunction defines "affected consumers" as "consumers with first or second lien residential

loans that were transferred to [Greentree] between January 1, 2010 and November 2014 and as of [April 23, 2015] . . . [were] 45 or more days delinquent or have been referred to foreclosure[.]"

In August 2015, Greentree was renamed Ditech Financial, LLC (Ditech or plaintiff), and in February 2016, the trial court entered an order substituting Ditech as plaintiff. On June 3, 2016, Anthony died. James is Anthony's sole heir, and James acquired Anthony's share of the home through intestacy. On June 10, 2016, the court entered final judgment in foreclosure in favor of plaintiff and against all named defendants.<sup>2</sup>

In October 2016, Kathryn finally provided James with a deed in accordance with the PSA; this deed has never been recorded. On January 20, 2017, the court entered an order denying defendant's motion to stay the sheriff's sale, as well as "any other action against the [home] until further order."

In its decision, the court rejected all of James's arguments. James' primary contentions were: (1) the mortgage was defective and unenforceable because he had not signed it; (2) the mortgage vested in him when, upon Anthony's death, he

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<sup>2</sup> The final judgment indicates defendants include "Anthony P. DiChiara." It is not known if plaintiff moved to substitute the estate for Anthony P. DiChiara.

acquired the remaining interest in and became the sole owner of the home; (3) Greentree could not foreclose upon the mortgage because it was merely a servicing company; (4) the federal order of injunction precluded Greentree from prosecuting any foreclosure actions; and (5) he was entitled to a modification of the mortgage.

## II

On appeal, James' principal arguments are: (1) N.J.S.A. 3B:28-3 mandates that if a mortgage is refinanced, all owners of the property being used as collateral must sign the mortgage or the mortgage is defective and unenforceable; (2) N.J.S.A. 3B:28-3 permits a married person to be in possession of the principal marital residence and such property cannot be transferred without the consent of both spouses; (3) the order of injunction prohibited plaintiff from pursuing the foreclosure action; and (4) the mortgage is unenforceable because plaintiff did not permit James to modify the mortgage. None of these arguments has any merit. We address each argument in turn.

According to James, N.J.S.A. 3B:28-3 requires that if a mortgage is refinanced, all owners of the property must sign the mortgage or it will be unenforceable. First, when the subject mortgage was created in 2004, Kathryn and Anthony, the only owners of the property, did sign the mortgage. Second, N.J.S.A.

3B:28-3 does not state that if a mortgage is refinanced – or even executed in the first instance – the property that is the subject of the mortgage must be signed by all of its owners.

This statute states:

a. During life every married individual shall be entitled to joint possession with his spouse of any real property which they occupy jointly as their principal matrimonial residence and to which neither dower nor curtesy applies. One who acquires an estate or interest in real property from an individual whose spouse is entitled to joint possession thereof does so subject to such right of possession, unless such right of possession has been released, extinguished or subordinated by such spouse or has been terminated by order or judgment of a court of competent jurisdiction or otherwise.

b. Nothing contained herein shall be construed to prevent the release, subordination or extinguishment of the right of joint possession by either spouse, by premarital agreement, separation agreement or other written instrument.

c. The right of joint possession shall be extinguished by the consent of both parties, by the death of either spouse, by judgment of divorce, separation or annulment, by other order or judgment which extinguishes same, or by voluntary abandonment of the principal matrimonial residence.

[Ibid.]

N.J.S.A. 3B:28-3 is not germane to any of issues before us. This statute provides that a married person who jointly occupies the principal marital residence with his or her spouse is entitled to possession. If a third party acquires an interest in such property, the third party does so subject to a spouse's right of possession, unless such right has been extinguished. The right of joint possession can be extinguished by the consent of both spouses or by a judgment of divorce.

N.J.S.A. 3B:28-3 provides no support for James' argument that, because he did not sign the subject mortgage, it is unenforceable. Further, this statute does not pertain to the parties' circumstances, who in March 2012 divorced and agreed James could have sole use and occupancy of the home, thus extinguishing both James' and Kathryn's right to joint possession.

James also claims this statute permits a married person to be in possession of the principal marital residence and that such property cannot be transferred without the consent of both spouses. We agree the statute permits a married individual to joint possession of the principal martial residence, unless that right has been extinguished as provided in the statute; however, we question the relevance of such premise to the issues before us. Similarly, there is no need to address whether a principal



marital residence can be transferred without the consent of both spouses, because both Kathryn and James agreed she would transfer her share of the home to James.

James next argues the order of injunction prohibited plaintiff from pursuing the foreclosure action. We disagree. The injunction requires plaintiff to reach out to "affected consumers" and offer loss mitigation options. In the interim, plaintiff was required to suspend any pending foreclosure sales to the extent necessary to permit such consumers to be solicited and considered for loss mitigation.

James, who is not a signatory to the mortgage, is not an "affected consumer" protected by the order of injunction. An affected consumer must be a mortgagor with a first or second lien residential loan that was transferred to Greentree between January 1, 2010 and November 2014. While the subject mortgage was transferred to Greentree during the latter time period, James is not a mortgagor. He may be responsible for paying the mortgage under the PSA, but that is as a result of entering into a private agreement between him and Kathryn. There is no agreement between James and plaintiff.

Finally, James argues the mortgage is unenforceable because plaintiff did not permit him to modify the mortgage. James does not cite any law that supports this premise, specifically, that

a mortgagee is obligated to afford a third-party – who is not even a mortgagor or a party to the mortgage agreement – the opportunity to modify the mortgage.

We have considered James' remaining arguments, and conclude they are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION