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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-3406-16T4

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR SG MORTGAGE
SECURITIES ASSET BACKED
CERTIFICATES, SERIES 2006-FRE2,

Plaintiff-Respondent,

v.

LORI LEFF and KEVIN LEFF,

Defendants-Appellants.

Submitted May 2, 2018 – Decided May 22, 2018

Before Judges Fuentes and Suter.

On appeal from Superior Court of New Jersey,
Chancery Division, Middlesex County, Docket
No. F-010843-09.

Mark R. Silber, attorney for appellants.

Reed Smith, LLP, attorneys for respondent
(Henry F. Reichner, of counsel; Siobhan A.
Nolan, on the brief).

PER CURIAM

Defendants Lori and Kevin Leff appeal from the March 8, 2017 final judgment that foreclosed their interests in certain residential real estate. We affirm.

On April 5, 2006, Lori Leff signed a note in the principal amount of \$484,500 to FGC Commercial Mortgage Finance (FGC) to finance a residential property in Highland Park. On the same day, both defendants executed a non-purchase money mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for FGC. The mortgage was recorded. In February 2009, the mortgage was assigned by MERS to U.S. Bank National Association, as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2 (U.S. Bank). Defendants defaulted on the note on November 1, 2008. No payments have been made since then.

On February 27, 2009, U.S. Bank filed a foreclosure complaint, and amended it in September 2009. Defendants did not answer either complaint and were defaulted. They filed a motion to extend time to answer and an order to show cause to vacate their default, but their requests were denied on April 21, 2010. That order has not been challenged.

The final judgment of foreclosure for \$982,361.69 was not entered in this case until March 8, 2017. Defendants appeal that order, raising a single issue. They claim the trial court abused its discretion on October 21, 2016, when it entered an order that

allowed U.S. Bank to continue to litigate this matter. Specifically, defendants challenge U.S. Bank's delay in prosecuting this case from February 20, 2015 to June 20, 2016.

From March 2010 through 2013, this case did not proceed while the Court's decision in U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449 (2012) was pending and thereafter as U.S. Bank implemented the Court's directives. In January 2014, U.S. Bank's motion to reform the mortgage was granted which permitted it to correct the property's legal description. Although U.S. Bank applied for a final judgment of foreclosure in 2014, it withdrew this request when defendants filed for Chapter 7 bankruptcy protection. The bankruptcy was discharged on February 20, 2015. From that time on, counsel for U.S. Bank certified that it "was working with Plaintiff on executing the Certification of the Amount Due [and] a draft . . . was sent to Plaintiff on June 15, 2015." However, it discovered a title issue that would entail "join[ing] an additional defendant, add[ing] assignment recording information, and . . . [a] new third count [to the complaint]."

On June 20, 2016, the Clerk of the Superior Court (Clerk) issued a Foreclosure Dismissal Notice, advising U.S. Bank that the complaint would be dismissed without prejudice on July 15, 2016, for lack of prosecution under Rule 4:64-8, unless U.S. Bank proceeded with the case or filed a certification of "exceptional

circumstances." U.S. Bank filed an attorney's certification in opposition to the lack of prosecution notice, but the Clerk denied U.S. Bank's request to avoid dismissal on July 22, 2016, with the notation "Denied: Certification does not set forth exceptional circumstances." The Foreclosure Dismissal Order of July 22, 2016, provided the case was dismissed under Rule 4:64-8 "without prejudice for lack of prosecution. Reinstatement of the matter after dismissal may be requested by a motion for good cause."

On August 31, 2016, U.S. Bank filed a motion to reinstate the case to active status. The supporting certification was similar to the one submitted to the Clerk, but added that it was prepared to file an amended complaint because it had completed investigation of the title issue and it could not obtain consent to the amendment. Defendants opposed the motion, which was transferred to the Chancery Division of the Superior Court in Middlesex County.¹ Reinstatement was granted on October 21, 2016. A final judgment of foreclosure was entered on March 8, 2017. Defendants appeal from the final judgment.

On appeal, defendants contend that the law of the case doctrine precluded the court from reinstating the case. Defendants

¹ Once opposition was received, the uncontested order of reinstatement that was entered on September 16, 2016, was vacated on October 5, 2016, so that the matter could be heard in the vicinage.

argue that U.S. Bank was unsuccessful in forestalling administrative dismissal because its certification did not show exceptional circumstances. They contend that because of that decision, the Superior Court was precluded from reinstating the foreclosure case. We find absolutely no merit in this argument.

"[I]t has long been the law of New Jersey that an application to open, vacate, or otherwise set aside a foreclosure judgment or proceeding subsequent thereto is subject to an abuse of discretion standard." United States v. Scurry, 193 N.J. 492, 502 (2008). An "abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Scurry, 193 N.J. at 504 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). There was no abuse of discretion here.

U.S. Bank's administrative dismissal under Rule 4:64-8 for lack of prosecution was without prejudice. See R. 4:64-8 (providing that a foreclosure matter pending for twelve months without "required" action "will be dismissed without prejudice 30 days following the date of the notice"). The Rule expressly provides how to request reinstatement and the standard that must

be met. Ibid. (providing "[r]einstatement of the matter after dismissal may be permitted only on motion for good cause shown"). The court appropriately exercised discretion to reinstate this complaint where U.S. Bank encountered delays in investigating a title issue, needed to amend the complaint and had to await resolution of defendants' bankruptcy filing.

Rule 4:64-8 "follows R. 1:13-7." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:64-8 (2018). As under Rule 1:13-7, "reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later." Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007). "[A]bsent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality." Id. at 197.

The case was dismissed for lack of prosecution simply as a docket clearing measure. Defendants cannot credibly argue that they were prejudiced given their default on the mortgage for nearly ten years.

The law of the case doctrine had no applicability. "The law of the case doctrine requires judges to respect unreversed decisions . . . by the same court or a higher court regarding questions of law." Sisler v. Gannett Co., 222 N.J. Super. 153,

159 (App. Div. 1987) (citing State v. Reldan, 100 N.J. 187, 203 (1985)).

No contested question of law was decided. Here, the dismissal by the Clerk was not the same as, or higher than, the Superior Court and there was additional information in U.S. Bank's second certification that was not before the Clerk. To apply the doctrine as suggested by defendants would negate the Rule that permits reinstatement because every application, if not granted by the Clerk, would be barred thereafter.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION