SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3607-16T1

BANK OF AMERICA, NA,

Plaintiff-Respondent,

v.

SAMBUL RIZVI and JAVAID RIZVI, her husband,

Defendants-Appellants,

and

MARWA TORK; Mr. TORK, husband of MARWA TORK; MIDLAND FUNDING, LLC; and NEW CENTURY FINANCIAL SERVICES,

Defendants.

Submitted March 5, 2018 – Decided March 28, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-017679-14.

Sambul Rizvi and Javaid Rizvi, appellants pro se.

Winston & Strawn, LLP, attorneys for respondent (Jason R. Lipkin, on the brief).

PER CURIAM

In this mortgage foreclosure action, defendants Sambul Rizvi and Javaid Rizvi[1] appeal from a March 31, 2017 order of the Chancery Division denying their motion to vacate final judgment. We affirm.

On December 18, 2007, co-defendant Marwa Tork[2] borrowed $148,000 from Countrywide Bank, FSB ("CBFSB"). Tork executed and delivered to CBFSB a note promising to repay the loan. To secure payment of the loan, Tork and Sambul executed a mortgage encumbering residential property located in Monroe. The mortgage was recorded in the county clerk's office on January 4, 2008. Tork defaulted under the terms of the note on February 1, 2008. The mortgage was then assigned to Mortgage Electronic Registration System, Inc. as nominee for CBFSB. On July 11, 2011, after a

[1] Because defendants share a common surname, we use first names in order to avoid confusion. No disrespect is intended in doing so. Further, according to plaintiff, Javaid did not execute the mortgage, nor ever hold any interest in the property. Although plaintiff initially named Javaid as the wife of Sambul, plaintiff later corrected the record to reflect that Javaid is Sambul's husband.

[2] Having failed to file a response to plaintiff's complaint, default judgment was entered against Tork and "Mr. Tork," as her husband. The Torks did not contest the judgment, nor participate in this appeal.

series of assignments and mergers, plaintiff became the holder of the note and mortgage.[3]

Plaintiff filed a foreclosure complaint on May 2, 2014. Defendants answered the complaint and asserted affirmative defenses, which did not include the statute of limitations.

On May 8, 2015, the court entered an order granting plaintiff's motion for summary judgment and denying defendants' cross-motion to dismiss the foreclosure complaint. The judge further ordered plaintiff to serve defendants with a notice of intent to foreclose ("NOI") and "not [to] pursue final judgment until expiration of the [thirty] days afforded for reinstatement by the NOI." See also N.J.S.A. 2A:50-56(a). Plaintiff sent to Sambul "via [f]irst [c]lass and [c]ertified [m]ail" an NOI dated August 13, 2015, affording Sambul forty days to cure the default.

By correspondence dated October 22, 2015, Sambul confirmed receipt of plaintiff's NOI. Sambul also expressed her willingness to cure the default, but failed to do so. On April 11, 2016, the court entered a final judgment of foreclosure, and issued a writ of execution ordering a sheriff's sale of the property.

[3] Defendants do not challenge plaintiff's ownership of the note and mortgage.

Defendants did not appeal from the final judgment of foreclosure within forty-five days of its entry. R. 2:4-1. Rather, on January 31, 2017, defendants moved to vacate the judgment. At the conclusion of oral argument on March 31, 2017, the motion judge denied defendants' motion in a terse oral decision. This appeal followed.

On appeal, as they did before the motion judge, defendants claim the statute of limitations bars the underlying foreclosure action, and plaintiff failed to properly serve an NOI before moving for final judgment. Defendants did not, however, address the sole issued raised on appeal, i.e., the judge's denial of their motion to vacate the final judgment of foreclosure.

Our scope of review of the trial court's ruling on a motion for relief from a judgment or order is exceedingly narrow. Rule 4:50-1 provides the grounds upon which an order or judgment may be vacated:

> [T]he court may relieve a party . . . from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or

> discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

In a foreclosure context, a trial court's decision, pursuant to Rule 4:50-1, "warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (citations omitted). An abuse of discretion occurs "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Ibid. (internal quotation marks and citation omitted). The Court has long recognized, our task is to decide "only whether the trial judge pursued a manifestly unjust course." Gittleman v. Cent. Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967). Further, the movant bears the burden of demonstrating his or her entitlement to relief. Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425-26 (App. Div. 2003).

Here, defendants do not rely on any of the subparagraphs set forth in Rule 4:50-1 to support their claim that the judgment should be vacated. As the judge observed during oral argument, defendants asserted "no grounds to vacate the final judgment." In any event, the court considered defendants' arguments.

Initially, the motion judge found the NOI "was in fact served . . . [and plaintiff] did not proceed to final judg[]ment until the expiration of the [thirty] days." The record supports her finding. Indeed, defendants' claims are belied by Sambul's October 22, 2015 letter to plaintiff, acknowledging receipt of the NOI, and expressing a willingness to cure the default. Further, defendants' claim that the NOI is defective because it lacks a tracking number and return receipt lacks merit. See N.J.S.A. 2A:50-56(b) ("The notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party.") (emphasis added).

Secondly, citing N.J.S.A. 2A:50-56.1, the court found "plaintiff here was well within the time periods allowed by that [s]tatute." N.J.S.A. 2A:50-56.1 provides, in pertinent part:

> An action to foreclose a residential mortgage shall not be commenced following the earliest of:
>
> a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note . . .
>
> b. Thirty-six years from the date of recording of the mortgage . . .
>
> c. Twenty years from the date on which the debtor defaulted . . .

Here, Sambul executed the note and mortgage on December 18, 2007; the mortgage was recorded on January 4, 2008; Tork defaulted

on the note on February 1, 2008; and the note's maturity date is January 1, 2038. We reject defendant's contention that N.J.S.A. 12A:3-118(a) bars the foreclosure action. Security Nat'l Partners Ltd. P'ship v. Mahler, 336 N.J. Super. 101, 105-06 (App. Div. 2000). Applying the plain language limitation periods set forth in N.J.S.A. 2A:50-56.1, plaintiff's foreclosure action was instituted well within the time constraints of the statute. See also, Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2.1 on R. 4:5-4 (2018) ("While the rule does not expressly so state, it is clear that ordinarily an affirmative defense that is not pleaded or otherwise timely raised is deemed to have been waived."). Defendants failed to assert the statute of limitations as an affirmative defense, and raising it here more than nine months after entry of the final judgment is far from timely.

In sum, defendants' purported grounds for vacating the judgment of foreclosure simply are not supported by the record. Therefore, pursuant to our deferential standard of review, we conclude the trial court correctly denied defendants' motion to vacate default judgment. As such, defendants' arguments are without sufficient merit to warrant further discussion in this written opinion. R. 2:11-3(e)(1)(E).

Affirmed.