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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3639-15T2

US BANK, N.A. as trustee for Citigroup Mortgage Loan Trust 2007-WFHE2, asset-backed pass through certificates, series 2007-WFHE2,

Plaintiff-Respondent,

v.

PATRICIA A. MARCHESE, MR. MARCHESE, husband of PATRICIA A. MARCHESE; JAMES B. MARCHESE,

Defendants-Appellants.

Submitted October 25, 2017 – Decided January 10, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Camden County, Docket No. F-024866-13.

Patricia A. Marchese, appellant pro se.

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

PER CURIAM

Defendant Patricia A. Marchese appeals from multiple orders denying her motion to vacate a mortgage foreclosure summary judgment awarded to plaintiff US Bank National Association as trustee for Citigroup Mortgage Loan Trust 2007-WFHE2, asset-backed pass through certificates, series 2007-WFHE2 (US Bank). The most recent order denying relief was entered March 18, 2016. We affirm.

Briefly summarized, defendant and her husband James B. Marchese borrowed $215,000 from Wells Fargo Bank, N.A., on December 27, 2006. They signed a mortgage and promissory note evidencing the debt. On May 31, 2012, Wells Fargo assigned the mortgage to US Bank.[1] On December 6, 2010, the Marcheses entered into a modification agreement, upon which they defaulted in July 2012. Having sent the Marcheses a notice of intent to foreclose, US Bank filed a foreclosure complaint on July 17, 2013.

On July 25, 2014, the Chancery judge heard oral argument, granted US Bank's motion for summary judgment, dismissed the answer and counterclaim, and denied the Marcheses' applications for other relief, such as discovery. We have not been provided with a copy of that transcript. The matter was then sent to the foreclosure unit, and a final judgment entered in foreclosure on November 5, 2015.

[1] An earlier assignment was expunged because of an error in the name.

The Marcheses thereafter filed a final motion to vacate summary judgment and vacate the judgment of foreclosure, which motion was denied on March 18, 2016. On April 26, 2015, the Marcheses sent Wells Fargo a document they styled as a "notice of rescission." The Marcheses' three prior applications filed between January 2015, and October 2015 also sought to vacate US Bank's summary judgment and obtain various forms of relief.

The judge's first decision denying the Marcheses relief, issued February 20, 2015, stated that the court was concerned the Marcheses were "mixing up what happens in a certification and a motion for summary judgment with what happens at a trial and the presentation of proofs at a trial." While citing Rule 4:50-1 in support of their application, the Marcheses recited, instead of facts, "a series of case[s,]" and asked "20 questions as to why there is a genuine issue of material fact . . . you know, standing, fraudulent paperwork[] . . . but nothing specific as to this particular case."

The Marcheses contended in their applications that the Wells Fargo and US Bank credentials as custodians of the records were inadequate, or that the records were not maintained in the ordinary course of business. The Marcheses also argued lack of standing and that US Bank had no authority to file the foreclosure, which were arguments the judge summarized as no more than an attempt to

have a second bite at the same apple. She determined that none of the grounds the Marcheses raised met the requirements of Rule 4:50-1.

The Marcheses do not dispute the obligation, their failure to make payments, or the amount due. They challenged, and continue to do so on appeal, the issuance of the judgment based on issues such as that US Bank violated banking laws designed to protect consumers in mortgage foreclosure proceedings:

> I. THE TRIAL COURT COMMITTED A HARMFUL ERROR AND ABUSED ITS DISCRETION BY REFUSING TO VACATE ITS ORDER GRANTING SUMMARY AND FINAL JUDGMENT IN FAVOR OF THE APPELLEE WHEN THE DISPUTED UNCONSUMMATED TRANSACTION AT BAR WAS RESCINDED BY OPERATION OF LAW.
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> II. THE TRIAL COURT COMMITTED A HARMFUL ERROR AND ABUSED ITS DISCRETION BY REFUSING TO VACATE THE ORDERS GRANTING SUMMARY AND FINAL JUDGMENT IN FAVOR OF THE APPELLEE WHO NEVER TOOK POSSESSION OF THE DISPUTED PAPER NOTE AND MORTGAGE AT BAR, AND TOGETHER WITH ITS AFFIL[IA]TES, RESULTED IN FRAUDS AND FORGERIES.
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> III. THE TRIAL COURT COMMIT[T]ED A HARMFUL ERROR AND ABUSED ITS DISCRETION BY REFUSING TO VACATE THE ORDERS GRANTING SUMMARY AND FINAL JUDGMENT IN FAVOR OF THE APPELLEE WHO SUBMITTED TWO CONTRADICTORY INSTRUMENTS EACH ALLEGED TO BE "TRUE COPIES" OF THE DISPUTED PAPER NOTE, AND NEITHER DISPLAY POSSESSION BY THE APPELLEE PRIOR TO COMMENCING ITS FORECLOSURE ACTION.
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> IV. THE TRIAL COURT COMMITTED A HARMFUL ERROR AND ABUSED ITS DISCRETION BY GRANTING A MOTION FOR SUMMARY JUDGMENT, AND REFUSING TO VACATE

> THE ORDER IN FAVOR OF THE APPELLEE WHO WILLFULLY FAILED TO COMPLETE THE APPELLANT'S DISCOVERY REQUEST, AND THE VIOLATED 12 C.F.R. § 1024.41 BY FILING FOR SUMMARY JUDGMENT AFTER RECEIVING A COMPLETE MODIFICATION APPLICATION FROM THE APPELLANT.
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> V. THE TRIAL COURT COMMIT[T]ED A HARMFUL ERROR AND ABUSED ITS DISCRETION BY REFUSING TO VACATE ITS ORDER GRANTING SUMMARY AND FINAL JUDGMENT IN FAVOR OF THE APPELLEE UPON THE APPELLANT DISCOVERING AND PRESENTING TO THE COURT EVIDENCE THAT THE DISPUTED TRANSACT[I]ON AT BAR CONSTITUTES A "HIGH-COST LOAN" IN VIOLATION OF THE HOME OWNERSHIP EQUITY PROTECTION ACT AND NEW JERSEY HOME OWNERSHIP SECURITY ACT.

We consider the arguments to lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E). We add only the following.

Bare conclusions in the pleadings, lacking any factual support, "will not defeat a meritorious application for summary judgment." United States Pipe & Foundry Co. v. Am. Arb. Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961) (citing Gheradi v. Trenton Bd. of Educ., 53 N.J. Super. 349, 358 (App. Div. 1958)). Disputed issues "of an insubstantial nature[]" cannot overcome a motion for summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995) (citing Judson v. Peoples Bank & Tr., 17 N.J. 67, 75 (1954)). The Chancery judge concluded the issues were insubstantial in nature, a conclusion supported by the record.

With regard to her first point, Marchese alleges the mortgage loan was an "unconsummated transaction" which was "rescinded by operation of law." She argues that the mortgage contract was never consummated since the identity of the lender was unknown at the time. This argument is unfounded. At the time of the loan, the lender was Wells Fargo.

The Marcheses' right to rescind expired long before they sent the "notice of rescission" to the bank. Hence, the notice had no legal effect. See 15 U.S.C. § 1635(f).

Marchese's second point alleges precisely the type of circumstance which is not a material fact in dispute — her allegation that the bank did not have possession of the note and mortgage. The assignments between the two banks were detailed in the complaint and are unexceptional. This claim is no more than a bare allegation. There is no factual support for the claim that the executed documents referred to in plaintiff's pleadings were forgeries or fraud.

In her third point, Marchese attacks the validity of the documents, specifically, the assignment of mortgage and the note, claiming that plaintiff's supporting certifications were false. To buttress that claim, Marchese cites to a number of cases from other jurisdictions and other circumstances. The material does

not support her arguments or repudiate the validity of the documents.

Marchese also claims that the bank violated 12 C.F.R. § 1024.41 by seeking summary judgment after a completed modification application was mailed to them. A servicer must comply with 12 C.F.R. § 1024.41 requirements for a single complete loss mitigation application for a borrower's mortgage loan account. However, the Consumer Financial Protection Bureau's official interpretations regarding the prohibition against multiple applications state: "[t]he Bureau believes that it is appropriate to limit the requirements in § 1024.41 to a review of a single complete loss mitigation application." 78 Fed. Reg. 10696, 10836 (Feb. 14, 2013).

Furthermore, 12 C.F.R. Section 1024.41(g) states:

> [i]f a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:
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> (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period

> for requesting an appeal, or the borrower's appeal has been denied;
>
> (2) The borrower rejects all loss mitigation options offered by the servicer; or
>
> (3) The borrower fails to perform under an agreement on a loss mitigation option.
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> [12 C.F.R. § 1024.41(g) (emphasis added).]

According to the Bureau's own interpretation of Section 1024.41(g):

> [n]othing in § 1024.41(g) prevents a servicer from proceeding with the foreclosure process . . . when the first notice or filing for a foreclosure proceeding occurred before a servicer receives a complete loss mitigation application so long as any such steps in the foreclosure process do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41.
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> [78 Fed. Reg. at 10897-98 (emphasis added).]

The Bureau clarifies that the steps in the foreclosure process that cause or directly result in the issuance of a foreclosure judgment include "filing a dispositive motion, such as a motion for a default judgment, judgment on the pleadings, or summary judgment, which may result in the issuance of a foreclosure judgment." Id. at 10819 (emphasis added). The Bureau also enumerates examples of actions that do not directly result in the issuance a foreclosure judgment, including engagement in mediation and publications in a local paper. Id. at 10834.

Moreover, borrowers have a private right of action to enforce the procedural requirements set forth in 12 C.F.R. § 1024.41. Violations of 12 C.F.R. § 1024.41 are enforced under the Real Estate Settlement Procedures Act, which only awards monetary damages. 12 U.S.C. § 2605(f)(1)(A).

US Bank filed the foreclosure complaint prior to receiving a loss mitigation application from the Marcheses. US Bank did not, during the loss mitigation review, file a motion for summary judgment. Nothing in the record indicates that US Bank moved for summary judgment until the application was rejected.

Additionally, Marchese has admitted to requesting multiple loan modifications since 2008, and actually received a loan modification in 2010. Because Marchese has requested multiple loan modifications, one of which led to a modification that the Marcheses subsequently defaulted upon, she is barred from using 12 C.F.R. § 1024.41(g) to prevent the entry of the judgment of foreclosure.

Finally, Marchese contends that issuance of the final judgment in this matter violated the Home Ownership Equity Protection Act (HOEPA), 15 U.S.C. § 1601 to -1651, and the New Jersey Home Ownership Security Act (HOSA), N.J.S.A. 46:10B-22 to -35. HOEPA requires additional disclosures on certain "high-cost loans" secured by the borrower's principal residence that bear

rates or fees above certain thresholds. 12 C.F.R. § 226.31-32. In order to conduct the analysis that subjects a lender to additional disclosure requirements: (1) the borrower's principal dwelling must secure the mortgage; (2) the mortgage must be a "closed-end credit" plan; and (3) the mortgage must not be a purchase money loan, a reverse mortgage loan or an open-end credit plan. 12 C.F.R. § 226.32(a)(1); 12 C.F.R. § 226.2(a)(10).

If the mortgage meets the initial requirements for HOEPA analysis, the mortgage must then meet certain thresholds in order to subject a lender to additional disclosure requirements. The Annual Percentage Rate (APR) threshold is met when the APR of the mortgage at the time of consummation exceeds comparable Treasury securities by more than eight percent. 15 U.S.C. § 1602; 12 C.F.R. § 226.32(a)(1)(ii). The APR threshold for first-lien mortgages was "[eight] percentage points . . . [above] the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor[.]" 12 C.F.R. § 226.32(a)(1)(i).

In regards to the total points and fees threshold, the "total loan amount" for a closed-end credit transaction is "the amount financed, as determined in accordance to § 1026.18(b), and deducting any [reasonable costs unrelated to creditor or affiliate

compensation, certain premiums at or before consummation, and the total prepayment penalty, pursuant to] section 1026.32(b)(1)(iii), (iv), or (vi) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor." 12 C.F.R. § 1026.32(b)(4)(i).

Here, because Marchese's mortgage is (1) secured by her principal dwelling, (2) a closed-end credit plan, and (3) not a purchase money loan or a reverse mortgage loan, the mortgage meets the initial requirements for HOEPA analysis. However, it neither meets the APR nor points and fees thresholds.

Wells Fargo received the Marcheses' mortgage application on the December 27, 2006. Using the thirty-year Treasury yield, the rate was 4.78%.[2] The APR threshold, then, would be 12.78%. Since the APR at execution of defendant's mortgage was only 8.875%, the APR threshold is not met. In regards to the points and fees threshold, even if we believed that the fees were all financed at closing, the total loan amount would only come to $207,924.20.[3] The Marcheses were obligated to pay $7075.80 in fees and did not

[2] Federal Reserve, Daily Treasury Yield Curve Rates, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2006 (last visited on October 11, 2017).

[3] Pursuant to 12 C.F.R. § 226.32(a)(1)(ii), the total loan amount is the principal less the points and fees ($215,000 – $7075.80), which equals $207,924.20.

pay more than eight percent of the total loan amount ($16,633.94). Thus, the mortgage did not meet the APR nor the points and fees thresholds, and, thus, did not violate HOEPA.

The mortgage does not violate HOSA either. Under HOSA, a mortgage must meet one of two tests: (1) the APR of the mortgage at consummation must exceed the APR threshold of HOEPA; or (2) the points and fees on the loan must exceed 4.5% of the total loan amount for closed-end credit transactions. N.J.S.A. 46:10B-24. The total loan amount is defined to mean "the principal of the loan minus those points and fees . . . that are included in the principal amount of the loan." Ibid.

The Marcheses' mortgage does not meet the APR threshold set out in HOEPA. In addition, it does not meet the points and fees threshold. To reiterate, even if it is assumed that US Bank financed all of the points and fees, the total loan amount would be $207,924.20.[4] Since 4.5% of the total loan amount ($9356.59) is greater than the points and fees charged ($7075.80), it did not violate HOSA.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

[4] Pursuant to N.J.S.A. 46:10B-24, the total loan amount is the principal less the points and fees (215,000 – 7075.80), which equals $207,924.20.