SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4586-15T2

DITECH FINANCIAL LLC,

Plaintiff-Respondent,

v.

FRANK MENDEZ and KATHIE MENDEZ,

Defendants-Appellants,

and

593 AVENUE E CONDOMINIUM ASSOCIATION, FORD MOTOR CREDIT COMPANY, OLYMPIA INTERNATIONAL, INC., F.A. SAAVEDRA, M.D., P.A., DISCOVER BANK, and STATE OF NEW JERSEY,

Defendants.

Submitted September 14, 2017 – Decided February 5, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-033843-10.

Howard A. Miller, attorney for appellants.

Ras Citron LLC, attorneys for respondent (John Habermann and Monika S. Pundalik, on the brief).

PER CURIAM

In this residential mortgage foreclosure action, defendants Frank and Kathie Mendez[1] (collectively defendants) appeal from a May 23, 2016 final judgment in favor of plaintiff Ditech Financial LLC (Ditech). We affirm.

We derive the following facts from the record. On March 27, 2006, Frank[2] executed a thirty-year fixed-rate promissory note for $228,000 to America's Wholesale Lender (America's). The note was secured by a purchase money mortgage on his residential property. On the same date, the mortgage was jointly executed by both defendants to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for America's, and recorded with the Hudson County Clerk on April 27, 2006. Defendants defaulted on March 1, 2010 and have not made any mortgage payments since that date.

On June 21, 2010, the note and mortgage were assigned to BAC Home Loans Servicing, LP (BAC), f/k/a Countrywide Home Loans Servicing LP, and the assignment was recorded on July 19, 2010.

[1] The remaining defendants did not participate in this appeal but were named in the foreclosure complaint to reflect any interest or lien they may have in the mortgaged premises by virtue of any unpaid assessments on the property or unsatisfied judgments entered against Frank Mendez.

[2] We refer to defendants by their first names to avoid any confusion caused by their common surname. We intend no disrespect.

BAC filed a foreclosure complaint against defendants on June 30, 2010, after complying with the notice requirements of the Fair Foreclosure Act, N.J.S.A. 2A:50-56. On July 25 and July 18, 2010, respectively, Frank and Kathie were personally served with the complaint, but failed to file an answer. On November 16, 2010, default was entered. On May 15, 2013, Bank of America, N.A., successor by merger to BAC, assigned the mortgage to Green Tree Servicing LLC (Green Tree), and the assignment was recorded on July 17, 2013. Green Tree provided a corrective notice of intention to foreclose as authorized by a March 12, 2014 order, permitting Green Tree to resume the foreclosure action.[3]

On September 15, 2014,[4] defendants moved to vacate the default. Judge Marybeth Rogers entered an order on October 10, 2014, denying the motion, reasoning as follows:

> Under [Rule] 4:43-3, an entry of default may be vacated for good cause shown. Meaning, a party seeking to vacate default must demonstrate good cause for failure to answer. Eileen T. Quigley, Inc. v. Miller Family Farms, Inc., 266 N.J. Super. 283, 293 (App. Div. 1993). In addition to first demonstrating good cause for failure to answer, the moving party must show the presence of a meritorious defense worthy of

[3] In a November 6, 2014 order, the trial court granted Green Tree's motion to replace BAC as plaintiff on all pleadings.

[4] On July 17, 2014, following Frank's filing of a Chapter 7 Bankruptcy Petition, a Discharge of Debtor and Order of Final Decree was entered, permitting the foreclosure action to continue.

> judicial determination. Trs. of Local 478 [Trucking & Allied Indus. Pension Fund] v. Baron Holding Corp., 224 N.J. Super. 485, 489 (App. Div. [1988]). Here, [d]efendants have failed to demonstrate good cause for failure to answer. In fact, [d]efendants did not raise any reason for why they did not answer, over a four[-]year period, a complaint that was personally served upon them. Since [d]efendants did not demonstrate good cause for failure to answer, it is of no consequence whether [d]efendants have a meritorious defense.

Judge Rogers entered an order on December 1, 2014, denying defendants' motion for reconsideration, noting as follows:

> Defendants' Motion for Reconsideration does not provide any additional facts that demonstrate good cause. In fact, [d]efendants' [m]otion does not provide a certification from the [d]efendants as to why they did not answer [p]laintiff's complaint for over three years. Moreover, [d]efendants' proposed [a]nswer does not raise a meritorious defense[,] as it solely states legal conclusions without any factual support contrary to [Rule] 4:5-4. Lastly, [d]efendants' [a]nswer merely states that the [d]efendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the [c]omplaint.[5] Thus, [d]efendants have not demonstrated a meritorious defense.

[5] Pursuant to Rule 4:64-1(c):

> An allegation in an answer that a party is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint shall not have the effect of a denial but rather of leaving the plaintiff to its proofs, and such an

After Ditech Mortgage Corp. merged into Green Tree on August 31, 2015, and changed its name to Ditech Financial LLC (Ditech), the court granted Ditech's motion to be substituted as plaintiff pursuant to Rule 1:34-6(4) on December 28, 2015. On March 29, 2016, Ditech moved for final judgment and served defendants with its moving papers accompanied by a supporting affidavit and certification. See R. 4:64-1(d)(1); R. 4:64-2. Defendants did not object to the motion as permitted under Rule 4:64-1(d)(3). On May 23, 2016, Judge Paul Innes entered final judgment in the amount of $345,371.64 in accordance with Rule 1:34-6 and 4:64-1(d)(4). This appeal followed.

On appeal, defendants contend the trial judge "erred as a matter of law" in denying their "motion to vacate the default judgment and [not] allow[ing] them to file a contesting answer when there was still a motion pending to substitute the [p]laintiff[,] and the [p]laintiff had not even filed for [f]inal [j]udgment." Defendants explain that "[they] were divorced on April 2, 2013." However, "the parties' [d]ual [j]udgment of [d]ivorce set forth . . . that only Frank Mendez was on the deed and mortgage to the marital residence and that 'the mortgage [was]

> allegation in an answer shall be deemed noncontesting to the allegation of the complaint to which it is responsive.

in pre-foreclosure.'" According to defendants, "these errors were corrected by way of a . . . post[-]judgment order dated August 29, 2014[,]" and "virtually immediately after the correction[,] the motion to vacate was filed."

As a result, defendants contend that the trial judge erred by not considering "the motion [to vacate the default] timely" and by concluding that there was "no need to determine whether the [d]efendants had a meritorious defense[,]" particularly since under Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323 (Ch. Div. 2010), the "'MERS' assignment . . . was inherently suspect." Defendants request that we overturn the trial judge's decision and vacate the final judgment under Rule 4:43-3.

However, defendants filed a Notice of Appeal identifying only the May 23, 2016 final judgment as the order being appealed. It is well-settled that we review "only the judgment or orders designated in the notice of appeal." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) (citing Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div. 1994)); see also R. 2:5-1(f)(3)(A). Stated differently, any arguments defendants raise that fall outside the four corners of the Notice of Appeal likewise fall outside the scope of our appellate jurisdiction, and are therefore not reviewable as a matter of law. As a result, defendants' arguments challenging the

trial judge's October 10, 2014 and December 1, 2014 orders are not reviewable as a matter of law.

Moreover, defendants did not move before the trial court under Rule 4:50-1 to vacate the final judgment, or oppose the motion that allowed the foreclosure case to proceed as uncontested. We "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Defendants did not properly present these issues to the trial court, and the issues are not jurisdictional in nature nor do they substantially implicate the public interest.

Nevertheless, because plaintiff did not object to our review of the trial judge's October 10, 2014 and December 1, 2014 orders, we may address the merits, W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 459 (App. Div. 2008), and affirm substantially for the reasons set forth in Judge Rogers' orders. We also choose to exercise our original jurisdiction under Rule 2:10-5 to affirm the final judgment. Our review is governed by Rule 4:50-1, which permits a court, at its discretion, to relieve a party from a final judgment for the following reasons:

> (a) [M]istake, 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 [Rule] 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.

Rule 4:50-1 is "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Mancini v. EDS, 132 N.J. 330, 334 (1993)). However, relief from judgment under Rule 4:50-1 "is not to be granted lightly." Cho Hung Bank v. Kim, 361 N.J. Super. 331, 336 (App. Div. 2003). Rather, Rule 4:50-1 "provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." Ross v. Rupert, 384 N.J. Super. 1, 8 (App. Div. 2006) (quoting Baumann v. Marinaro, 95 N.J. 380, 393 (1984)).

"It is generally recognized that the requirements for setting aside a default judgment under [Rule] 4:50-1 are more stringent

than the 'good cause' standard for setting aside an entry of default under [Rule] 4:43-3." Bernhardt v. Alden Cafe, 374 N.J. Super. 271, 277 (App. Div. 2005). Moreover, "the showing of a meritorious defense is a traditional element necessary for setting aside both a default and a default judgment." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:43-3 (2018); see also Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div. 1964). That is so because when a party has no meritorious defense, "[t]he time of the courts, counsel and litigants should not be taken up by such a futile proceeding." Guillaume, 209 N.J. at 469 (quoting Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953)).

Here, defendants have made no showing to justify vacating the final judgment under any provision of Rule 4:50-1. Likewise, defendants have made no showing of a meritorious defense. Throughout the proceedings, defendants did not deny signing the loan documents or defaulting on the payments due under the mortgage loan. Where a defendant does not challenge the execution, recording, and nonpayment of the mortgage, a prima facie right to foreclose is established. See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952); see also Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). Moreover, Ditech presented undisputed evidence of the note and mortgage assignment to BAC before BAC filed the foreclosure complaint, satisfying the

requirement that "either possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012).

Indeed, even if Ditech lacked standing to foreclose, "standing is not a jurisdictional issue in our State court system and, therefore, a foreclosure judgment obtained by a party that lacked standing is not 'void' within the meaning of Rule 4:50-1(d)." Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 101 (App. Div. 2012). Notably, defendants did not assert that any other entity sought repayment of the mortgage loan during the four-year period the loan was allegedly in default.

The final judgment is affirmed.