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MURPHY PROPERTY ACQUISITION, LLC, Plaintiffs, v. PFISTER CHEMICAL INC., f/k/a PFISTER CHEMICAL WORKS, INC.; JAMES BENDELIUS; ALAN BENDELIUS; STATE OF NEW JERSEY and UNKNOWN TENANTS, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. F-22393-18 **OPINION** Argued: June 21, 2019 Decided: June 25, 2019

Appearances: David Stein, (Wilentz, Goldman & Spitzer, P.A., attorneys) for Plaintiff

Arla Cahill, (Mandelbaum Salsburg, P.C., attorneys) for Defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter is before the court by way of a Motion for Summary Judgment, which was heard as a Motion to Strike the Answer, filed by Plaintiff on April 4, 2019. Defendants filed an opposition on June 11, 2019. Plaintiff filed a reply brief on June 17, 2019. The Court heard oral argument on June 21, 2019.

BACKGROUND

The plaintiff has established the uncontested material facts set forth below, which are pertinent to its right to foreclose.

On June 16, 2015, Defendant Pfister Chemical Inc. ("Defendant") entered into a Loan Agreement with 100 Mile Fund, LLC, the original lender,("Lender") borrowing the sum of $7,500,000.00, and executed a Promissory Note to secure that sum with a fixed interest rate of 12%

per annum, commencing on August 1, 2015 and continuing until June 1, 2017, at which time the entire outstanding principal balance would be due and payable. See Adler Cert., at Exs. A and B.

To secure payment of the original note, Defendant executed to Lender a Mortgage in the sum of $7,500,000.00, which was duly recorded on June 23, 2015 in the Office of the Clerk of Bergen County. See id. at Ex. C.

The Mortgage encumbers all real property commonly known as Railroad to Overpeck, designated as 1098 Route 46, Borough of Ridgefield, County of Bergen, State of New Jersey, Lot 1, Block 503 on the Tax Map of the Borough of Ridgefield.

To further secure the Original Note, on or around June 16, 2015, Defendant executed and delivered an Assignment of Leases and Rents, as well as an Environmental Agreement and Guaranty of Payment in favor of Lender. See id. at Exs. D, E, and F.

On or around October 2, 2017, Defendant, Lender, and Guarantors James Bendelius and Alan Bendelius ("Guarantors") executed a Mortgage and Note Splitter Modification Agreement, which modified the terms of the original loan to (i) increase the amount of the loan to $8,750,000.00 and (ii) split and sever the original note and original mortgage into two promissory notes and mortgages, evidencing a principal indebtedness of $4,996,250.00 ("Original Substitute Note A") and $3,753,750.00 ("Original Substitute Note B"), respectively. See id. at Ex. G.

The above Original Substitute Notes (the "Notes") were amended on October 2, 2017, but effective as of September 29, 2017 to accurately reflect "Romspen US Mortgage LP," as holder. See id. at Exs. I and J.

To secure payment of the Substitute Notes referenced above, Borrower executed to Romspen Mortgage Limited Partnership a Substitute Mortgage, Assignment of Leases and Rents and Security

Agreements A and B ("Original Substitute Mortgages A and B" respectively). See id. at Exs. K and N.

Substitute Mortgage A was assigned from Romspen US Mortgage LP to Romspen US Master Mortgage LP on June 1, 2018. See id. at Ex. M.

On or around June 24, 2015, Lender perfected its security interest in the collateral by recording a UCC-1 financing statement. See id. at Ex. Q. On or around January 3, 2018, Romspen perfected its security interest in the collateral by recording a UCC-1 Financing Statement. See id. at Ex. R.

Thereafter, on or around August 16, 2018, Lender and Romspen (together, the "Sellers") conveyed to Murphy Property Acquisition, LLC ("Plaintiff") all of Sellers' right, title and interest in and to the Notes and the related Loan Documents in which Sellers delivered an Allonge to Substitute Note A, dated August 21, 2018 from Romspen to Murphy; an Allonge to Substitute Note B, dated August 21, 2018 from Lender to Murphy, and an Assignment and Assumption of Loan Documents from Lender and Romspen to Murphy, dated July 3, 2018. See id. at Exs. S, T and U.

Substitute Mortgage A was assigned to Murphy by Romspen through an Assignment of Substitute Mortgage, Assignment of Leases and Rents and Security Agreement A, dated July 3, 2018. See id. at Ex. V.

Substitute Mortgage B was assigned to Murphy by Lender through an Assignment of Substitute Mortgage, Assignment of Leases and Rents and Security Agreement B, dated July 5, 2018. See id. at Ex. W.

The Assignment of Rents was assigned to Murphy by Lender through an Assignment of Rents and Leases dated August 21, 2018. See id. at Ex. X.

The Lender UCC-1 and the Romspen UCC-1 were transferred to Plaintiff through UCC-3 Financing Statements respectively, both on September 5, 2018. See id. at Exs. Y and Z.

In connection with the transfer of the Loan to Plaintiff, on August 20, 2018, Borrower and Guarantors executed a General Release in favor of Procida Funding LLC, Lender and Romspen, including their respective successors and assigns. See id.at Ex. AA.

Defendant has defaulted by failing to make payment of all amounts due under the loan documents on the maturity date of June 1, 2018.

On October 5, 2018, Plaintiff formally declared Defendant and the Guarantors in default for failure to make payment of all amounts due under the Loan Documents on the Maturity Date. See id. at Ex. BB.

The mortgaged property is a commercial property, which has never been and is not now occupied by the record owner as a principal place of residence. The record owner of the mortgaged premises is a corporate entity, and thus New Jersey's Fair Foreclosure Act, N.J.S.A. 2A:50-53, *et seq.* does not apply.

Suit was commenced on November 8, 2018. Plaintiff filed the instant motion on April 4, 2019.

The court notes that on November 20, 2018, a Complaint was filed in the Superior Court of New Jersey, Law Division, Bergen County, captioned Adler New Jersey Acquisition, LLC v. Pfister Chemical, Inc., et al., Docket No.: BER-L-8392-18. See id. at Ex. CC. On February 8, 2019, Pfister Chemical, Inc. filed an Answer, Affirmative Defenses and Counterclaim in the Law Division Action. See id. at Ex. DD. Amongst others, Defendant asserts many overlapping defenses and counterclaims in the above referenced Law Division action, including, but not limited to, "Bad Faith" or unclean hands, and Tortious Interference. See id.

LEGAL STANDARD

The Court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c). In determining whether the existence of a genuine issue of material fact precludes summary judgment, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

When a motion for summary judgment is made and supported as provided in this rule, the nonmoving party "may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial." R. 4:46-5. Therefore, the nonmoving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment, but must produce evidence that demonstrates a genuine issue of material fact. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014).

The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). In Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952), the court set forth the elements for a prima facie right to foreclose:

> Since the execution, recording, and non-payment of the mortgage was conceded, a *prima facie* right to foreclose was made out. Defendants argue since the mortgage was in their counsels' possession and produced by him at the request of plaintiff, delivery thereof after execution was not established and consequently no case

appeared. However, proof of the recording creates a presumption of delivery. Id. at 37.

If the defendant's answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike defendant's answer as a non-contesting answer. Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989).

When a party alleges he or she is without knowledge or information sufficient to form a belief as to the truth of an aspect of the complaint, the answer shall be deemed non-contesting to the allegation of the complaint to which it responds. R. 4:64-1(a)(3). Pursuant to R. 4:64-1(c)(2) an answer to a foreclosure complaint is deemed to be non-contesting if none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed, or create an issue with respect to plaintiff's right to foreclose. Consequently, a plaintiff may move to strike such an answer pursuant to R.4:6-5 on the grounds it presents "no question of fact or law which should be heard by a plenary trial." Old Republic Ins. Co., 284 N.J. Super. at 574-575. When a foreclosure action is deemed uncontested, R. 4:46-1(d) dictates the procedure. At the conclusion of a successful motion for summary judgment or to strike the defendant's answer, the matter shall be referred to the Office of Foreclosure to proceed as uncontested.

ANALYSIS

Here, Defendant opposes the instant motion, alleging that its Contesting Answer, Defenses and Counterclaims alleging unclean hands and tortious interference demonstrate issues of fact that warrant further discovery and procession to trial. However, it is well settled that counterclaims must be germane to the foreclosure pursuant to R. 4:64-5, in that they must serve to defeat Plaintiff's right to foreclose on the subject mortgage. The goal of the "germane" requirement in foreclosure actions is to eliminate extraneous legal and equitable claims that would otherwise impede and delay the

foreclosure action. See § 30.8 Germane claims – Joinder in foreclosure actions, 30A N.J. Prac., Law of Mortgages § 30.8 (2d ed.). For the reasons set forth in detail below, Defendants allegations fail to satisfy this requirement.

First, Defendant argues that summary judgment in the instant matter is inappropriate and premature because the discovery period has not been completed. More specifically, Defendant takes the position that discovery will elicit information supportive of Defendant's counterclaims for unclean hands and tortious interference.

However, Defendant has not denied the execution and validity of the loan documents, has admitted its default under said loan documents, and does not deny the passing of the maturity date of the loan. Thus, this foreclosure matter is ripe for disposition on summary judgment.

Although Defendant cites numerous cases in which courts have in fact ruled that summary judgment was premature due to a lack of discovery, the majority of these cases are not on point with the instant matter. For instance, Laidlow v. Hariton Mach. Co., Inc., relied upon by Defendant, involved a workers' compensation case involving operation of a safety guard of industrial machinery. See generally, 170 N.J. 602 (2002). Furthermore, Plaintiff also cites Crippen v. Cent. Jersey Concrete Pipe Co., and Velantzas v. Colgate-Palmolive Co., in which the courts dealt with issues surrounding wrongful death stemming from purported OSHA violations and unsafe work conditions and wrongful termination and employment discrimination, respectively. See generally, 176 N.J. 397 (2003); 109 N.J. 189 (1988). In sum, the authority Defendant relies on does not address the merits of a foreclosure action, especially a foreclosure action in which Plaintiff has, quite clearly, made out a *prima facie* argument.

Defendant does also rely on Suser v. Wachovia Mortg., FSB, in further support of its position that further discovery should be permitted in this matter. Nevertheless, the facts underlying the

foreclosure in the Suser decision are drastically different from the facts before this court. There, the lender's assignment had not been recorded, which cast doubt upon whether or not the lender was in fact the holder in due course, thereby creating a question of fact as to the lender's right to foreclose. See 433 N.J. Super. 317, 323 (App. Div. 2013). Here, however, no such factual discrepancy exists that impairs Plaintiff's arguments in regards to the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. See Great Falls, 263 N.J. Super. at 394.

Next, Defendant contends that because it has raised defenses and counterclaims centered around unclean hands, that not only should Plaintiff's summary judgment be denied, but Plaintiff should also should be barred from foreclosing on equitable grounds. More specifically, Defendant relies on Leisure Technology-Northeast, Inc. v. Klingbeil Holding Co., in an attempt to demonstrate that Plaintiff acted with unclean hands when Adler purportedly utilized confidential information in order to purchase the property for $20 million and orchestrate a scheme to benefit Plaintiff.

Nevertheless, Defendant's reliance on Leisure Technology is misplaced and not on point with the facts before this court. There, the court did find that "[t]he defense of unclean hands is cognizable in a foreclosure action," but *not* in a manner that supports Defendant's argument. See 137 N.J. Super. 353, 356 (App. Div. 1975). To the contrary, the Leisure Technology court dealt with a counterclaim that asserted false representations to a development planning board subsequent to the execution of the mortgage that caused the defendants to miss an opportunity to sell their land, which ultimately led to their default under the loan. See id. at 356-57. Specifically, the Leisure Technology court held that the defendants' unclean hands counterclaim was "germane" to the foreclosure action because "the thrust of the counterclaim [was] the assertion that plaintiff had breached the *underlying*

agreement in relation to which the mortgage was executed and interfered with defendants' rights under that agreement." Id. at 358 (emphasis added).

Here, however, Plaintiff was not even involved in the underlying loan documents, and therefore could not have interfered with Defendant's rights under the original agreement. In other words, Defendant's allegations that Plaintiff failed to disclose to Defendant that the loan had been assigned and that Plaintiff was "scheming" to acquire the property at a below market price are immaterial to the matter at hand, because such allegations do not relate to the *inception* of the loan. Plaintiff was not a party to the original transaction, and that fact is uncontested. Therefore, Defendant's reliance on Leisure Technology is inconsistent with the facts in the underlying litigation, and as a result, Defendant's bold assertion of unclean hands does not rise to the level of a valid defense or counterclaim germane to the foreclosure action. Whether or not that assertion is germane in the companion Law Division action is not a matter that is before this court.

Moreover, Defendant's tortious interference claims fail for the same reason: they do not address the validity of the mortgage or the amount of the indebtedness. Instead, the counterclaims and defenses address claims that have already been asserted under a counterclaim in the companion Law Division Action, which is the proper venue to hear such claims. Put simply, the conduct asserted by Defendant is non-germane because it does not "arise out of the mortgage [being] foreclosed." See Joan Ryno, Inc. v. First Nat'l Bank, 208 N.J. Super. 562, 570 (App. Div. 1986). None of Defendant's counterclaims go to the *original* inception of the loan transaction, and instead are based solely on alleged bad faith conduct with respect to a subsequent loan purchase – not with the loan itself.

Nevertheless, Defendant's unclean hands and tortious interference also fail on the merits because they are both predicated on Defendant's false assertion that Plaintiff deliberately withheld

from Defendant the assignment of the subject loan to Plaintiff and intentionally did not record the July 2018 assignments until September 24, 2018. This allegation, however, is not supported by the facts of this case. To the contrary, Defendant was served with a Notification of Servicing Transfer letter on August 20, 2018, advising that the loan had been transferred to Plaintiff. See Adler Cert. in Further Support of the Motion, at paragraph 21 and Ex. D. Furthermore, the August 22, 2018 letter to Commonwealth Land Title Company, LLC requesting return of the Earnest Money upon termination of the Agreement of Purchase and Sale was executed by Defendant. See id. at paragraph 22 and Ex. E. Via e-mail dated August 22, 2018, the principals of Defendant acknowledged a "great" meeting with Plaintiff's principal. See id. at paragraph 23 and Ex. F. Additionally, both Defendant and its principals executed a General Release in connection with the sale of the subject loan on August 20, 2018 to Plaintiff. See id. at paragraph 20 and Ex. C.

Therefore, it is clear that Defendant's self-serving statements indicating that Plaintiff did not act in good faith – despite statements from the Defendant that it was satisfied with a post-sale meeting, the tendering of a General Release, and a release of Earnest Money by Defendant in connection with the terminated property sale – are without merit, and unable to support its argument that the counterclaims are germane.

The court also notes that Defendant attempts to defend against summary judgment by contesting the amounts claimed due by Plaintiff. More specifically, Defendant contends that Plaintiff is not entitled to legal fees in excess of $7,500.00, which is the statutory limit for legal fees in foreclosure actions provided for in R. 4:42-9. Nevertheless, the legal fee determinations will be made by this court at the final judgment stage. Moreover, Defendant will have an opportunity to contest the amount due when Plaintiff moves for final judgment, at which point the matter will return from the Office of Foreclosure to this court to determine the validity of Plaintiff's proofs. Therefore,

Defendant's objections to the amount due do not represent germane defenses to Plaintiff's prima facie right to foreclose, and will not be taken up by the court at this time.

In sum, while Defendant provides lengthy factual allegations and case law regarding "germane" counterclaims and the need for further discovery, Defendant fails to demonstrate how any alleged conduct of Plaintiff – which, even if true, occurred long after the inception of the original loan – would rise to the level of being germane to the Plaintiff's right to foreclose on the loan. Moreover, as was stated above, Defendant has already brought similar counterclaims in the Law Division Action, which is the proper venue for such claims.

The court notes that Plaintiff also filed a motion to quash a subpoena served on Newmark & Company Real Estate, Inc., on May 31, 2019. Defendant filed opposition to the motion to quash on June 13, 2019, to which Plaintiff replied on June 17, 2019. For the reasons set forth above, that motion is now rendered moot as a result of the ensuing summary judgment decision.

Thus, for the foregoing reasons, Plaintiff's motion for summary judgment is hereby granted. Defendants' counterclaims in this action are hereby dismissed, and their Answer is hereby stricken. The matter shall be returned to the Office of Foreclosure to proceed as uncontested. An order accompanies this decision.