SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3280-20

HMC ASSETS, LLC, solely in its capacity as Trustee of CAM XI TR,

Plaintiff-Respondent,

v.

SHIRLEY P. MIRANDA, her heirs, devisees and personal representatives, and her, their, or any of their successors in right, title, and interest, DAWN MIRANDA, individually and as Co-Administratrix of the Estate of SHIRLEY P. MIRANDA, deceased, and LAURA F. MIRANDA, individually and as Co-Administratrix of the Estate of SHIRLEY P. MIRANDA, deceased,

Defendant-Appellants,

and

MR. MIRANDA, husband of LAURA F. MIRANDA, DARLENE P. HUBER, MR. HUBER, husband of DARLENE P. HUBER, JAMES

M. MIRANDA, MRS. JAMES M. MIRANDA, his wife, SHIRLEY C. MIRANDA, MR. MIRANDA, husband of SHIRLEY C. MIRANDA, CHERYL HERNANDEZ, MR. HERNANDEZ, husband of CHERYL MIRANDA, RICHARD MIRANDA, MRS. RICHARD MIRANDA, his wife, NEW CENTURY FINANCIAL SERVICES, INC., MIDLAND FUNDING, LLC, MSW CAPITAL, LLC, STATE OF NEW JERSEY, UNITED STATES OF AMERICA, and SUPREME ENERGY, INC.,

Defendants.

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Submitted April 26, 2022 – Decided May 25, 2022

Before Judges Smith and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-002028-09.

James F. Villeré Jr., attorney for appellants.

Friedman Vartolo LLP, attorneys for respondent (Michael Eskenazi, on the brief).

PER CURIAM

Defendants, Dawn and Laura Miranda, co-administrators of the estate of their mother, Shirley Miranda, appeal from the trial court's order striking their

answer and affirmative defenses as non-contesting and granting summary judgment to plaintiff in this foreclosure action, alleging decedent's signature was forged on the mortgage documents. However, decedent never alleged forgery during her lifetime in defense of this litigation. Accordingly, we affirm substantially for the reasons set forth by Judge Jeffrey R. Jablonski in his thorough statement of reasons rendered on October 25, 2019.

We will not recite in detail the lengthy history of the foreclosure proceedings. Instead, we incorporate by reference the factual findings and legal conclusions contained in Judge Jablonski's well-reasoned decision. We add the following comments.

The original complaint in this matter was filed in January 2009. The original defendant in foreclosure, Shirley Miranda,[1] passed away during the pendency of the litigation in February 2017. Prior to her passing, Shirley filed a contesting answer raising the following defenses: (1) plaintiff did not comply with the Fair Foreclosure Act, N.J.S.A. 2A:50-56(c), (2) plaintiff's claims were barred because of unclean hands, (3) plaintiff's claims arose because of its own negligence, and (4) consumer fraud. She also filed a counterclaim alleging predatory lending. By order dated January 17, 2014, Shirley was sanctioned

[1] Because several individuals share a surname, we refer to them by their first names. We mean no disrespect.

for her continuing failure to provide discovery, and her answer was stricken with prejudice pursuant to Rule 4:23-5(a)(2). Although Shirley asserted a consumer fraud claim, it is uncontested she did not assert forgery regarding the loan documents in the original contesting answer or at any time before she died. In fact, her answer, later stricken, specifically acknowledged the validity of the loan documents.

A first amended complaint was filed in April 2015, reflecting the substitution of plaintiff and addition of judgment creditors. By order dated May 31, 2016, the trial court did not allow Shirley to set aside default and file an answer to the first amended complaint due to the prior dismissal with prejudice, and because no new claims were asserted in the first amended complaint. Shirley appealed that denial.

Shirley passed away in February 2017. Final judgment was entered in May 2017. However, because she passed away prior to final judgment being entered, final judgment was vacated in November 2017. In April 2018, plaintiff filed a second amended complaint reflecting decedent's death and naming her heirs. [2]

[2] If an owner dies prior to entry of final judgment, their heirs, devisees, and personal representatives are indispensable parties who must be joined; otherwise the final judgment does not bind them. See R. 4:34-1(b); R. 4:34-3;

On May 14, 2018, the first appeal was dismissed as moot given that final judgment was vacated. This court's order states:

> [a]ll further proceedings relating to the new complaint shall be conducted in the trial court, and any subsequent appeal by any aggrieved party of final orders or judgments entered during those proceedings is limited to those new final orders or judgments, and shall not include the vacated May 9, 2017 final judgment that is the subject of this appeal, which is now dismissed.

On June 28, 2019, plaintiff filed a third amended complaint reflecting defendants had been named co-administrators of decedent's estate. The estate filed a contesting answer on August 1, 2019.

Defendants' "law of the case" argument relies upon the appeal's dismissal order language to claim they get to "start all over again." This court's dismissal of the prior appeal as moot was not a decision in defendants' favor on any substantive grounds.

Defendants incorrectly argue the trial court dismissed their answer and affirmative defenses to the third amended complaint because decedent's answer was previously stricken for failure to provide discovery. They argue our dismissal of the appeal gave them a "fresh start" and opportunity to file an

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Jeter v. Stevenson, 284 N.J. Super. 229, 236 (App. Div. 1995) (ordering estate substituted for named defendant).

answer to the second amended complaint. Neither argument is valid. The second amended complaint was rendered moot because plaintiff filed a third amended complaint. Defendants were given the opportunity and, indeed, did file an answer to the third amended complaint. That answer was not stricken because of decedent's prior failure to provide discovery. On the contrary, Judge Jablonski addressed the affirmative defenses raised by defendants in their most recent answer and found each failed to raise any issue of material fact sufficient to rebut plaintiff's prima facie right to foreclose.

Additionally, the trial court did not improperly convert plaintiff's motion to strike defendants' answer and affirmative defenses as non-contesting into a summary judgment motion.[3] On a motion to strike an answer as non-contesting in a foreclosure matter, the court is tasked with ascertaining whether a mortgagee has established a prima facie right to foreclosure. To obtain relief in a mortgage foreclosure action, the mortgagee must establish: (1) the validity of the documents; (2) the default itself; and (3) the right to foreclose. See Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994). Once plaintiff has

[3] Rule 4:64-1(d)(4) provides "[t]he court, on motion on 10 days' notice, and subject to paragraph (h) of this rule, may enter final judgment upon proofs as required by R. 4:64-2."

established a prima facie right to foreclose, defenses are limited to these issues and germane counterclaims. An answer denying the complaint's allegations or raising separate defenses contesting the validity of the mortgage being foreclosed, or disputing plaintiff's right to foreclose, would rebut a plaintiff's prima facie right to foreclose. R. 4:64-1(c)(2). Rule 4:6-5 provides a court may strike an answer which "presents no question of fact or law which should be heard by a plenary trial." Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 575 (Ch. Div. 1995) (citations omitted).

Plaintiff did not file a summary judgment motion; defendants' contention that they failed to comply with Rule 4:46-2(b) by failing to file a statement of material facts is unsupported. The trial court advised the parties, because they relied upon matters outside of the pleadings, including defendants' certification supporting the alleged forgery claim, the motion to strike the answer would be considered pursuant to the summary judgment standard and invited additional briefing and argument.[4]

Finally, defendants claim they were entitled to a N.J.R.E. 104 hearing on the forgery issues raised in Dawn's certification and whether decedent's alleged statements were admissible hearsay. A motion to strike and a motion for

[4] Defendants did not object to the trial court's notice.

summary judgment are both decided on the basis of pleadings, without testimony. Pursuant to Rule 4:46-2(c), summary judgment is appropriate if "the pleadings . . . together with the affidavits, if any, 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). It is not enough to simply raise a defense to delay foreclosure proceedings; defendants must raise sufficient material factual issues to defeat summary judgment. Brill, 142 N.J. at 529.

Defendants did not request a N.J.R.E. 104 hearing from the trial court.[5] Regardless, Dawn's certification, even if deemed entirely admissible, fails to rebut plaintiff's right to foreclose. N.J.S.A. 2A:82-17 creates a presumption as to the validity of the mortgage documents because they are notarized. The statute provides:

> If any instrument heretofore made and executed or hereafter to be made and executed shall have been acknowledged, by any party who shall have executed

[5] Rule 2:10-2 applies. "A defendant who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error . . . ." State v. Santamaria, 236 N.J. 390, 404 (2019). Plain error requires a demonstration of "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result.'" State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)). Defendants did not address plain error.

> it, or the execution thereof by such party shall have been proved by one or more of the subscribing witnesses to such instrument, in the manner and before one of the officers provided and required by law for the acknowledgment or proof of instruments in order to entitle them to be recorded . . . such certificate of acknowledgment or proof shall be and constitute prima facie evidence of the due execution of such instrument by such party.

This presumption is only overcome by "clear, satisfactory and convincing" evidence. Potter v. Steer, 95 N.J. Eq. 102, 104 (Ch. 1923). The issue is not whether decedent's alleged statements made to Dawn are admissible hearsay because decedent is unavailable to testify, but whether the alleged statements made by decedent are sufficient to rebut the presumption.

Even affording defendants[6] all favorable inferences, it is undisputed the mortgage and note are notarized. It is undisputed decedent never raised forgery as a defense during the eight years she contested this action. It is undisputed decedent's answer, filed March 30, 2009, states "[d]efendant Shirley P. Miranda admits that she executed a Mortgage in favor of Wachovia

[6] Our review of a ruling regarding summary judgment is de novo. Green v. Monmouth Univ., 237 N.J. 516, 529 (2019); RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). We "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Bank, N.A." It is undisputed decedent's counterclaim, filed the same day, states "[o]n or about May 1, 2007, Defendant/Counterclaimant Shirley P. Miranda borrowed the sum of $129,512.00 with interest rate of 6.62% from plaintiff and secured the debt with a mortgage." These are admissions made by decedent in signed pleadings.

In contrast, defendants' only evidence offered in support of a forgery defense are alleged conversations between decedent and Dawn, and Dawn's layperson opinion regarding her mother's handwriting. Dawn offers no explanation for her mother's failure to allege forgery during her own defense of this claim during her lifetime. The certification she provides does not address and cannot rebut the presumption raised by the notarized mortgage and promissory note in this case or decedent's own admissions in her prior pleadings.

A party does not create a genuine issue of fact simply by offering a sworn statement. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). "[C]onclusory and self-serving assertions in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (citing Puder v. Buechel, 183 N.J. 428, 440-41

(2005)). As such, the court correctly concluded defendants' proposed affirmative defense of forgery was waived by decedent during her lifetime because she failed to raise it. Even if it had not been waived, defendants' alleged proofs are insufficient to rebut the presumptions created by the notarized documents and sworn pleadings and do not create a material issue of fact precluding summary judgment.

Judge Jablonski properly concluded defendants' answer, affirmative defenses, and certification alleging forgery were unable to rebut plaintiff's prima facie right to foreclose. On this record, we see no basis to disturb the trial court's order striking the answer as non-contesting and granting summary judgment to plaintiff.

Defendants' remaining claims lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.