SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3650-20

LEONE & DAUGHTERS REALTY MANAGEMENT CORP.,

Plaintiff-Respondent/ Cross-Appellant,

v.

NAHEED A. KHAN, M.D.,

Defendant-Appellant/ Cross-Respondent.

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Argued October 6, 2022 – Decided December 5, 2022

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0934-18.

Chad M. Sherwood argued the cause for appellant/ cross-respondent (Law Office of Chad M. Sherwood, LLC; Chad M. Sherwood, on the briefs).

Gary Ahladianakis argued the cause for respondent/cross-appellant (Cooper Levenson, PA, attorneys; Gary Ahladianakis, on the briefs).

PER CURIAM

In these cross-appeals, defendant, Naheed Khan appeals two orders of the Law Division denying a fair market value credit hearing and denying attorney fees or sanctions for frivolous litigation, and plaintiff, Leone & Daughters Realty Management Corporation cross-appeals a September 25, 2020 order granting summary judgment to Khan and dismissing the complaint. Because we agree with the trial court that certain provisions in the mortgage foreclosure statutes, N.J.S.A. 2A:50-1 to -68, apply to this action, and plaintiff failed to meet several of the statutory requirements in pursuing its claim pursuant to Khan's personal guaranty, we affirm summary judgment in favor of Khan. We also agree with the trial court that Khan's counterclaim for a fair market value hearing is derivative of plaintiff's claims and cannot be litigated independently once the trial court dismissed Leone & Daughters' complaint. We affirm all three final orders of the trial court.

Khan, with her mother, Akhtar Afzal, and brother Sarfraz Afzal, now both deceased, contacted attorney Leone to help Akhtar regain title to "the Galloway Township property", which was in the process of foreclosure for failure to pay property taxes in the amount of $16,627.08. Default judgment had been entered against Akhtar, but the redemption period had not yet passed when she and Khan

contacted attorney Leone to prevent the impending final judgment in foreclosure, which would bar redemption. Attorney Leone structured a mortgage through his company, Leone & Daughters, which Akhtar used to redeem the taxes, regain title to the property, and make improvements to it in anticipation of its sale.

On January 20, 2012, Akhtar signed the mortgage note and loan agreement in exchange for a $60,000 mortgage loan. The mortgage note and loan agreement were secured by the property. The parties do not dispute Akhtar was the only signatory on both the note and the loan agreement. Khan signed a personal guaranty to Leone & Daughters in the event Akhtar defaulted as consideration for the mortgage loan. The guaranty states "I hereby guaranty, unconditionally the payment when due of each and every obligation . . . including all obligations under the note and mortgage . . . this guaranty is a continuing guaranty and shall remain in force until revoked by mutual consent in writing."

Six months later, on June 1, 2012, Khan, using her mother's power of attorney, transferred ownership of the property to Akhtar's son and defendant's

brother, Sarfraz.[1] Akhtar defaulted on the mortgage loan in February 2015. Plaintiff initiated foreclosure proceedings against Akhtar, and her two children as interested parties, on March 3, 2015. Akhtar passed away on June 25, 2015.[2] Plaintiff filed a notice dismissing the action against Akhtar but never substituted her estate. The caption was never amended, and on January 19, 2017, a final judgment in foreclosure was entered against defendant and her brother, but not Akhtar. A sheriff sale occurred on June 22, 2017, where Leone & Daughters purchased the property for $1,000. Sarfraz, the only party still residing at the property at that time, was evicted on January 31, 2018. Leone & Daughters sold

[1] It is unclear whether Sarfraz was competent at the time of the foreclosure proceedings, as defendant represents his disability rendered him unable to comprehend legal notices. At her deposition, Khan asserted "when my mother got admitted to the nursing home, there were certain regulations that required either we give the property over to the nursing home, or we had a one-time chance under the [M]edicare or Medicaid regulations to transfer it to the living handicapped [adult] child at the residence." Khan stated at her deposition "because the person living at the residence is disabled . . . he never looked at any document." Khan filed the later bankruptcy proceeding on behalf of Sarfraz as his "personal representative."

[2] There is no evidence Sarfraz or Khan assumed the mortgage on the property after their mother passed away. All parties concede the complaint in foreclosure was never amended to include decedent's estate as an indispensable interested party prior to entry of final judgment of foreclosure. See R. 4:34-1(b); R. 4:34-3. The propriety of the judgment in foreclosure is not before us on appeal and was not preserved by defendant. R. 2:6-2.

the mortgaged property to a third party on March 26, 2018, realizing $88,103.57 from the sale.

On April 17, 2018, Leone & Daughters filed a collection action in the Law Division against Khan for the full amount of the mortgage guaranty and interest, $62,314.41, which is subject of the current cross-appeals. Leone & Daughters alleges Khan's default amount totals $150,417.98, which represents the full original mortgage note due and owing, defendant's separate guaranty, interest, forced-place insurance, legal fees, real estate taxes, sewer payments, electrical payments, and clean-out expenses for the mortgaged property. However, Leone & Daughters "credited" Khan $88,103.57, the sale amount of the property, and therefore alleges Khan still owes $62,314.41 under the personal guaranty.

Khan filed an answer, affirmative defenses, and a counterclaim seeking a fair market value credit pursuant to N.J.S.A. 2A:50-3. She claims she is entitled to a full credit set-off amount of $88,103.57 pursuant to the mortgage guaranty or the fair market value of the property at the time of the sale. She asserts, "if the fair market value of the [p]roperty was more than the amounts allegedly owed by [her], then [she] is entitled to those proceeds." Leone & Daughters concedes any action on the guaranty would require a fair market value hearing.

The trial court granted summary judgment to Khan, holding because N.J.S.A. 2A:50-22 is applicable to actions on guarantees involving residential properties, Leone & Daughters' action could not be maintained because it 1) failed to provide a notice of intent to file the enforcement action pursuant to N.J.S.A. 2A:50-22(c); 2) failed to name the estate as an indispensable party pursuant to N.J.S.A. 2A:50-22(e); and 3) failed to meet the statute of limitations by filing the action by October 16, 2017, the latest date possible pursuant to N.J.S.A. 2A:50-22(b).

Leone & Daughters subsequently filed a summary judgment motion regarding Khan's counterclaim for a fair market value hearing, which the trial court granted, finding a fair market value hearing is governed by N.J.S.A. 2A:50-3 and cannot be maintained as an independent action. Rather, it attaches to a creditor's claim for deficiency, enforcement, or some other collection activity. Khan filed a motion for fees and sanctions pursuant to the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, and Rule 1:4-8, which the trial court denied.

On appeal, Khan argues she is entitled to a fair market value hearing and an award of damages for frivolous litigation, claiming she is entitled to a surplus as a guarantor to prevent plaintiff from obtaining a "windfall." She also seeks

attorneys' fees and sanctions, arguing there was no deficiency after the foreclosure sale, but instead a surplus, and plaintiff's post-foreclosure action to enforce her guaranty constituted frivolous litigation.

On cross-appeal, Leone & Daughters continues to argue N.J.S.A. 2A:50-22 does not apply to the personal guaranty signed by Khan in consideration for a mortgage loan to her mother. It argues alternatively, if the statute does apply, the statute of limitations should be tolled to allow Leone & Daughters to bring the enforcement action.

"In reviewing a grant of summary judgment, 'we apply the same standard governing the trial court -- we view the evidence in the light most favorable to the non-moving party.'" Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 349-50 (2016) (quoting Qian v. Toll Bros. Inc., 224 N.J. 124, 134-35 (2015)). We accord no special deference to a trial court's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a judge's determinations of the credibility of testimony rendered in court but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Leone & Daughters contends the Law Division action, initiated after the conclusion of the foreclosure action, was a collection action on a personal

guaranty from a non-mortgagor, therefore rendering the statutory requirements of the mortgage foreclosure statutes inapplicable. The balance of its argument is its interpretation of N.J.S.A. 2A:50-22, and the assertion plaintiff's right to collect on the continuing guaranty was not otherwise limited by the outcome of the foreclosure proceedings or the constraints of the statute. We disagree.

"A mortgage is simply a form of 'security for the payment of a debt.'" Brunswick Bank & Tr. v. Affiliated Bldg. Corp., 440 N.J. Super. 118, 125 (App. Div. 2015) (quoting J.W. Pierson Co. v. Freeman, 113 N.J. Eq. 268, 271 (E. & A. 1933)). "[F]ull payment of the underlying debt, by operation of law will extinguish a mortgage . . . ." Ibid. (citing Valley Nat'l Bank v. Meier, 437 N.J. Super. 401, 404-05 (App. Div. 2014)). Moreover, a "mortgagee is not entitled to recover more than full amount of [the] mortgage debt." Ibid. (citing 79-83 Thirteenth Ave., Ltd. v. DeMarco, 79 N.J. Super. 47, 54 (Law Div. 1963), aff'd, 83 N.J. Super. 497 (App. Div. 1964), aff'd, 44 N.J. 525 (1965)). "If the eventual disposition of the foreclosed property fails to 'bring an amount sufficient to satisfy the debt, interests, and costs,'" the lender may commence an action on the deficiency when the mortgagor is personally liable on the mortgage and bring a subsequent Law Division action for any deficiency. Id. at 125-26 (citing

N.J.S.A. 2A:50-2); see also DeMarco, 44 N.J. at 532. Such an action is deemed a "deficiency" action.

In New Jersey, the statutes regulating such deficiency actions date back to 1880 and include the "foreclosure first" rule, which requires foreclosure be sought first when collecting a debt secured by a mortgage. Brunswick Bank & Tr., 440 N.J. Super. at 125; see also Myron C. Weinstein, Law of Mortgages, 30A N.J. Practice Law Series § 39.1 (2d ed. 2000 & Supp. 2022). The regulations were designed to protect residential homeowners in instances where a note and mortgage have been given for the same debt. Weinstein, § 39.1 (2d ed. 2000 & Supp. 2022).

The mortgagee, unless abrogated by the "foreclosure first" rule, may still elect to bring suit in the Law Division before, during, or after foreclosure for the full amount due on the note, levy on the mortgaged property, acquire the property at a judicial sale for a nominal figure if there are no other bidders, and still collect the full deficiency out of its debtor's other property. Ibid.

N.J.S.A. 2A:50-2 requires "foreclosure first" for mortgages, unless exempted by N.J.S.A. 2A:50-2.3. The statutory exceptions to the "foreclosure first" rule are generally commercial mortgages but, at the very least, (b) applies to residences:

> b. Where the mortgaged property is other than a one-family, two-family, three-family or four-family dwelling in which the owner or his immediate family resides at the time of institution of proceedings to collect the debt;
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> [N.J.S.A. 2A:50-2.3.]

As we have previously observed, "the Legislature created [these] exceptions and determined -- for reasons apparently 'based on efficiency and respect for arms-length business transactions,' -- that when the debt is secured 'for a business or commercial purpose' . . . the lender is not obligated to foreclose first." Brunswick Bank & Tr., 440 N.J. Super. at 126 (quoting Business Loan Ctr. L.L.C. v. Nischal, 331 F. Supp. 2d 301, 309 (D.N.J. 2004)); see also West Pleasant-CPGT, Inc. v. U.S. Home Corp., 243 N.J. 92, 107 (2020) ("[C]reditors are not required to follow the foreclosure-first sequence with respect to commercial property.").

The mortgage foreclosure statutes protect residential mortgagors against exploitation by making the land primarily liable to pay the debt and limiting any subsequent deficiency judgment to the difference between the fair market value of the property and the full mortgage debt. See Weinstein, § 39.1 (2d ed. 2000 & Supp. 2022). This protection also extends to others liable on the mortgage

debt by limiting the time period for recovery against a guarantor. See N.J.S.A. 2A:50-22.

Although our case law recognizes the distinction between enforcement of a note and mortgage through quasi in rem and in personam actions, in the case of most residential mortgage foreclosures, the "foreclosure first" rule is squarely applicable. See First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 351 (2007) (discussing N.J.S.A. 2A:50-2.3 and setting forth the exceptions to the "foreclosure first" rule).

Thus, the protections in the mortgage foreclosure statutes codify "the broad equitable concept that a mortgagee is not entitled to recover more than the full amount of the mortgage debt," DeMarco, 44 N.J. 534, and service judicial economy by preventing "the possibility of multiple actions for the recovery of such a debt." Brunswick Bank & Tr., 440 N.J. Super. at 126; see N.J.S.A. 2A:50-1; see also West-Pleasant, 243 N.J. at 106 (holding this equitable policy extends to the deficiency portion of the statute, N.J.S.A. 2A:50-3) (citing Citibank, N.A. v. Errico, 251 N.J. Super. 236, 248 (App. Div. 1991)).

Moreover, N.J.S.A. 2A:50-22 extends certain protections to persons who "assume or guarantee the payment of any mortgage." The right of recovery

against third-party guarantors of residential mortgages, such as Khan, requires, in pertinent part:

> a. The person making such agreement was made a party defendant in the foreclosure action, and
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> b. The action is commenced within 3 months from the date of sale . . . or in the case of the extinguishment of the mortgage lien by the foreclosure of a prior mortgage lien, then within 12 months from the date of such extinguishment, and
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> c. A notice of intention to bring the action, is filed in the office of the register or the clerk as the case may be, of the county wherein the mortgaged premises are located, before the commencement of the action, and
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> d. The plaintiff shall in his complaint offer to credit upon the indebtedness the fair market value, which shall be specified, of the mortgaged premises as of the date of the sale in the foreclosure suit, in any case where the plaintiff was the purchaser of the mortgaged premises at such sale, and in such case the defendant may contest, in the action, the amount of such fair market value; and
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> e. The plaintiff shall join in the action any and all persons within the jurisdiction of the State of New Jersey alleged to be liable upon the note or as obligors upon the bond and upon any other agreement of assumption of payment of the same note or bond, express or implied, and upon any and all agreements or covenants to pay the same note or bond, or any moneys alleged to be due thereon, as principal, guarantor, surety or otherwise, whether such persons are alleged to be liable directly, indirectly, jointly, severally, or in the alternative.

[N.J.S.A. 2A:50-22.]

Plaintiff contends N.J.S.A. 2A:50-22 does not apply because the Law Division action is not a deficiency action, but rather a separate common law right of collection action, akin to a contract enforcement action. Plaintiff further contends the personal "guaranty" signed by defendant does not fall within the ambit of the statute, which covers only "guarantee[s]."[3]

We construe N.J.S.A. 2A:50-3 (deficiency actions against primary obligors) and N.J.S.A. 2A:50-22 (collection actions on persons who "assume" or "guarantee") more narrowly than plaintiff urges, given the plain language of the statute. We recognize plaintiff had a right to initiate a collection action regarding the continuing personal guaranty, which was not a deficiency action pursuant to N.J.S.A. 2A:50-3; however, the right to enforce such a guarantee is not unconditional, as evidenced by the plain language of N.J.S.A. 2A:50-22.

N.J.S.A. 2A:50-22 was last amended in 1979, as part of broader changes to the mortgage foreclosure statutes to eliminate the distinction between notes

[3] Although we note the word "guaranty" does not appear in the statute in a noun form, we are not persuaded by the semantic argument advanced by plaintiff at oral argument. The verb form of the word clearly implicates the third-party agreement entered into by the parties here. To state the issue simply, someone who "guarantees" a mortgage is a guarantor, just as Khan in the underlying matter, regardless of the spelling used.

and bonds. See Penn Salem Marina Inc., 190 N.J. at 350-51 (discussing history of N.J.S.A. 2A:50-2); see also Sponsor's Statement to S. 732 6 (L. 1979 c. 286) ("This bill eliminates the difference between bonds and notes secured by residential real estate mortgages. It extends present law to allow a mortgagor to dispute the amount of a deficiency in a foreclosure in the case where a note is involved as well as those where a bond is involved.").

As amended, the statute in its current iteration reads: "[n]o action to enforce an agreement, express or implied, to assume or guarantee the payment of any mortgage, or of any bond or note secured by a mortgage, shall be maintained against a person making such agreement unless the mortgage shall have been first foreclosed."

We are unpersuaded by plaintiff's contention that the Legislature intended to address a "guarantee" agreement but not a "guaranty" agreement; the plain language of the statute evinces an intent to extend protections to persons who make a "guarantee" (i.e. a guarantor), which is the agreement entered by the parties here.

A "continuing guaranty" does not continue in perpetuity, and plaintiff's argument on this point likewise fails. The legal consequence of the continuity does not refer to the duration or length of time an obligee has to prosecute a

collection action against the secondary obligor (i.e. the guarantor), but rather the nature of the secondary obligation itself. Our jurisprudence has conceptualized such a "continuing" obligation as a series of successive obligations, until terminated. See Housatonic Bank and Tr. Co. v. Fleming, 234 N.J. Super. 79, 82-83 (App. Div. 1989) (discussing effect of revocation on continuing guaranty); Restatement (Third) of Suretyship and Guaranty § 16 (Am. Law Inst. 1996).

It is fundamental that a guarantor's obligation cannot be extended by implication. Ctr. 48 Ltd. P'Ship v. May Dep't Stores Co., 355 N.J. Super. 390 (App. Div. 2022) (citing Fleming, 234 N.J. Super. at 82). The terms of a guarantee agreement must be read in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in those types of transactions. Mt. Holly State Bank v. Mt. Holly Washington Hotel, Inc., 220 N.J. Super. 506, 511 (App. Div. 1987). While any ambiguity should be construed in favor of the guarantor, the agreement should be interpreted, like any other contract, according to its clear terms so as to effect the objective expectations of the parties. Fleming, 234 N.J. Super. at 82.

The intent of the parties is not disputed here as Khan readily concedes she agreed to guarantee the mortgage loan; the parties dispute instead the time and manner in which plaintiff had to bring an enforcement action, which, in the residential mortgage context, is governed by the mortgage foreclosure statutes. A plaintiff seeking to enforce a guarantee is not without recourse to collect on the in personam judgment of such a guarantee at common law; however, it must do so within the boundaries of our law, as expressed by the plain language of N.J.S.A. 2A:50-22 and meeting all the requirements of that statute.

The trial court correctly noted, even granting the most favorable inferences to the non-movant at summary judgment, plaintiff failed to meet several criteria specifically set forth in N.J.S.A. 2A:50-22(b)-(c), (e). The trial court found the automatic stay in bankruptcy expired thirty days after the bankruptcy case was dismissed pursuant to 11 U.S.C. § 108(c). Because the case was dismissed on September 15, 2017, the trial court held plaintiff had until October 16, 2017 to resume a collection action pursuant N.J.S.A. 2A:50-22(b). In so reasoning, the trial court granted plaintiff a more favorable inference than the three-month statute of limitations contemplated by N.J.S.A. 2A:50-22(b), which would have required such action to be filed by September 22, 2017, three months after the date of the sheriff sale. The trial court did not err in refusing

to consider the action timely on April 17, 2018, seven months after the conclusion of bankruptcy proceedings and nearly nine months after the sheriff sale.

The trial court also found plaintiff failed to file the requisite notice of intention to bring such an action in the county clerk's office pursuant to N.J.S.A. 2A:50-22(c), and further failed to name the defendant's estate as a defendant "alleged to be liable on the note" pursuant to N.J.S.A. 2A:50-22(e). Plaintiff did not dispute these failures but argued N.J.S.A. 2A:50-22 did not apply. We have rejected that argument here and have no occasion to disturb the trial court's findings on the applicability of N.J.S.A. 2A:50-22.

We next address the portion of Khan's appeal claiming she is entitled to pursue a fair market value hearing independent of an action pending against her. We affirm for the reasons expressed by Judge Brenner in his well-reasoned opinion and add only the following.

The New Jersey Supreme Court recently had occasion to address a similar issue in West Pleasant-CPGT, Inc., 243 N.J. at 92, and held a fair market value credit hearing was inappropriate months after a sheriff sale where there was no deficiency or collection action complaint pending. Id. at 112. The Court meticulously traced the history of the fair market value credit doctrine, which is

codified in N.J.S.A. 2A:50-3; and occasionally employed as an equitable device even where the exemptions in N.J.S.A. 2A:50-2.3 apply, to prevent "double recovery or windfall to the judgment creditor who . . . may profit on the purchase of the property at the foreclosure sale (if purchased for less than fair market value), [and] who also seeks to obtain satisfaction of his judgment." Id. at 109 (quoting Morsemere Fed. Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637, 645 (App. Div. 1986)).

In holding the fair market value credit action should not generally exist in the absence of a pending collection action, the Court reasoned:

> Public policy generally favors finality in the foreclosure process. A debtor has the ability to seek a fair market value credit by objecting to the sheriff's sale. After the time for objecting to the sheriff's sale has passed, unless a deficiency action or other collection activity is pursued, later claims for fair market value credit should not be permitted to generate endless litigation.
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> [Id. at 111.]

Khan's contention contravenes the express holding of West Pleasant, and the Court's explicit recognition the fair market value credit doctrine is to be used "as a shield, not a sword." Id. at 106 (citing Michael T. Madison, et. al. 2 Law of Real Estate Financing § 12:73 (Dec. 2019)). Absent rare equitable principles not present here, the fair market credit doctrine is derivative of a deficiency or

other collection action. We, therefore, decline to disturb the trial court's holding on appeal.

We also find the court properly exercised discretion in not imposing sanctions pursuant to the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, and Rule 1:4-8. See United Hearts L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App Div. 2009) (applying an abuse of discretion standard for review of an award of sanctions). "An 'abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error of judgment.'" Ibid. (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002)). The trial court set forth detailed reasons explaining why this case did not amount to frivolous litigation, even though Khan prevailed on summary judgment, particularly due to the novelty of the arguments made.

"A claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 332 N.J. Super. 124, 144 (App. Div. 1999). A trial court has discretion to award reasonable attorney fees and

costs pursuant to the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1,[4] if and when it finds a non-prevailing party was frivolous in advancing a legal position, but where a trial court finds a party has a reasonable good faith basis for its positions, fees and expenses will not be awarded. In re Estate of Ehrlich, 427 N.J. Super. 64, 77 (App. Div. 2012).

Affirmed.

[4] The statute provides: "A party who prevails in a civil action, either as a plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous."