SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0813-21

WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS CERTIFICATE TRUSTEE OF BOSCO CREDIT V TRUST SERIES 2012-1,

Plaintiff-Respondent,

v.

DENNIS PFEFFERKORN, MRS. DENNIS PFEFFERKORN, his wife, JANICE PFEFFERKORN, MR. PFEFFERKORN, husband of JANICE PFEFFERKORN,

Defendants-Appellants,

and

HSBC BANK USA, N.A., UNITED STATES OF AMERICA, STATE OF NEW JERSEY, BARTHOLOMEW PASQUALE, KATHLEEN PASQUALE, TD BANK, N.A., ALLIED CAPITAL FUNDING LLC,

WESTERN PACIFIC MUTUAL INSURANCE COMPANY, RESIDENTIAL WARRANTY CORPORATION, HOVSONS INC., CHARLES M. PETRUZZI, JAMES T. SCOTT, EMMANUEL SPANOS, RICHARD S. WENIGER, KYLE E. HILL, SPT ELECTRICAL SUPPLY CO INC., COMMUNITY MEDICAL CENTER, ABC SUPPLY CO INC., COLORADO CAPITAL, CACH OF NEW JERSEY LLC, OCEAN MEDICAL CENTER, and OCEAN MEDICAL CENTER, on behalf of MEDICAL CENTER OF OCEAN COUNTY,

Defendants.

Submitted January 18, 2023 – Decided March 22, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. F-009665-20.

Dennis Pfefferkorn and Janice Pfefferkorn, appellants pro se.

Respondents have not filed a brief.

PER CURIAM

Defendants Dennis and Janice Pfefferkorn appeal from an order dismissing without prejudice a residential foreclosure action brought by

plaintiff, Wilmington Savings Fund Society, FSB, as Certificate Trustee of Bosco Credit V Trust Series 2012-1 (plaintiff or Wilmington Savings). Defendants contend that the chancery court erred by dismissing the action without prejudice after they had moved for summary judgment certifying that plaintiff's claims were time-barred under the governing statute of limitations. Wilmington Savings conceded that it could not prove when defendants last made a payment on the promissory note and it offered no evidence to rebut defendants' certification that they had not made a payment on the note since June 1999, which was more than twenty years before Wilmington Savings filed its foreclosure action.

We hold that the chancery court erred in granting a dismissal without prejudice because the court failed to consider the requirements for a voluntary dismissal under Rule 4:37-1(b). Because the material undisputed facts established that plaintiff's claims are barred by N.J.S.A. 2A:50-56.1(c) (2009), the fair and efficient administration of justice entitled defendants to a dismissal with prejudice. Therefore, we vacate the order dismissing the action without prejudice, and remand with direction that the chancery court enter an order dismissing plaintiff's complaint with prejudice.

I.

We discern the material facts from the summary judgment record. On September 29, 1998, defendants signed a promissory note (the Note), acknowledging that they had borrowed $87,600 from Ivy Mortgage Corporation (Ivy) and promising to repay the loan with interest in monthly installment payments over the next thirty years. To secure the repayment, defendants also executed and gave Ivy a mortgage (the Mortgage) on their residential real estate property located at 2219 Church Road, Toms River (the Property).[1]

In December 2020, Wilmington Savings filed an action to foreclose on the Property. It alleged that it held the Note, which had been assigned to it in November 2012. Wilmington Savings acknowledged that it was not the holder or assignee of the Mortgage. Instead, it explained that Ivy had assigned the Mortgage to Delta Funding Corporation (Delta), Delta was no longer in business, and Wilmington Savings had not been able to obtain an assignment of the Mortgage. Wilmington Savings also alleged that defendants had defaulted on the Note and Mortgage on August 5, 2008, when defendants allegedly failed to make a monthly installment payment.

[1] The Note and certain loan documents incorrectly list the Property's location as 2219 Old Church Road. That discrepancy, however, is not material since all parties agree that the Mortgage and Note properly describe the Property.

Defendants filed a contesting answer and expressly disputed that they had made their last payment on August 5, 2008. Defendants also asserted affirmative defenses, including that plaintiff's claims were barred under the statute of limitations set forth in N.J.S.A. 2A:50-56.1.

In July 2021, plaintiff moved for summary judgment and to strike defendants' answer. In support of its motion, plaintiff submitted certifications from Melissa Olivera, the foreclosure manager of Franklin Credit Management Corporation (Franklin). Olivera explained that Franklin was the mortgage loan servicer for Wilmington Savings as Trustee. She then certified that (1) Wilmington Savings possessed the original Note and had possessed that Note since November 2012; (2) Wilmington Savings did not possess the Mortgage and the Mortgage had not been assigned to Wilmington Savings; and (3) defendants defaulted under the Note when they failed to make a monthly payment on August 5, 2008. To support the August 5, 2008 default date, Olivera attached a loan history summary that stated:

Trans Date Eff Date	Due Date	Trans Desc	Rev Code Flag	Trans Amount	Balance
11/08/12	08/05/08	New Loan	0 0	0.00	$81,706.85

The loan history summary did not list or disclose any payment history before or after August 5, 2008. Instead, the history showed only five other

transaction dates: "03/20/19[;] 04/25/19[;] 07/10/20[;] 10/12/20[; and] 10/12/20[;]" all listed as "legal fee" assessments.

Defendants opposed plaintiff's motion and cross-moved for summary judgment to dismiss plaintiff's complaint. In support of their motion, defendants certified that they had (1) executed the Note in September 1998; (2) made no payment on the Note after June 1999; and (3) filed for bankruptcy and the Note had been discharged in the bankruptcy proceeding in March 2002. Defendants also pointed out that plaintiff had not submitted any evidence establishing that they had made a loan payment in 2008, or any time after June 1999. Defendants, therefore, argued that they were entitled to summary judgment dismissing plaintiff's claim as barred by the statute of limitations.

The chancery court heard arguments on the cross-motions on September 24, 2021. The court questioned plaintiff's proofs, pointing out that the loan payment history did not establish when defendants had made their last payment and the court needed proof of the last payment to evaluate the statute of limitations defense. The court also noted that plaintiff had the burden to establish the payment history because it was responsible for maintaining a record of the payment history. Accordingly, the court adjourned the motion to

allow plaintiff to submit proofs of when defendants made their last payment and to allow defendants to respond to plaintiff's supplemental submissions.

On October 21, 2021, the day before argument was to continue, plaintiff's counsel submitted a letter to the chancery court. In pertinent part, that letter stated: "Plaintiff was unable to locate any historical payment records other than what it has proffered to the [c]ourt. In light of this, [p]laintiff has elected to dismiss its complaint without prejudice."

The following day, the court heard continued argument. Defendants objected to a dismissal without prejudice contending that plaintiff's complaint was time-barred and should be dismissed with prejudice. Without citing any authority, the chancery court stated that it would dismiss the complaint without prejudice. In making that ruling, the court reasoned:

> So I'm not going to dismiss it with prejudice, I'm going to dismiss it without prejudice. [Plaintiff's counsel] indicated in the letter that they were unable to locate the payment records which would support their – their documents, that is that the – the payments – the default occurred within the statute of limitations and that they didn't want to have the case pending while this [c]ourt – while they look for those documents. If they find the documents they're going to make an application to reinstate. I think that's appropriate.

On October 22, 2021, the court entered an order dismissing plaintiff's complaint without prejudice. Defendants now appeal from that order. Plaintiff

did not file a brief in opposition to defendants' appeal. Instead, plaintiff's counsel submitted a one-page letter, contending, without citations to any authority, that the chancery court "was well within its discretion to dismiss the subject foreclosure action without prejudice, and that decision should stand."

II.

On appeal, defendants argue that the chancery court abused its discretion by dismissing the complaint without prejudice. They contend that the complaint should have been dismissed with prejudice because they submitted proofs in support of their summary judgment motion establishing that plaintiff's claims were time-barred under the governing statute of limitations. See N.J.S.A. 2A:50-56.1(c) (2009).

The question we must decide is whether the chancery court erred in granting a voluntary dismissal without prejudice when defendants had a pending motion for summary judgment. "The voluntary dismissal of a complaint without prejudice is governed by [Rule] 4:37-1." Shulas v. Estabrook, 385 N.J. Super. 91, 96 (App. Div. 2006). Subsection (a) of that rule allows a plaintiff to obtain a dismissal without prejudice "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first." R.

4:37-1(a). That subsection of the rule does not apply here because defendants had filed an answer and had moved for summary judgment.

Instead, subsection (b) of Rule 4:37-1 governed plaintiff's request for a voluntary dismissal. That provision of the rule states that "an action shall be dismissed at the plaintiff's insistence only by leave of court and upon such terms and conditions as the court deems appropriate." R. 4:37-1(b). We have explained that a dismissal under this Rule is generally a "matter[] that lie[s] within the [trial] court's sound discretion." Shulas, 385 N.J. Super. at 97 (citing Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 258 (App. Div. 1990)). "In exercising that discretion, the court is chiefly required to protect 'the rights of the defendant.'" Ibid. (quoting Burke v. Central R. Co., 42 N.J. Super. 387, 398 (App. Div. 1956)).

We have also explained that Rule 4:37-1(b) is similar to Federal Rule of Civil Procedure 41(a)(2) and, therefore, federal decisions on that companion rule are useful in applying Rule 4:37-1. Shulas, 385 N.J. Super. at 97, 101. Looking to that companion federal rule, and considering federal caselaw on that rule, we have set out certain guidelines to inform the court's discretion in considering motions for voluntary dismissal under Rule 4:37-1(b). See id. at 97-98.

Those guidelines require a trial court to consider the rights of defendants. Id. at 97. Thus, we have explained that the Rule should protect the litigant where a termination of the proceedings without prejudice will place the defendant "in the probable position of having to defend, at additional expense, another action." Ibid. (quoting Union Carbide Corp. v. Litton Precision Prods., Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967)). We have also explained that the plaintiff's motive should be considered. Id. at 100. Finally, we have directed that Rule 4:37-1(b) requires the court to consider the impact of a dismissal without prejudice on the efficient administration of justice. Ibid.

Applying those guidelines, we hold that the chancery court erred in granting plaintiff a dismissal without prejudice. First, we note that plaintiff did not file a formal motion as required by the Rule. Instead, it simply submitted a letter, requesting a voluntary dismissal. Second, the court did not conduct any meaningful analysis. It did not consider defendants' interest, plaintiff's motive, or the impact on the efficient administration of justice.

In different circumstances, we might have remanded this matter for the chancery court to exercise its discretion. We do not need to do that here, however, because the record established that defendants were entitled to a summary judgment dismissal with prejudice. The governing statute of

limitations affords plaintiff twenty years "from the date on which the debtor defaulted." N.J.S.A. 2A:50-56.1(c) (2009).[2] The record on the cross-motion for summary judgment establishes three material facts related to the statute of limitations defense. First, the loan was made in 1998. Second, defendants defaulted on the loan in June 1999. Third, plaintiff filed their foreclosure action on December 3, 2020. Consequently, as more than twenty years had passed between the June 1999 default and the December 2020 foreclosure action, the plaintiff's action was time-barred.

In plaintiff's counsel's letter dated October 21, 2021, it argued that defendants had not produced any documents supporting their claim that they had not made a payment since 1999. Defendants had, however, submitted certifications stating that they had not made a payment since June 1999. On summary judgment, it was plaintiff's obligation to rebut defendants' certification. As the chancery court correctly pointed out, plaintiff, as the holder

[2] As originally enacted, that statute codified, in relevant part, Security National Partners Ltd. Partnership v. Mahler, 336 N.J. Super. 101 (App. Div. 2000), which applied a twenty-year limitation to a residential mortgage foreclosure action based on default due to nonpayment. In 2019, N.J.S.A. 2A:50.56.1(c) was amended to shorten the limitation period from twenty to six years, but only for mortgages executed on or after the effective date of April 29, 2019. See L. 2019 c. 67, § 1.

of the Note, had the obligation to maintain the payment history on the Note. See, e.g., 12 C.F.R. § 1024.38(c)(1). Just as importantly, plaintiff admitted that it could not locate any payment records establishing when defendants made their last payment. On that record, defendants were entitled to summary judgment. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Town of Kearny v. Brant, 214 N.J. 76, 96 (2013); R. 4:46-2(c).

Finally, we point out that dismissal with prejudice is the appropriate remedy here because it also advances the efficient administration of justice. Plaintiff had more than sufficient time to locate proofs showing when defendants made the last payment on the Note. It would be unfair to defendants to dismiss this action without prejudice and, thereby, give plaintiff an opportunity to file another foreclosure action in the future. Even though defendants are self-represented, they still will incur time and cost, as well as emotional energy, if required to respond to a future legal action.

It is also not clear that plaintiff even had a right to bring a foreclosure action. Plaintiff admitted it only had an assignment of the Note and Ivy had assigned the mortgage to Delta. Thus, plaintiff conceded it did not have an assignment of the Mortgage. Because "the note [was] separated from the mortgage," plaintiff did not demonstrate it had standing to bring a foreclosure

action. See Capital One, N.A. v. Peck, 455 N.J. Super. 254, 259 (App. Div. 2018) (explaining that a plaintiff in a foreclosure action must demonstrate both possession of the note and a valid mortgage assignment); see also N.J.S.A. 46:18-13(a) (providing that "[o]nly the established holder of a mortgage shall take action to foreclose a mortgage"). Indeed, a creditor must own or control the mortgage to foreclose on a property. If a party simply has a promissory note, its course of action is to file an action on the note. See, e.g., Restatement (Third) of Prop.: Mortgs. § 5.4 cmt. e, illus. 8 (Am. L. Inst. 1997). If the creditor prevails, a judgment will be entered, and the creditor can seek to enforce that judgment against the debtor's available assets.

In short, considerations of the requirements under Rule 4:37-1(b) do not support a dismissal without prejudice. Instead, defendants established their right to summary judgment dismissing plaintiff's complaint with prejudice as barred by the statute of limitations. Accordingly, we vacate the October 22, 2021 order and remand this matter with direction that the chancery court enter an order dismissing plaintiff's complaint with prejudice.

Reversed and remanded. We do not retain jurisdiction.