SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2811-21

U.S. BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF THE LODGE SERIES III TRUST,

Plaintiff-Respondent,

v.

VICTOR NUGENT and EMMA NUGENT,

Defendants-Appellants,

and

ACTIVE ENVIRONMENTAL TECHNOLOGIES, INC.,

Defendant.

Submitted September 26, 2023 – Decided November 3, 2023

Before Judges Marczyk and Chase.

On appeal from the Superior Court of New Jersey, Chancery Division, Gloucester County, Docket No. F-009436-20.

Victor Nugent and Emma Nugent, appellants pro se.

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

PER CURIAM

In this residential foreclosure action, defendants Victor and Emma Nugent appeal pro se from an August 20, 2021 order granting summary judgment[1] and an April 1, 2022 order granting final judgment to plaintiff U.S. Bank Trust National Association. Defendants further appeal the April 1, 2022 order denying their cross-motion to fix the amount due. Following our review of the record, applicable legal principles, and arguments of the parties, we affirm.

I.

Defendants own real property located in Swedesboro. In June 2010, defendants executed a note in the amount of $167,300 in favor of Integrated Financial Group, Inc. As security for the note, defendants secured a mortgage. The mortgage was recorded in the Gloucester County Clerk's Office in June 2010.

In November 2013, the note and mortgage were modified by a loan modification agreement. The note and mortgage were assigned several times,

[1] The August 20, 2021 order also struck defendants' answer and granted default.

most recently to plaintiff. Defendants breached the terms of the note and mortgage by failing to remit payment on May 1, 2019, and each payment thereafter. On May 29, 2020, plaintiff filed a Notice of Intent to Foreclose ("NOI") and to accelerate, which was mailed to defendants.

On November 18, 2020, plaintiff commenced a foreclosure action, and defendants were duly served. On January 8, 2021, defendants filed an answer. On August 20, 2021, the court granted defendants' motion for summary judgment and struck defendants' answer with prejudice. Plaintiff subsequently moved for final judgment, and defendants cross-moved to fix the amount due and assert damages based on an alleged violation the New Jersey Home Ownership Security Act of 2002 ("HOSA"). On April 1, 2022, the trial court granted plaintiff's motion for final judgment and denied defendants' cross-motion. This appeal followed.

II.

Defendants argue the trial court erred in granting summary judgment because plaintiff did not submit a statement of material facts with its summary judgment motion. Defendants further contend the court erred in entering summary judgment because plaintiff did not establish defendants defaulted on their payments. Defendants next assert there was no evidence they received the

NOI. Lastly, defendants maintain the court erred by denying defendants' motion to fix the amount due and failing to find a violation of HOSA.

In our review of a grant of summary judgment, we apply the same legal standard as the motion judge. Townsend v. Pierre, 221 N.J. 36, 59 (2015). We must determine whether there is a "genuine issue as to any material fact" when the evidence is "viewed in the light most favorable to the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014) (first quoting R. 4:46-2(c); and then quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). The "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo. Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010) (quoting City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010)).

In a mortgage foreclosure proceeding, the court must determine three issues: "the validity of the mortgage, the amount of the indebtedness" and default, and the right of the plaintiff to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994). Standing for foreclosure proceedings is established through "either possession of the note or an assignment of the

mortgage that predated the original complaint . . . ." Deutsche Bank Tr. Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (citing Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011)). A party initiating a foreclosure proceeding "must own or control the underlying debt" obligation at the time an action is initiated to demonstrate standing to foreclose on a mortgage. Mitchell, 422 N.J. Super. at 222 (quoting Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011)). "[E]ither possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." Angeles, 428 N.J. Super. at 318 (citing Mitchell, 422 N.J. Super. at 216, 225).

Initially, we observe that we need not consider arguments not raised in the trial court. Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see State v. Robinson, 200 N.J. 1, 19 (2009) ("Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves."); see also Zaman v. Felton, 219 N.J. 199, 226-27 (2014); see also R. 2:2-3. Here, defendants did not oppose the summary judgment and therefore did not raise their first three arguments before the trial court. Nevertheless, for the sake of

completeness, we briefly address why we are unpersuaded by the procedural arguments advanced by defendants.

Defendants assert we should reverse the trial court based on plaintiff's failure to include a statement of material facts with its summary judgment motion. The certification submitted in support of the summary judgment motion was the functional equivalent of a statement of material facts. First, consistent with Rule 1:6-6, it was based on the individual's personal knowledge.[2] Second, in accordance with Rule 4:46-2, it sets forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact. Lastly, we have held a certification will support the grant of summary judgment if the material facts alleged therein are based, as required by Rule 1:6–6, on "personal knowledge." See Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003). Moreover, as noted, defendants did not file any opposition to plaintiff's motion.

Defendants next claim plaintiff did not provide proof of defendants' default. Here, the trial court concluded plaintiff was entitled to summary

[2] The certification at issue clearly lays out that defendants obtained the mortgage loan, the mortgage was recorded, defendants defaulted on May 1, 2019, and failed to make any payments thereafter.

judgment concerning the validity of the mortgage, defendants' indebtedness, and plaintiff's right to foreclose on the mortgaged premises. The trial court reached this conclusion based on the certification provided from plaintiff's asset manager. The trial court noted it is apparent defendants breached the terms of the mortgage by failing to remit payment beginning in May 2019 and thereafter. The certification submitted in support of plaintiff's motion was sufficient, under the facts of this case, to establish defendants defaulted. The certification clearly stated the asset manager was responsible for internal loan and foreclosure documents, and thus had personal knowledge of defendants' foreclosure. We agree with the trial court's finding that the certification sufficiently established defendants' default.

Defendants next contend plaintiff did not provide evidence of defendants' receipt of an NOI. N.J.S.A. 2A:50-56(b) provides the NOI must be in writing and "sent to the debtor by registered or certified mail, return receipt requested, at the debtor's last known address . . . . The notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party." Here, the certification submitted in support of the summary judgment motion states plaintiff sent defendants an NOI on May 29, 2020, by first class certified

mail, return receipt requested, and regular mail. In addition to this sworn statement, defendants included exhibits of the declaration of mailing.

The plain language of the New Jersey Fair Foreclosure Act ("FFA"), N.J.S.A. 2A:50-53 to -68, does not require that a lender produce a return receipt and prove actual delivery, but provides that the notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party. Because plaintiff presented unrebutted proof that it mailed the NOI to defendants' correct address via certified mail with return receipt requested, we find that it complied with the FFA's notice requirements.

Defendants next argue the trial court erred by dismissing their affirmative defense based on HOSA. Defendants contend the late fees charged in excess of five percent was a violation of HOSA.

In addressing this issue, the trial judge noted:

> I find by clear and convincing evidence, that here the $25.55 late fee is under [five] percent of the monthly payment.
>
> Defendant notes that as of the time of default, the monthly payment due was . . . $1,295.75 . . . . That amount is consistent with the principal plus interest detailed in the modification agreement, plus an allocation of the escrow amount. [Five] percent of $1,295 is $64.75, which is well over the late charge listed . . . and [it is] even well over defendant's invented figure of $35.77. At no time is there any evidence in

> . . . violation of HOSA's provision, let alone a material [breach], which would cause the [c]ourt to deny final judgment . . . .

We affirm on this issue substantially for the reasons set forth above and in the trial court's decision.

To the extent we have not specifically addressed any other contentions raised by defendants, they lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.