

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

BUPM NJ ASSETS LLC,

Plaintiff,

v.

15 NORTH DEAN ST., LLC, SAADIA A.
SHAPIRO and MARLA SHAPIRO,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. F-6651-23

OPINION

Argued: February 20, 2024

Decided: April 5, 2024

Appearances: Kriss & Feuerstein LLP (Michael J. Bonneville, Esq., appearing) for Plaintiff.
Charles I. Epstein, Esq., appearing, and Saadia A. Shapiro, Esq., appearing *Pro Hac*
Vice for Defendants.

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

This matter is before the Court by way of a Motion for Summary Judgment and to Strike Defendant's Answer filed by Plaintiff BUPM NJ Assets LLC ("Plaintiff"), by and through its attorneys, Kriss & Feuerstein LLP (Michael Bonneville, Esq., appearing), on January 4, 2024. Defendants 15 North Dean St., LLC, Saadia A. Shapiro, and Marla Shapiro (collectively, the "Defendants") filed opposition by and through their attorney, Charles I. Epstein, Esq., appearing, on February 5, 2024. Plaintiff thereafter submitted a reply on February 9, 2024. Oral argument was heard on February 20, 2024.

On September 1, 2020, Defendant 15 North Dean St., LLC (hereinafter "15 North") executed a Note (the "Note") in the amount of \$900,000.00 with an interest rate of 3.750% per

annum in favor of Mariner's Bank. Principal and interest were to be in monthly installments commencing on October 1, 2020, and on the first day of each month thereafter. The Note has a maturity date of October 1, 2030.

To secure the payment obligations under the Note, on even date of the Note's execution, a Mortgage (the "Mortgage") and Security Agreement were executed by 15 North to Mariner's Bank on the property located at 26 Bergen Street, Englewood, New Jersey 07631, otherwise known on the Tax Lot Map as Block 1208, Lot 22 (hereinafter the "Property"). The Mortgage was recorded in the Bergen County Clerk's Office on October 21, 2020, in Book 3779 at Page 719. The Mortgage is not a purchase money mortgage.

On even date of the Note and Mortgage execution, Saadia A. Shapiro and Marla Shapiro (collectively, the "Guarantors") executed a certain Guaranty of Payment and Performance (hereinafter the "Guaranty"), wherein Mr. and Mrs. Shapiro guaranteed payment and performance of the Obligations under the Guaranty.

On March 1, 2023, the Mortgage was assigned by Mariner's Bank to American Standard Capital, LLC ("American Standard"), and duly recorded on April 3, 2023, in Bergen County Clerk's Office in Book 4964 at Page 1167 ("American Standard Assignment"). The assignment of the Note is evidenced by an Allonge dated March 1, 2023.

On the same date as Mariner's Bank's assignment, American Standard further assigned the Mortgage to Plaintiff ("Plaintiff's Assignment"). Plaintiff's Assignment was recorded in the Bergen County Clerk's Office on June 1, 2023, in Book 5005, Page 797. American Standard assigned the Note to Plaintiff as is evidenced by that certain allonge dated March 1, 2023 ("Plaintiff's Allonge").

On August 1, 2022, Defendants defaulted and remain in default on the Mortgage.

Mariner's Bank provided Defendants with a Notice on or about October 21, 2022. Thereafter, on or about March 10, 2023, Plaintiff provided Defendants a Notice of Default.

The Complaint in Foreclosure was filed on May 26, 2023. The Defendant filed a Contesting Answer (the "Answer") on August 4, 2023.

Under New Jersey law, Article III of the Uniform Commercial Code (UCC), N.J.S.A. 12A:3-101 to -605, governs the transfer of negotiable instruments, including those secured by mortgages. N.J.S.A. 12A:3-104. There are three categories of persons entitled to enforce negotiable instruments: (1) "the holder of the instrument," (2) "a nonholder in possession of the instrument who has the rights of a holder," or (3) "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to [N.J.S.A. 12A:3-309]." N.J.S.A. 12A:3-301.

Under category (3), when an instrument is lost, destroyed, or stolen, enforcement is governed by N.J.S.A. 12A:3-309(a), which provides:

A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. N.J.S.A. 12A:3-309(a).

To have standing in a foreclosure case, a mortgagee must own or control the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). To establish standing to bring a foreclosure action, a plaintiff must show that it is either in possession of the note or was assigned the mortgage at the time it brought the complaint. Deutsche Bank v. Mitchell, 422 N.J. Super. 214, 255 (App. Div. 2011).

Where the plaintiff is the original lender and has established ownership or control, it has further established standing as a “person entitled to enforce” the instrument within the meaning of N.J.S.A. 12A:3-301.

The Mitchell Court stated that the plaintiff “could have established standing as an assignee, N.J.S.A. 46:9-9, if it had presented an authenticated assignment indicating it was assigned the note before it filed the complaint.” Id. The statute cited by Mitchell, N.J.S.A. 46:9-9, states the following:

All mortgages on real estate in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and any such assignment shall pass and convey the estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name, but, in any such action by the assignee, there shall be allowed all just set-offs and other defenses against the assignor that would have been allowed in any action brought by the assignor and existing before notice of such assignment.

The Appellate Division, in Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012), clarified that “[i]n Mitchell, we held that either possession of the note **or** an assignment of the mortgage that **predated the original complaint** conferred standing.” (emphasis added).

An entity seeking enforcement under this subsection must prove (1) the terms of the instrument, and (2) the entity’s right to enforce the instrument. N.J.S.A. 12A:3-309(b). However, [t]he court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means. Ibid. For example, protection can include the Mortgagee indemnifying the Mortgagor against any liability in the event that a third party were to attempt to

enforce the Lost Note. See Investors Bank v. Torres, 243 N.J. 25, 50 (N.J. 2020).

Moreover, N.J.S.A. 12A:3-309 may be construed to permit enforcement of a lost promissory note by an enforcing party so long as the party is the assignee and can further prove its terms and the right to enforce. See id. at 46-47; see also Maddock v. Connolly, 82 N.J. Eq. 533, 534 (Ch. 1913), *aff'd*, 82 N.J. Eq. 609 (E.& A. 1914).

Summary judgment is designed to “avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief.” Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Under New Jersey’s summary judgment standard, as set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), a movant is entitled to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a relevant material issue in dispute. Thus, 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.” R. 4:46-2(c).

The trial court’s “function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial.” Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge 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. Id. When the facts present “a single, unavoidable resolution” and the evidence “is so one-sided that one party must prevail as a matter of law,” then a trial court should grant summary judgment. Id.

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Id. at 528–29. Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. “A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by R. 1:6-6, on ‘personal knowledge.’” Ford, 418 N.J. Super. at 599 (citing Claypotch v. Heller, Inc., 360 N.J. Super., 472, 489 (App. Div. 2003)). The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014); see also Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014) (“Bald assertions are not capable of either supporting or defeating summary judgment.”). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 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. If the non-moving party “points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment.” Brill, 142 N.J. at 529.

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 factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

“Generally, summary judgment is inappropriate prior to the completion of discovery.” Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988)). Specifically, the disposition of a matter via summary judgment pursuant to R. 4:46 is not appropriate prior to the non-moving party engaging in the completion of discovery of relevant and material evidence sought to aid in the defense of the motion. See Velantzas, 109 N.J. at 193. This is especially true where “critical facts are peculiarly within the moving party’s knowledge.” Id. Thus, where discovery on a relevant and material issue is incomplete, the responding party must be given the opportunity to take discovery before the motion is decided. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2011).

While summary judgment is generally inappropriate prior to the completion of discovery, the court is not barred from granting such relief prior to that time. See Velantzas, 109 N.J. at 193. A mere contention that discovery is incomplete is insufficient to bar the Court from granting summary judgment. The party opposing summary judgment on such grounds may not simply assert a generic contention that discovery is incomplete, but instead “must specify what further discovery is required.” Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) (citing Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Further, the party opposing the motion on the basis that discovery is incomplete “has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.” Wellington, 359 N.J. at 496 (quoting Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Stated differently, the objecting party must demonstrate with some specificity the discovery sought and its materiality. In re Ocean County Comm’r of Registration for a Recheck of the Voting, 379 N.J. Super. 461, 478 (App. Div. 2005). The fact that discovery is incomplete may not defeat a summary judgment motion if it will not change the outcome of the motion.

Wellington, 359 N.J. at 496.

To establish a prima facie case in a foreclosure proceeding, a mortgagee must establish proof of execution, recording, and non-payment of the note, and mortgage, a mortgagee has established a prima facie right to foreclose. Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952); R. 1:6-6 and 4:46-2 (proof may be established through a certification or affidavit based on business records). Once the foreclosing mortgagee has established a prima facie case for foreclosure, the mortgagor-defendant has a duty to come forward with facts which controvert the foreclosing mortgagee's prima facie case. Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div.) *cert. denied*, 37 N.J. 229 (1962) (where there is a prima facie right to summary judgment, “[i]t is incumbent upon [the party opposing the motion] to make an affirmative demonstration, where the means are at hand to do so, that the facts are not as the movant alleges”); J.P. Morgan Chase Bank v. Floyd, 2009 N.J. Super. Unpub. LEXIS 2269 (App. Div. Aug. 20, 2009) (summary judgment granted where the mortgagor “did not file certification, even in the absence of discovery, that there was any substance to her asserted defenses”).

The only material issues in a foreclosure proceeding are the validity of the note and mortgage, whether the loan is in default (or the amount of indebtedness), and the right of the plaintiff to resort to the mortgaged premises in satisfaction of the debt, i.e., 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); *see also* Thorpe, 20 N.J. Super. at 37 (App. Div. 1952) (“Since the execution, recording, and non-payment of the mortgage was conceded, a prima facie right to foreclose was made out”). If the mortgagor's answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike defendant's 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). Answers that deny the allegations in the complaint or that raise separate defenses are also deemed non-contesting unless they “either contest the validity or priority of the mortgage or the lien being foreclosed or create an issue with respect to [the mortgagee’s] right to foreclose it.” R. 4:64-1(c)(2). A court may declare a foreclosure action uncontested notwithstanding the filing of responsive pleadings if that responsive pleading merely leaves the foreclosing party to its proofs or states that a defendant is without knowledge or information sufficient to affirm or deny the allegations raised in the complaint. R. 4:64-1(c); Old Republic Ins. Co., 284 N.J. Super. at 574.

R. 4:64-5 states “claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt.” In other words, a party may only plead germane counterclaims and cross-claims in a foreclosure action with leave of court. R. 4:64-5.

Defendants’ opposition mainly consists of regurgitating the same arguments and claims the Court has already addressed and severed. Defendants seek to reargue the fraud alleged in the counterclaims and third-party complaint, which the Court previously found to be non-germane to the foreclosure. Significantly, Defendants do not argue that they were fraudulently induced into executing the Note and Mortgage nor default on same, but instead claim that Plaintiff’s fraud prevented them from purchasing their own Mortgage. Defendants had been in default for seven months prior to Plaintiff’s commencement of this action and maintain that they intend to rectify their default. However, nothing is proffered as to any attempts to engage in loss mitigation with the original lender. Yet, Defendants request this Court to deny Plaintiff’s motion for summary judgment because their “everybody [is] a winner” plan did not come to fruition.

Furthermore, in his certification, Mr. Shapiro admits to having defaulted in August 2022 and having had no reason after January 2023 to make any mortgage payments as the alleged

fraudulent actors “induced” him into not doing so. Even if Defendants could not make mortgage payments up to the first point of contact with the alleged fraudulent actors, they intimate that they could start making payments in January 2023. At this point in time, Mariner’s Bank was still in possession of the Note and Mortgage. Defendants simply needed to engage in loss mitigation with the original lender to cure their default. Besides, this argument does not allege that Defendants were induced into defaulting in August 2022.

With respect to Defendants’ Answer, it is devoid of any specific factual allegations sufficient to defeat a motion for summary in a foreclosure action. None of Defendants’ Answer addresses the three material issues of a foreclosure action nor provide a sufficient demonstration of evidential material to dispute Plaintiff’s prima facie case.

In addition, Plaintiff has established a prima facie right to foreclosure the Property and has, through the Certification of Shane Hakakian, established the following: Defendants executed the Note and Mortgage, the Note was endorsed in blank and transferred to Plaintiff, the Mortgage was assigned to Plaintiff, the assignment of which was recorded, and that Defendant defaulted under the terms of the Note and Mortgage on August 1, 2022 (See Hakakian Cert. ¶ 21)

Specifically, Plaintiff has established ownership or control as it is a “person entitled to enforce” the instrument within the meaning of N.J.S.A. 12A:3-301. Through the Hakakian Certification, Plaintiff has established that it was assigned the mortgage and was in possession of the note on and before the date it filed the foreclosure complaint. (Hakakian Cert. ¶¶ 9-10); See N.J.S.A. 12A:3-301. Namely, Plaintiff attaches as Exhibits D and E to the Hakakian Cert. the duly recorded chain of assignments. Defendants attempt to dispute Plaintiff’s proofs by claiming that there are no “staple marks” and inconsistent Document Index Numbers. However, Defendants do not claim that the Note is actually in possession of another, simply that the Allonge may not be

fixed to the Note. Defendants do not provide evidence of their own indicating that the Allonge and Note were not fixed together. The Hakakian Certification is sufficient proof that the Allonge was fixed to the Note evidencing the assignment to Plaintiff prior to the filing of the Complaint. Thus, the Court finds that Plaintiff has factually demonstrated standing to bring the within foreclosure action.

Defendants further assert that Plaintiff fails to identify every entity in the chain of title and provide a complete record of the merger of Mariner's Bank and Spencer Savings Bank. However, there is valid record of assignments, which identify Mariner's Bank and Spencer Savings Bank. The assignments are self-authenticating because it constitutes a copy of an official record or "of a document authorized by law to be recorded or filed and actually recorded or filed in a public office," and it has been certified by the custodian or any other person authorized to make the certification N.J.R.E. 902(d). Even if the Court were compelled to consider the argument, such consideration still does not invalidate Plaintiff's standing in this case. Assignments are presumed valid, a presumption that may be rebutted if two or more entities are claiming ownership of the Note and Mortgage. Here, Defendants have never asserted that any entity other than Plaintiff has made demand upon them for payment following the assignment. HSBC Bank USA v. Gomez, 2013 N.J. Super. Unpub. LEXIS 62 (App. Div. Jan. 10, 2013).

Moreover, Defendants contend that Plaintiff has failed to demonstrate Defendants' payment history up until the date of default. Indeed, Defendants argue that Plaintiff has not established what amounts have already been paid off. Specifically, Defendants claim that Plaintiff must provide "the whole set of Business Records crucial to establish whether Defendants have [d]efaulted and, if so, how much Defendants were accused of not paying." This argument contradicts Mr. Shapiro's own certification in which he admits to having defaulted and remaining

in default to the time of the filing of the Complaint.

Further, this argument goes to the amount due. As such, it is not the appropriate time to raise the argument as to the amount owed. Instead, this argument should be raised at the time of Final Judgment, which is the subsequent step to this in the Foreclosure process. At that time may the Defendants raise such objections as to what ought to be paid.

Accordingly, there appears to be no Prima Facie defense to the Complaint, nor any dispute as to material fact. Defendant's defenses do not touch on the essential elements of a foreclosure action, and the allegations Defendant makes in the Answer are merely conclusory with little to no factual or legal support.

Plaintiff's motion is granted. This matter is to return to the Office of Foreclosure and proceed accordingly.

An Order accompanies this decision.