

INDYMAC BANK, FSB, Plaintiff-Respondent,
v.
ALTON DECASTRO, Defendant-Appellant.

No. A-3003-11T1.

Superior Court of New Jersey, Appellate Division.

Submitted January 7, 2013.

Decided March 13, 2013.

Alton Decastro, appellant pro se.

Zucker, Goldberg & Ackerman, L.L.C., attorneys for respondent (Douglas J. McDonough, of counsel and on the brief).

Before Judges Parrillo and Maven.

NOT FOR PUBLICATION

PER CURIAM.

In this residential foreclosure case, Alton DeCastro appeals from an August 18, 2010 final judgment in favor of IndyMac Bank FSB (IndyMac), and subsequent December 16, 2011 and January 20, 2012 orders dismissing his applications to vacate the judgment and dismiss the complaint. DeCastro raises several claims in his pro se brief but primarily argues that IndyMac lacked standing because the mortgage had not been assigned to it prior to the filing of the foreclosure complaint. **We reject that claim because lack of standing is not a meritorious defense to a foreclosure action, and because DeCastro did not timely raise any defenses or contest the foreclosure until after the default judgment was entered. We affirm.**

I.

On January 26, 2006, DeCastro executed a note for the sum of \$431,000 with IndyMac. To secure payment of the note, DeCastro executed a mortgage that same day to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for IndyMac.^[1] DeCastro failed to make the installment payment due on November 1, 2007 or anytime thereafter. On February 28, 2008, IndyMac filed a foreclosure complaint. The Assignment of Mortgage was recorded with the Hudson County Register of Deeds on November 24, 2008.

On March 19, 2008, DeCastro was served with the summons and complaint. He failed to file a responsive pleading and default was entered on June 30, 2009. Final judgment of foreclosure was entered more than a year later on August 18, 2010.

The court stayed the sheriff's sale initially scheduled for March 10, 2011, eight times through December 1, 2011. DeCastro initially moved to vacate the final judgment and sheriff's sale^[2] on November 29, 2011, which was more than fifteen months after the final judgment, arguing that he had not been served with the complaint. The motion was denied on December 16, 2011 with the court finding that service was effectuated by DeCastro signing for the certified mail. DeCastro's second application to vacate the final judgment and dismiss the foreclosure complaint was filed December 29, 2011. In this motion, he argued for the first time that IndyMac lacked standing to file the foreclosure complaint, because it was not assigned the mortgage until after the complaint was filed. The judge denied the motion finding that

DeCastro failed to timely raise his objections in accordance with Rule 4:50-2. This appeal followed.

II.

We begin by addressing the court's denial of DeCastro's motion as untimely pursuant to Rule 4:50-2. Rule 4:50-1 governs an applicant's request for relief from default when judgment has been obtained. US Bank Nat'l Ass'n. v. Guillaume, 209 N.J. 449, 466 (2012). In the context of a foreclosure case, a party may seek to vacate a default judgment on these grounds:

(a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and for which by due diligence could not have been discovered in time to move for a new trial under R[ule] 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

[R. 4:50-1 (emphasis added); Guillaume, supra, 209 N.J. at 467.]

The law is quite settled that to succeed in a Rule 4:50-1(d) motion based on a claim that a foreclosure judgment is void, the motion must be filed within a reasonable time after entry of the judgment. See R. 4:50-2; Deutsche Bank Nat'l. Trust Co. v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012). In this case, DeCastro's applications were filed more than fifteen months after the August 18, 2010 final judgment was entered. The trial court dismissed the motion challenging standing as out-of-time under Rule 4:50-2, and noted that defendant did not file a responsive pleading or timely "attack" the standing of plaintiff. See Deutsche Bank Nat'l. Trust Co. v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012) (holding that the trial court properly barred relief under Rule 4:50-1, notwithstanding the filing date of the assignment, where a defendant did not respond to a complaint, did not raise the standing issue until years later, and never denied his responsibility for the debt incurred).

We review the trial court's decision for abuse of discretion. Guillaume, supra, 209 N.J. at 467. "The trial court's determination under [Rule 4:50-1] warrants substantial deference," and the abuse of discretion must be clear to warrant reversal. *Ibid.* (citing DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009)). We find no abuse of discretion in the court's determination that DeCastro failed to timely raise his objections.

We now turn to the primary contention that the final judgment is void for lack of standing. In support of this claim, DeCastro relies on Deutsche Bank Nat'l. Trust Co. v. Mitchell, 422 N.J. Super. 214 (App. Div. 2011), to assert that IndyMac lacked standing and should be precluded from filing a foreclosure claim because it had not been assigned the mortgage prior to filing the foreclosure complaint. This claim lacks merit.

In *Mitchell*, Deutsche Bank had not been assigned the mortgage prior to filing the foreclosure complaint. Relying on Article III of the Uniform Commercial Code (UCC), N.J.S.A. 12A:3-101 to-605, which addresses who may enforce negotiable instruments, we held that either possession of the note or an assignment of the mortgage that predated the original complaint conferred standing. *Id.* at 216, 225. We remanded for the trial court to determine whether before filing the original complaint, Deutsche Bank was in possession of the note or had another basis to achieve standing to foreclose, pursuant to N.J.S.A. 12A:3-301. *Id.* at 225.

DeCastro's reliance on *Mitchell* is inapposite, as that case is plainly distinguishable from the instant case. The record is clear that, unlike Deutsche Bank in *Mitchell*, IndyMac was the holder of the note on DeCastro's property at the time it filed the foreclosure complaint. DeCastro has not disputed that fact in the complaint nor presented any proof that

IndyMac did not possess the note at the time of the filing of the complaint. See Angeles, supra, 428 N.J. Super. at 319. In accordance with the UCC provision, N.J.S.A. 12A:3-301, the plaintiff bank, as the holder of the negotiable instrument, has a legal right to enforce the note at the time it obtained the judgment. As such, IndyMac had standing to bring the foreclosure action.

Subsequent to our Mitchell decision, our Supreme Court and this court have had occasion to reexamine our jurisprudence on standing in the foreclosure context. It is upon this subsequent review that we now have made clear that lack of standing is not a meritorious defense to a foreclosure complaint. Russo, supra, 429 N.J. Super. at 101 (holding that "standing is not a jurisdictional issue in our State court system and, therefore, a foreclosure judgment obtained by a party that lacked standing is not 'void' within the meaning of Rule 4:50-1(d)"). Furthermore, even if there were filing deficiencies, as alleged here, dismissal of the complaint is not necessarily the appropriate remedy. Guillaume, supra, 209 N.J. at 475. Based on the foregoing, DeCastro's standing challenge is rejected because lack of standing would not void the final judgment.

The remaining contentions raised in the pro se brief lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

On this record, we find no abuse of discretion in Judge Thomas P. Olivieri's determination that DeCastro was not entitled to vacate the judgment, particularly given defendant's unexcused, years-long delay in asserting that defense or any claim.

Affirmed.

[1] IndyMac is also the holder and owner of a note and second mortgage covering the mortgaged property, dated March 15, 2006, made by DeCastro in the amount of \$100,000.

[2] Although DeCastro's initial motion and second application both sought to vacate the sheriff's sale, no sale had occurred at either point, nor had the sale occurred at the time of the appeal.

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