U.S. BANK, N.A. v. DARREN BRESTIN

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

U.S. BANK, N.A., as trustee to

Master Adjustable Rate Mortgages

Trust 2007-3, Mortgage Pass-Through

Certificates, Series 2007-3,

Plaintiff-Respondent,

v.

DARREN BRESTIN and RANDI BRESTIN,

husband and wife, each of their

heirs, devisees, and personal

representatives, and his, her,

their or any of their successors

in right, title and interest,

Defendants-Appellants,

and

JPMORGAN CHASE BANK, N.A.,

Defendant.

November 2, 2016

Argued September 14, 2016 - Decided

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-018731-14.

John P. Fazzio and Zubin Haghi argued the cause for appellants (Fazzio Law Offices, attorneys; Mr. Fazzio and Michael J. Cicala, of counsel and on the brief).

Danielle Weslock argued the cause for respondent (McCarter & English, LLP, attorneys; Joseph Lubertazzi, Jr., of counsel and on the brief; Ms. Weslock and Sheila E. Calello, on the brief).

PER CURIAM

In this residential foreclosure case, defendants Darren Brestin (Darren) and Randi Brestin (Randi) appeal from the May 8, 2015 final judgment of foreclosure.1 Defendants argue that the trial court erred in granting summary judgment to plaintiff U.S. Bank, N.A., who lacked standing to foreclose upon the mortgage and note because it was never in possession of the original note. We disagree and affirm. However, we remand for the court to fashion adequate protections for defendants against any claims by another person to enforce the note, in accordance with N.J.S.A. 12A:3-309(b).

Because the court entered judgment in plaintiff's favor as a matter of law, we review the factual record in the light most favorable to defendant. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c).

On November 24, 2006, Darren executed to Chevy Chase Bank, F.S.B. (Chevy Chase) a promissory note in the amount of $596,700. To secure payment of the note, both Darren and Randi executed a purchase money mortgage on their residence located in the Borough of Palisades Park in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as a nominee for Chevy Chase. The mortgage, which incorporated the note, was

originally recorded on December 6, 2006, and re-recorded on March 15, 2007, in the Bergen County Clerk's Office.

On April 1, 2007, through a pooling and servicing agreement, plaintiff acquired the loan. Chevy Chase endorsed the note in blank, delivered it to plaintiff, and remained the servicer for the loan. Under the pooling and servicing agreement, Wells Fargo Bank, N.A. (Wells Fargo) was the master servicer, trust administrator, and document custodian, and plaintiff was the trustee for Master Adjustable Rate Mortgages Trust 2007-3, Mortgage Pass-Through Certificates, Series 2007-3. As custodian, Wells Fargo submitted an initial certification to plaintiff dated May 15, 2007, attesting that, "as to each related Mortgage Loan listed in the Mortgage Loan Schedule," Wells Fargo was in possession of "the original Mortgage Note . . . and . . . a duly executed assignment of the Mortgage."

On June 19, 2009, Wells Fargo sent the original note back to Chevy Chase, and, on June 22, 2009, Chevy Chase acknowledged receipt. This transfer occurred when Chevy Chase, as servicer for plaintiff, was preparing to institute a foreclosure action as the loan had been in default since January 1, 2009.2 Chevy Chase has no record of transferring the original note to any other party after June 22, 2009, and remained the loan's servicer until July 2009, when it merged with Capital One, N.A. (Capital One). Capital One continued servicing the loan. Despite conducting a thorough search, Capital One and plaintiff were unable to locate the original note, and believe it was misplaced or misfiled after Chevy Chase received it in June 2009. Neither Capital One nor plaintiff has "transferred, assigned, endorsed, factored, hypothecated, modified, pledged or sold" the note, re-delivered the note to the borrower or otherwise cancelled the note. On April 25, 2011, MERS assigned the mortgage to plaintiff, and, on May 13, 2011, the assignment was duly recorded in the Bergen County Clerk's Office.

On May 9, 2014, plaintiff filed a foreclosure complaint against defendants and JPMorgan Chase Bank, N.A.,3 alleging that the loan was in default since January 1, 2009. Defendants filed an answer contesting plaintiff's right to foreclose and asserting twenty-three affirmative defenses. On October 21, 2014, plaintiff moved for summary judgment, which included a request to strike defendants' answer and affirmative defenses, and allowed the case to proceed as an uncontested foreclosure. In support of its motion, plaintiff submitted two affidavits signed by Stephen Witkop, Home Loans Authorized Signer for Capital One, the servicing agent and attorney-in-fact

for plaintiff. Witkop's responsibilities included handling the administration of certain defaulted loans. Witkop also certified that Wells Fargo had been the document custodian for the loan and took possession of the original note from Chevy Chase on March 15, 2007, at which time the mortgage was also re-recorded in the Bergen County Clerk's Office.

Defendants opposed plaintiff's motion and filed a cross-motion for summary judgment arguing that plaintiff lacked standing because it did not possess the original note. Following oral argument, the court denied defendants' cross-motion and granted plaintiff's motion to strike defendants' answer and affirmative defenses. The matter was deemed an uncontested foreclosure and returned to the Office of Foreclosure for entry of final judgment for foreclosure. In a written opinion, the court found that plaintiff established the material facts to demonstrate its right to foreclose. Specifically, the record shows Darren borrowed $596,700 from Chevy Chase under the terms reflected in a promissory note he signed on November 24, 2006; and that same day, defendants executed a mortgage in favor of MERS as nominee for Chevy Chase which listed the property they owned in Palisades Park as collateral. The mortgage was recorded on December 6, 2006. Defendants defaulted on their loan obligations on January 1, 2009, and the loan remains in default. Plaintiff secured the assignment of the mortgage on April 25, 2011 and provided defendants with the requisite notice prior to filing this foreclosure action.

In rejecting defendants' challenge to plaintiff's standing, the court determined that **EITHER POSSESSION OF THE NOTE OR ASSIGNMENT OF THE MORTGAGE PREDATING THE COMPLAINT CONFERS STANDING** under Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315 (App. Div. 2012). The court noted that **assignments of notes and mortgages are presumed valid, and that this presumption can be rebutted if two or more entities are asserting ownership of the instruments. However, no entity other than plaintiff made a demand for payment since the assignment.** The court struck defendant's affirmative defenses, characterizing them as "only vague allegations related to unclean hands, laches, estoppel, and waiver." The court also agreed that **plaintiff was not compelled to grant any type of loan modification and failure to grant a modification does not give rise to a foreclosure defense.** The court deferred adjudicating proof of possession of the note or the merits of the affidavit of lost note to the application for final judgment.

On January 16, 2015, plaintiff filed a notice to mortgagor of motion for final judgment and defendants filed a motion to deny entry of final judgment. On April 29, 2015, plaintiff filed a cross-motion for entry of final judgment for foreclosure. Following oral argument, the court denied defendants' motion, granted plaintiff's cross-motion and ordered the Office of Foreclosure to enter final judgment for foreclosure in the amount of $867,055.72. Referencing its December 5, 2014 decision conferring standing on plaintiff, in a written decision, the court determined that plaintiff was permitted to enforce the lost note pursuant to N.J.S.A. 12A:3-309. Acknowledging that neither the statute nor case law delineated the proofs required for the enforcement of a lost instrument, the court found that plaintiff's proofs satisfied the statutory requirements.

Specifically, the court found that plaintiff's affidavit of lost note certified that: (1) plaintiff's document custodian took possession of the note on March 15, 2007; (2) Chevy Chase, plaintiff's predecessor in interest, acknowledged receipt of the note on June 22, 2009, but had no record of transmitting the note after that date; (3) plaintiff's servicer conducted a diligent inquiry for the location of the note and certified that the note had not been cancelled or re-delivered; and (4) no other entity made a demand on the debt since defendants' default in 2009. The court concluded that "[p]laintiff would be substantially burdened if [d]efendants were allowed a windfall as a result of the [n]ote being lost. Equity demands that plaintiff be permitted to proceed to final judgment with their current proofs."

On May 19, 2015, a conforming final judgment for foreclosure was entered by the Office of Foreclosure and this appeal followed.4 On appeal, defendants argue that the court's summary judgment and final judgment determinations must be reversed because the court improperly applied an inference of validity to the lost note. Defendants also argue that plaintiff is not entitled to enforce the lost note based on N.J.S.A. 12A:3-309 because the Legislature did not adopt the proposed Uniform Commercial Code (UCC) revisions regarding the easing of lost note restrictions. We disagree.

We apply the same standard as the trial court when reviewing the disposition of a motion for summary judgment. W.J.A. v. D.A., 210 N.J. 229, 237 (2012). **Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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). Without making credibility determinations, the court considers the evidence "in the light most favorable to the non-moving party" and determines whether it would be "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.

Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence that there is a genuine issue for trial. Ibid. In satisfying its burden, the non-moving party may not rest upon mere allegations or denials in its pleading, but **must produce sufficient evidence to reasonably support A VERDICT in its favor**. R. 4:46-5(a); Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523 (App. Div. 2004). The non-moving party's mere identification of a disputed fact of an insubstantial nature will not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). "If there is no genuine issue of material fact," an appellate court must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). It is against these standards that we evaluate defendants' substantive arguments.

Defendants argue that plaintiff lacks standing to foreclose upon the underlying debt because plaintiff has never been in possession of the original note and does not know its current whereabouts. "As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt." Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011) (internal quotation marks and citation omitted). **In foreclosure actions, standing is conferred upon a plaintiff by either possession of the original note or an assignment of the mortgage that predates the original complaint.** Angeles, supra, 428 N.J. Super. at 318 (citing Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214 (App. Div. 2011)). Here, plaintiff clearly demonstrated its standing to foreclose on the property based on the undisputed 2011 mortgage assignment to plaintiff, years before the filing of the foreclosure complaint in 2014. Ibid.

Plaintiff also established standing by demonstrating it was the owner of the note at the time that the original note was lost. 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. T**here 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.5

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.]

Here, plaintiff established the terms of the instrument by attaching to Witkop's certification a copy of the note endorsed in blank executed by defendant Darren Brestin in favor of Chevy Chase for repayment of the principal sum of $596,700. Plaintiff also established its right to enforce the instrument by providing a copy of the assignment of the mortgage from MERS to plaintiff on April 25, 2011. Contrary to defendants' argument, Witkop was a competent witness with personal knowledge of the custodial status of the note and his certifications adequately detailed and documented plaintiff's possession of the original note from 2007 until it was lost in 2009. See Ford, supra, 418 N.J. Super. at 599.

Moreover, **defendants have not presented any evidence of a genuine issue for trial. Defendants have not asserted that they are paying anyone else on the outstanding note obligation, or that any other lender has contacted them demanding payment on the mortgage or commencing foreclosure on the default. Further, no evidence has been presented demonstrating that the mortgage was assigned to a party other than plaintiff**. Because plaintiff established that it is an entity "not in possession of an instrument" who is entitled to enforce the instrument pursuant to N.J.S.A. 12A:3-309, the court's grant of summary judgment and subsequent entry of final judgment of foreclosure was well

founded.6

Finally, for the first time on appeal, defendant argues that there is insufficient evidence upon which the court could have concluded that any agency relationship exists between plaintiff and Wells Fargo. This court "'will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Because the issue raised by defendants does not implicate the jurisdiction of the trial court nor concerns a matter of great public interest, we decline to consider it here.

As a condition of entering judgment in favor of plaintiff, N.J.S.A. 12A:3-309(b) requires that the court ensure defendants are adequately protected against the loss that might occur if another person should seek in the future to enforce the note. "Adequate protection may be provided by any reasonable means." Ibid. Notwithstanding the passage of time since the note was lost, in the event any such action is filed in the future, plaintiff shall be required to intervene and participate in the defense so that defendants are not held liable twice for the same obligation. Accordingly, we affirm the court's decision but remand for the court to enter an amended judgment providing such protection.

Affirmed.

1 We use defendants' first names for ease of reference. We shall sometimes collectively refer to them as defendants.

2 This initial foreclosure action was filed in July 2009, but was dismissed without prejudice in April 2013.

3 On July 22, 2014, plaintiff filed a request and certification of default against JPMorgan Chase Bank, N.A., pursuant to Rule 4:64-1(c)(1), for failure to plead or otherwise defend.

4 Before this appeal was scheduled for oral argument, plaintiff moved for summary disposition pursuant to Rule 2:8-3(a). We denied plaintiff's motion in an order dated December 11, 2015.

5 Section 3-309 of the UCC was amended in 2002 to eliminate the requirement of possession, specifically including a person who "has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred" as a person with the right to enforce a lost instrument. 2 James J. White & Robert S. Summers, Uniform Commercial Code, 18-2 at 241 n.2 (5th ed. 2002). Defendants correctly point out that New Jersey has not adopted the 2002 amendment. Our version of UCC Section 3-309 is as originally adopted in 1995. However, since plaintiff was in possession of the note when it was lost, the fact that the 2002 amendment has not been adopted in New Jersey is of no moment and we decline to divine legislative intent from the Legislature's inaction as urged by defendants.

6 We also agree with the trial court that, notwithstanding plaintiff's right to relief under the UCC, **the equitable remedy of unjust enrichment which is well-established in New Jersey would still compel the result reached here.** See Goldsmith v. Camden Cty. Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div.), certif. denied, 200 N.J. 502 (2009) (citation omitted).