WELLS FARGO BANK, N.A., Plaintiff-Respondent,
v.
IRIS GONZALEZ-FRAZEE and DWIGHT M. FRAZEE, Defendants-Appellants.

Docket No. A-5374-15T1.

Superior Court of New Jersey, Appellate Division.

Submitted December 6, 2017.
Decided April 17, 2018.

On appeal from Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. F-018750-14.

Lewis G. Adler, attorney for appellants.

Reed Smith, LLP, attorneys for respondent (Henry F. Reichner, of counsel and on the brief).

Before Judges Koblitz and Manahan.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

PER CURIAM.

Defendants Iris Gonzalez-Frazee and Dwight M. Frazee appeal from a June 29, 2016 final judgment of foreclosure in the amount of $380,180.83 plus interest, arguing that plaintiff Wells Fargo Bank, N.A. did not have standing to file the complaint and that they have no financial obligation to Wells Fargo due to their timely rescission of the loan under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 to-67f. We affirm.

On October 19, 2004, defendant Iris Gonzalez-Frazee executed a $232,000 note. To secure payment of the note, Gonzalez-Frazee executed a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for

Commerce Bank, N.A. and its successors and assigns, on her property located in Toms River. On October 8, 2007, MERS assigned the mortgage to Wells Fargo. Gonzalez-Frazee stopped making payment in 2007, more than ten years ago, and purportedly wrote a notice of rescission to Wells Fargo on July 1, 2007, without a tender of funds.

Defendants provided a copy of the handwritten notice, dated July 1, 2007, without any proof of service. It states it is "To: Wells Fargo" without a specific address. Wells Fargo has no record of receiving the note, which is titled "Truth in Lending Act Rescission Notice" and raises a list of various TILA violations, alleging "we recently discovered that the required notices of our right to rescind the loan and other material disclosures were never provided or delivered, the APR is wrong, fees excessive, title ins, etc., no notices of our Right to Rescission. Please forward to owner."

Wells Fargo had possession of the note as well as the assignment of mortgage before filing this foreclosure complaint on May 19, 2014. During oral argument on a summary judgment motion, defendant Dwight M. Frazee conceded several times that defendants did not have the ability to tender the value of the property to Wells Fargo. On March 20, 2015, the court granted summary judgment to Wells Fargo. Defendants moved for reconsideration based on their discovery that "the loan was owned by Fannie Mae and not the servicer Wells Fargo Bank." This motion was denied in a November 20, 2015 order.[1]

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). We consider, as the trial judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, PA, 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). 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." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).

"To defeat a motion for summary judgment, the opponent must `come forward with evidence' that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

"If there is no genuine issue of material fact, we 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) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying the above standards, we conclude that summary judgment was appropriate.

"**As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt."** Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 222 (App. Div. 2011) (quoting Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011)). **To show ownership or control, the plaintiff must establish there was a valid assignment of the mortgage or possession of the original note that pre-dated the complaint**. Ibid. "[**E]ITHER POSSESSION OF THE NOTE OR AN ASSIGNMENT OF THE MORTGAGE THAT PREDATED THE ORIGINAL COMPLAINT CONFER[S] STANDING."** Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (emphasis added) (citing Mitchell, 422 N.J. Super. at 216, 225). Moreover, **A PLAINTIFF NEED NOT ACTUALLY POSSESS THE ORIGINAL NOTE IN ORDER TO HAVE STANDING TO FILE A FORECLOSURE COMPLAINT**. Mitchell, 422 N.J. Super. at 225. A **plaintiff can establish standing as an assignee if it presents an authenticated assignment of the note indicating that it was assigned the note before it filed the complaint**. Ibid. Lastly, under the Uniform Commercial Code (UCC), **THE NOTE MAY BE ENFORCED BY THE HOLDER OF THE NOTE, OR A NON-HOLDER IN POSSESSION OF THE NOTE WHO HAS THE RIGHTS OF THE HOLDER.** N.J.S.A. 12A:3-301. "**THE RIGHT TO ENFORCE AN INSTRUMENT AND OWNERSHIP OF THE INSTRUMENT ARE TWO DIFFERENT CONCEPTS."** UCC comment to N.J.S.A. 12A:3-203 at ¶ 1.

Here, the competent evidence in the record confirms that Wells Fargo had standing by possessing both the original note and an authenticated assignment of the mortgage that pre-dated the complaint. Defendants provide an undated "Loan Information Report" that lists Fannie Mae as the "Owner/Assignee." It is immaterial whether Wells Fargo is the "owner."

"[A] foreclosure court has the discretion to deny rescission under TILA if the defendant cannot tender the balance of his or her loan." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 483 (2012). Defendants argue that the United States Supreme Court has recently ruled to the contrary. Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. ___, 135 S. Ct. 790 (2015). **The Supreme Court ruled that a homeowner must notify the lender in writing of rescission within three years, but need not sue within that time period.** Jesinoski, 574 U.S. ___, 135 S. Ct. at 792. **The Court stated that tender of the loan is not necessary for the borrower to exercise his or her right to rescind**. Id. at 793. **THE UNITED STATES SUPREME COURT ONLY REACHED "THE NARROW ISSUE OF WHETHER [DEBTORS] HAD TO FILE A LAWSUIT TO ENFORCE A RESCISSION" OR "MERELY DELIVER A RESCISSION NOTICE WITHIN THREE YEARS OF THE LOAN TRANSACTION,"** and **"nothing in the Supreme Court's opinion . . . would override TILA's tender requirement".** Jesinoski v. Countrywide Home Loans, Inc., 196 F. Supp. 3d 956, 962 (D. Minn. 2016), aff'd, Jesinoski v. Countrywide Home Loans, Inc., No. 16-3385, 2018 U.S. App. LEXIS 4974 (8th Cir. Feb. 28, 2018).

With regard to an alleged TILA violation, **it is not enough to seek rescission and stop paying the mortgage to gain ownership of the home outright.** Defendants argue they own the home outright because Wells Fargo failed to respond to the rescission notice within twenty days. Although **FAILURE TO RESPOND TO A RESCISSION NOTICE WITHIN TWENTY DAYS WOULD CONSTITUTE ANOTHER TILA VIOLATION**, TILA also explicitly states that if a "creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his [or her] part to pay for it." 15 U.S.C. § 1635(b) (emphasis added). Here, defendants did not ever tender the home's reasonable value to Wells Fargo following the notice of rescission. Thus, no tender took place that would have forced Wells Fargo to take possession of the property within twenty days or lose the home to defendants.

Additionally, **Jesinoski did not overturn Third Circuit precedent** that **"A NOTICE OF RESCISSION IS NOT EFFECTIVE IF THE OBLIGOR LACKS EITHER THE INTENTION OR THE ABILITY TO PERFORM, I.E., REPAY THE LOAN."** Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 265 n.7 (3d Cir. 2013). **JESINOSKI ALSO DID NOT TAKE AWAY A COURT'S DISCRETION TO MODIFY THE RESCISSION PROCEDURES.** See 15 U.S.C. § 1635(b) (**stating that the rescission "procedures prescribed by this subsection shall apply except when otherwise ordered by a court")** (emphasis added); see also 12 C.F.R. 226.23(d)(4) (stating that the **rescission "procedures outlined in paragraphs (d)(2) and (3) of [§ 226.23] may be modified by court order"**) (emphasis added).

Jesinoski did not eliminate TILA's requirement that defendants tender the property's reasonable value to fully effectuate rescission, nor did it eliminate the need for good faith when serving a notice of rescission.

Affirmed.

[1] Although the March and November orders are not referenced in defendants' notice of appeal, we will review those orders. "Rule 2:5-1(f)(3)(A) declares that, in civil actions, the notice of appeal `shall designate the judgment, decision, . . . or part thereof appealed from.' We have recognized that the failure to comply with this rule permits our refusal to consider its merits," but we have also in appropriate circumstances considered orders not listed on the notice of appeal. Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97 n.3 (App. Div. 2014) (alteration in original).