SUPERIOR COURT OF NEW JERSEY

Chambers of
Stephan C. Hansbury, Judge
Chancery Division, General Equity Part
Morris-Sussex Vicinage

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May 6, 2015

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Re: **WELLS FARGO BANK, N.A. v. ROSA JACKSON, et al.**
DOCKET NO. F-29217-14

Dear Counsel:

The following represents the Court's written opinion of a decision put on the Court's record on April 22, 2015.

Defendants, Rosa Jackson, Lorenzo Jackson and Olga Jackson ("Defendants") move for an order to vacate default pursuant to R. 4:43-3. Plaintiff opposes.

Plaintiff filed the foreclosure Complaint in this matter on July 17, 2014. Paragraph 6 of the Complaint states that Defendants' loan is in default as of May 1, 2009. Defendants contend that this is a fraudulent statement provided by Plaintiff and contradicts the Plaintiff's own filings. In 2008, Plaintiff commenced a foreclosure action against these same Defendants on the same property, Wells Fargo N.A., et al. v. Jackson, F-21879-08. After years of litigation, Plaintiff voluntarily dismissed the case in 2013 because Defendants' Mortgage and Note had been reinstated. The loan was reinstated on February 27, 2013; thus, Defendants argue the loan could not have been in default since May 1, 2009. Default was entered on October 3, 2014. Defendants now seek to vacate default premised on the theory that the statute of limitations has tolled on Plaintiff's Complaint.

Defendants suggest that for the past two months, Defendants have been engaged in settlement discussions with Plaintiff's servicer. While these discussions were pending Plaintiff filed its request for default on October 3, 2014. Defendants were personally served with the Complaint on July 27, 2014, making the deadline to file an Answer September 1, 2014. On August 18, 2014, counsel for Defendants asked for an extension of time to answer and Plaintiff's counsel granted the extension, and indicated a stipulation was forthcoming to reflect the same. Plaintiff never received a Stipulation Extending Time to Answer, and Plaintiff asserts that as a professional courtesy, he advised his client not to file default against Defendants for thirty days past the due date requested, which would have made the answer due September 30, 2014. As no Answer was filed, Plaintiff filed the Request for Default October 3, 2014.

On October 20, 2014, defense counsel was preparing to file its responsive pleading when it learned from the Court that a Request for Default was filed on October 3, 2014. On that same day, defense counsel asserts that he reached out to Plaintiff's counsel to see if they would vacate default given that the case was only a few months old and Defendants were ready to file their responsive pleading, and prepared a Stipulation. But Plaintiff's counsel refused to sign. Instead of filing a contesting Answer, Defendants filed a motion to dismiss pursuant to R. 4:6-2(e).

This Court denies Defendants' motion to vacate default pursuant to R. 4:43-3.

Where no final judgment of default has been entered, a party against whom default has been entered may move to set aside the default under R. 4:43-3. The motion must be accompanied by either an answer to the complaint or a dispositive motion pursuant to R. 4:6-2. R. 4:43-3. The Court may set aside an entry of default for "good cause" shown. See R. 4:43-3. The "good cause" standard is less stringent than the standard for setting aside a final judgment of default under R. 4:50. Pressler, Current N.J. Court Rules, comment on R. 4:43-3 (2013). In light of this less stringent standard, the New Jersey Supreme Court has held that "before a default is set aside, defendant must at the very least show the presence of a meritorious defense worthy of a judicial determination." Local 478 v. Baron Holding Corp., 224 N.J. Super 485, 489 (App. Div. 1998). A defense is "meritorious" for the purpose of R. 4:43-3, even where the Court characterized the defense as "tenuous" and merely "arguable." See O'Connor v. Abraham Altus, 67 N.J. 106, 129 (1975). The court went further on to note, that a showing of a meritorious defense, with a lack of contumacious behavior, will satisfy the good cause standard. Id.

Additionally, the Defendants must demonstrate the existence of a meritorious defense to the underlying foreclosure action. The defenses to foreclosure actions are narrow and limited. The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and 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). The defenses to foreclosure actions are narrow and limited. If the defendant's answer fails to challenge the essential elements of the foreclosure action, the plaintiff is

entitled to strike the defendant's answer as a noncontesting 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).

Defendants' primary assertion of a meritorious defense is that Plaintiff's claim is time-barred under the statute of limitations. Defendants rely chiefly on an unpublished bankruptcy opinion currently pending appeal, In re Washington, 2014 Bankr. LEXIS 4649 (Bankr. D.N.J. Nov. 5, 2014). In that case, Judge Kaplan held that the lenders accelerated the loan's maturity date to the default date, thus the lender was time-barred as they failed to file a valid foreclosure complaint within six years of the accelerated maturity date as required under the Fair Foreclosure Act. Defendant argues that the exact same situation exists here: Defendants failed to make payment on January 1, 2008 and the date of default was established as February 1, 2008. Plaintiff voluntarily dismissed the Complaint on February 27, 2013. See Certification of Rubenstein Cert., Exh. B. Plaintiff refiled the Complaint on July 17, 2014. Id. Exh. C. Consequently, more than six years have elapsed since the date of default until the filing of the Complaint in this case. Defendants rely upon a Fifth Circuit case for the proposition that "[a]cceleration transforms a loan from a long-term installment contract with a monthly payment plan to a loan whose entire remaining principal balance is immediately due."

Foreclosure matters are governed pursuant to N.J. Stat. § 2A:50-56.1. Thus, an action to foreclose a residential mortgage shall not be commenced following the earliest of:

> a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;
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> b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or
>
> c. Twenty years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been
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> extended by a written instrument or payment on account has

> been made, the action to foreclose shall not be commenced after 20 years from the date on which the default or payment on account thereof occurred under the terms of the written instrument.

Pursuant to the plain, unambiguous language of this statute, the statute of limitations is six years from the "maturity date" that is set forth in the mortgage or note. N.J. Stat. § 2A:50-56.1(a). Here, Defendants took out a thirty-year loan on October 24, 2006, secured with a Mortgage on their property. The Note specifies that the "Maturity Date" is November 1, 2036. This Court is not bound by the bankruptcy case. Moreover, Washington is distinguishable from the instant matter. New Jersey Court Rules, R 4:64-8 provides a specific procedure for the dismissal of foreclosure actions for failure of prosecution. R.4:64-8 states,

> " . . . [W]hen a foreclosure matter has been pending for twelve months without any required action having been taken therein . . . will be dismissed without prejudice 30 days following the date of the notice . . ."

Additionally, R.4:64-8, provides, "[r]einstatement of the matter after dismissal may be permitted only on motion for good cause shown." On a motion to reinstate, the Plaintiff's burden is governed by the more liberal standard of "good cause" similar to the requirement under R. 1:13-7. The Court in Ghandi v. Cespedes, 390 N.J. Super. 193, 197 (App.Div. 2007), held "absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality." Instead of moving to reinstate that case, Plaintiff's counsel made the grievous error of conceding that there was a six-year statute of limitations which had already expired. Washington v. Specialized Loan Servicing, LLC (In re Washington), 2014 Bankr. LEXIS 4649, 18 (Bankr. D.N.J. Nov. 5, 2014) ("Defendants conceded that the 6-year statute of limitations for enforcement of the note had run . . .").

Judge Kaplan in his reasoning for In re Washington, used the term "accelerated." Washington v. Specialized Loan Servicing, LLC (In re Washington), 2014 Bankr. LEXIS 4649, 35-36 (Bankr. D.N.J. Nov. 5, 2014) ("Defendants accelerated the maturity date of the loan to the June 1, 2007 default date . . . and the Defendants have further failed to file a foreclosure complaint within 6 years of the accelerated maturity date as required by N.J.S.A. § 2A:50-56.1(a). Accordingly, the Defendants are now time-barred from filing a foreclosure complaint and from obtaining a final judgment of foreclosure."). The term "accelerated," however, is not contemplated within the language of N.J. Stat. § 2A:50-56.1. Judge Kaplan compared N.J.S.A. § 2A:50-56 to N.J.S.A. § 12A:3-118 ("Negotiable Instruments/ General Provisions and Definitions/Statute of Limitations"), stating that if the two statutes were to be paralleled, "there is a stronger argument that an accelerated maturity date applies and starts the running of the statute of limitations." Washington v. Specialized Loan Servicing, LLC (In re Washington), 2014 Bankr. LEXIS 4649, 31-32 (Bankr. D.N.J. Nov. 5, 2014). From the outset it should be noted that a foreclosure proceeding is uniquely distinct from a proceeding on the underlying note. A proceeding on the underlying note is governed by a six year statute of limitations which begins running

from the date of defendants' default. N.J.S.A. 12A:3-118(a); Security Nat. Partners Ltd. Partnership v. Mahler, 336 N.J. Super. 101, 105 (App. Div. 2000); Kaminski v. London Pub, Inc., 123 N.J. Super. 112, 301 A.2d 769 (App. Div.1973); Wilson v. Hughes, 119 N.J. Eq. 175, 176, 181 A. 649 (Ch.1935). Conversely, N.J. Stat. § 2A:50-56.1 sets forth a six year statute of limitations from the date of maturity.

Moreover, the legislature's intent, in forming a statute of limitations for foreclosure matters, was to ensure that evidence would not disappear, to provide clear title, and to protect the parties. The statute was not enacted for the need of a finality element, unlike N.J.S.A. § 12A:3-118. The Statement to Senate Bill Number 250, a supplement to the Fair Foreclosure Act, by New Jersey Assembly Financial Institutions and Insurance Committee, dated October 6, 2008, provides insight into the legislatures intent in codifying N.J.S.A. § 12A:3-118. Specifically, it states that "the bill is intended to address some of the problems caused by the presence on the record of residential mortgages which have been paid or which are otherwise unenforceable. These mortgages constitute clouds on title which may render real property titles unmarketable and delay real estate transactions." Thus, the focus of N.J.S.A. § 12A:3-118 is to provide clear marketable title, not to allow defendants the opportunity to evade payment.

Furthermore, courts of equity are unlike bankruptcy courts. "Chancery will settle all questions, both legal and equitable, if jurisdiction exists." Italian-American Bldg. & Loan Ass'n v. Russo, 130 N.J. Eq. 232, 236 (Ch. 1941) citing Cahill v. Town of Harrison, 87 N.J. Eq. 524, 100 A. 625. In the instant matter, several of the maxims of equity are applicable.

The first applicable equity maxim is equity regards that as done which ought to be done. "Where an obligation rests on a party to perform a certain act, a court of equity will treat the party in whose favor the act should have been performed as having the same interest and right as if the act had actually been performed." Martindell v. Fiduciary Counsel, 133 N.J.Eq. 408, 414 (E. & A. 1943). Similarly, Defendants here had the obligation to pay their mortgage, yet failed to fulfill this obligation. Second, he who seeks equity must do equity. This "maxim simply obliges the party seeking equitable relief to do what is required by conscience and good faith. It demands the enforcement of the equities of the adversary party, it applies only were the principles of equity may thereby be served." Here, Defendants cannot seek to have this matter time barred as they have not come into this Court with conscience and good faith by defaulting on their mortgage. Likewise, a third maxim holds the same tenets: he who comes into equity must come with clean hands. This doctrine is applied only against one who claims equitable relief and is not applied against one defending against it. Specifically, "one who induces the alleged wrongdoing, should not benefit from it." Joe D'Egidio Landscaping, Inc. v. Apicella, 337 N.J.Super. 252 (App. Div. 2001).

Fourth, equity abhors a forfeiture. Traditional notions of fairness have driven equity courts away from one-sided results. To allow Defendants to receive a free house would be an inequitable forfeiture. Finally, equity will not knowingly become an instrument of injustice. "A court of equity as a court of conscience, can never permit itself to become party to the division of tainted assets nor can it grant the request for an admitted wrong-

doer to arbitrate such a distribution . . . a court of equity can never allow itself to become an instrument of injustice." In the Matter of Niles, 176 N.J. 282 (2003). Time-barring Plaintiff's suit would be an injustice. Plaintiff provided Defendants with the loan money, and Defendants received the benefit of the loan proceeds, chiefly the property. Thus, to bar Plaintiff's claim to recoup these monies would be an injustice.

Finally, even assuming arguendo that In re Washington did not incorrectly interpret N.J. Stat. § 2A:50-56.1(a), Defendants are still unable to demonstrate that Plaintiff accelerated the maturity date. Defendants are unable to point to where Plaintiff accelerated the loan demanding all payments as due, but rather points to the Complaint which merely states, "The obligor(s) have/had failed to make the installment payment due on 01/01/2008, and all payments becoming due thereafter. Therefore, the loan has been in default since or about 01/01/2008." N.J. Stat. § 2A:50-56.1(a) is both clear on its face, and from legislative intent, that the statute of limitations tolls six years from the date of maturity, not the date of default or acceleration. Allowing Defendant to time-bar Plaintiff's claim would be inequitable; thus, the statute of limitations has not expired, and accordingly, the Defendants have not established a meritorious defense to set aside a default under R. 4:43-3.

Very truly yours,

STEPHAN C. HANSBURY, P.J., Ch.

SCH/fg