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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0376-10T3

US BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR CSAB MORTGAGE-
BACKED PASS-THROUGH CERTIFICATES,
SERIES 2006-3,

Plaintiff-Respondent,

v.

MARYSE GUILLAUME, EMILIO
GUILLAUME,

Defendants-Appellants,

and

CITY OF EAST ORANGE,

Defendant.

Submitted March 30, 2011 - Decided April 20, 2011

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. F-26869-08.

Broderick, Newmark & Grather, attorneys for appellants (Alan J. Baldwin, on the brief).

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

PER CURIAM

In this foreclosure case, defendants Emilio and Maryse Guillaume -- husband and wife -- appeal from an August 30, 2010 order denying their motion to vacate default judgment. The Guillaumes defaulted on their mortgage payments, unsuccessfully sought a loan modification, and have lived in their home -- rent free -- for the last three years. They attempted to rescind their loan and vacate default judgment on the eve of the sheriff's sale. The Guillaumes failed to demonstrate a basis to vacate default, and have not shown they are entitled to rescission. We affirm.

The Guillaumes borrowed $210,000 from the mortgagee for the purchase of a residential home, and America's Servicing Company (ASC) serviced the loan.[1] In April 2008, Maryse Guillaume contacted a housing counselor at Tri City Peoples Corporation because the Guillaumes fell behind on their payments. On April 1, 2008, they defaulted on the loan.

On May 18, 2008, ASC forwarded to the Guillaumes a Notice of Intent to Foreclose (NOI) that urged them to "immediately seek the advice of an attorney(s) of your own choosing

[1] Credit Suisse Financial Corporation (Credit Suisse) extended the loan evidenced by a promissory note. The mortgage named Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee but solely as a nominee for Credit Suisse. The loan was subsequently transferred to plaintiff US Bank National Association.

concerning this residential mortgage default." The Guillaumes did not seek the advice of counsel but continued to attempt a loan modification with ASC unsuccessfully.

On July 15, 2008, plaintiff filed its foreclosure complaint. The Guillaumes were personally served with the complaint and failed to respond. On August 26, 2008, the court entered default. Plaintiff provided to the Guillaumes the appropriate notice of entry of default pursuant to the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-56c. On May 6, 2009, plaintiff obtained default judgment.

The Guillaumes moved to vacate default judgment pursuant to Rule 4:50-1(a) and (f), and contended that they were entitled to rescind the loan. The judge stayed the sale, conducted oral argument on two separate days, and denied the Guillaumes' application in its entirety. The court then stayed the sheriff's sale pending this appeal.

On appeal, the Guillaumes argue that the judge erred by denying their motion to vacate default judgment because (1) under Rule 4:50-1(a) they demonstrated a meritorious defense and have shown excusable neglect, and (2) under Rule 4:50-1(f) they have shown exceptional circumstances because the court failed to apply the rules of court properly, thereby depriving them of their constitutional rights.

Rule 4:50-1:

> [I]s a carefully crafted vehicle intended to underscore the need for repose while achieving a just result. It thus denominates with specificity the narrow band of triggering events that will warrant relief from judgment if justice is to be served. Only the existence of one of those triggers will allow a party to challenge the substance of the judgment.
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> [DEG LLC v. Fairfield Twp., 198 N.J. 242, 261-62 (2009).]

A motion for relief from judgment under Rule 4:50-1 should be granted sparingly. When reviewing such motions we generally defer to the broad discretion afforded to the trial judge, whose determinations should be left undisturbed unless they result from a clear abuse of discretion. Morristown Hous. Auth. v. Little, 135 N.J. 274, 283 (1994); St. James AME Dev. v. Jersey City, 403 N.J. Super. 480, 487 (App. Div. 2008); Del Vecchio v. Hemberger, 388 N.J. Super. 179, 186-87 (App. Div. 2006). "[A]lthough the ordinary 'abuse of discretion' standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123-24 (2007) (quoting Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002)). We discern no abuse of discretion here.

We begin our analysis by addressing the Guillaumes' argument that they are entitled to relief under subsection (a). Rule 4:50-1(a) allows the court to vacate a final judgment for "mistake, inadvertence, surprise, or excusable neglect[.]" They must show that "the neglect to answer [the complaint] was excusable under the circumstances and that [they] ha[ve] a meritorious defense." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div.), aff'd, 43 N.J. 508 (1964). "Excusable neglect" under Rule 4:50-1(a) has been defined as carelessness "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335 (1993).

Concerning excusable neglect, it is undisputed that the Guillaumes were properly served with the foreclosure complaint and were fully aware of the proceedings. Rather than answer the complaint, they attempted a loan modification. The motion judge stated correctly that:

> I have a lot of problems with saying that all that's going, with all this evidence of [c]ourt process for over a year, to just rely on trying to negotiate something with the bank was like sticking your head in the sand.
>
> This wasn't going to go away and they didn't get any assurance from the bank that they were succeeding in their negotiation efforts or that an answer to the complaint was not required. I mean they just focused

> on one path. And they ignored the negotiation path and they ignored the litigation side of things. You can't do that.
>
> And I have to say that . . . Mrs. Guillaume was being so aggressive and so persistent in trying to negotiate and going to all these different places to get help, but the one place she wasn't going was a member of the bar, a lawyer which is usually what you do when you get [c]ourt papers.
>
> Or if you absolutely can't afford a lawyer and that's the case of many foreclosures, a very heavy self-represented area of the law to at least contact the [c]ourt yourself and you send in some rudimentary answer. And it doesn't have to be fancy. I mean you write a letter to the foreclosure unit, they'll stamp contested on it.
>
> Because I've seen so many of them long hand. But nothing was done. And I don't regard that as excusable neglect. So that prong is lacking.
>
> (emphasis added).

Concerning a meritorious defense, the Guillaumes contend that (1) plaintiff violated the FFA because although the NOI listed plaintiff as the holder of the Note, it did not list plaintiff's address, but rather, listed the address and telephone number of ASC; and (2) that the original lender violated the federal Truth-in-Lending Act, 15 U.S.C.A §§ 1601 to -1700 (TILA) because the Guillaumes were overcharged $120 in

recording fees thereby entitling them to rescission of the loan. Both arguments are without merit.

The NOI satisfied the purpose of the FFA because ASC is the appropriate party for the Guillaumes to contact to cure their default. N.J.S.A. 2A:50-56c provides in part that "[t]he written notice [of the NOI] shall clearly and conspicuously make the debtor . . . aware of the situation." The FFA requires that:

> the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.
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> [N.J.S.A. 2A:50-56c(11).]

Directing the Guillaumes to contact ASC fulfilled the purpose of the notice provision under the FFA -- making the debtor aware of the situation, and how and who to contact to either cure the default or raise potential disputes. In 2006, ASC notified the Guillaumes that its name would "appear on [their] monthly statements and other communications regarding [their] mortgage loan." From that point forward, the Guillaumes made their monthly payments to ASC, and, after they received the NOI, the Guillaumes contacted ASC and were fully aware of the situation as they attempted to modify their loan.

Under the TILA, lenders are required to disclose all charges associated with the loan and in the case of nondisclosure of such information, the TILA provides a federal cause of action against creditors who engage in such "predatory lending tactics." Cooper v. First Gov't Mortgage and Investors Corp., 238 F. Supp. 2d 50, 55 (D.D.C. 2002). The Guillaumes elected to rescind the loan pursuant to 15 U.S.C.A. 1635(b) because of a $120 overcharge. The Guillaumes are not entitled to rescission based on a TILA violation, however, because they are unable to tender the balance due on their mortgage. Am. Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 820 (4th Cir. 2007); Eqipciaco-Ruiz v. R&G Fin. Corp., 383 F. Supp. 2d 318, 321-22 (D.P.R. 2005); Manfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 147-48 (E.D. Pa. 1989); Mitchell v. Sec. Inv. Corp. of the Palm Beaches, 464 F. Supp. 650, 652 (S.D. Fla. 1979); Clemmer v. Liberty Fin. Planning, Inc., 467 F. Supp. 272, 276 (W.D.N.C. 1979). As a result of the inability of the Guillaumes to tender the balance due on the loan, they have no meritorious defense for a TILA violation.

Next we address the Guillaumes' contention that they are entitled to relief under subsection (f). Rule 4:50-1(f) allows the court to vacate a final judgment for "any other reason justifying relief from the operation of the judgment or order."

Subsection (f) of Rule 4:50-1 is the "catchall" category. "No categorization can be made of the situations which warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966). See also DEG LLC, supra, 198 N.J. at 269-71. In order to obtain relief under subsection (f), the movant must demonstrate that the circumstances are exceptional and that enforcement of the order or judgment would be unjust, oppressive or inequitable. Nowosleska v. Steele, 400 N.J. Super. 297, 304-05 (App. Div. 2008); City of East Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div.), certif. denied, 188 N.J. 352 (2006).

The Guillaumes have conflated the general rules governing motion practice with the specific rules governing mortgage foreclosure cases and contend that plaintiff's alleged failure to comply with Rules 4:64-2, 1:4-4 and 1:6-6 constitutes exceptional circumstances. We disagree.

Rule 4:64-2(a) governs the proof required concerning the foreclosure of mortgages and provides in part that "[i]n lieu of an original document, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy

. . . by a New Jersey attorney . . . ." Plaintiff complied with this requirement concerning the filing of the Note, and the Office of Foreclosure accepted and approved the certification without requiring any additional certifications.

The Guillaumes contend that plaintiff's counsel was also required by Rule 1:4-4 (addressing the form of an affidavit) and Rule 1:6-6 (addressing the substance of an affidavit) to certify that he personally compared the original Note to the copy filed with the court and certify that he was aware that he was subject to punishment if that certification was false. Our rules of court do not impose any additional such requirement.[2]

After a thorough review of the record and consideration of the controlling legal principles, we conclude that the Guillaumes' remaining arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[2] Indeed, the recent amendment to Rule 4:64 requires foreclosure counsel certify that he or she communicated with an employee of the mortgagee who reviewed the proofs, not that counsel personally review the original documents and certify them as true copies.