Prepared by the Court

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:GENERAL EQUITY

DOCKET NO. F-61269-09

FILED
SEP 19 2011
Robert P. Contillo
P.J.Ch.

INDYMAC VENTURE, LLC,

Plaintiff(s),

vs.

CARMINE E. GIORDANO, ET AL.,

Defendant(s).

CIVIL ACTION

ORDER

This matter being opened to the court on plaintiff's motion for summary judgment and/or striking the answer of the defendants Carmine E. Giordano and Sheryl A. Giordano, and upon the defendants' cross-motion to dismiss and for summary judgment on their counterclaim, and the court having considered the pleadings, affidavits/certifications, admissions and other moving papers, and for the reasons set forth on the annexed rider to Order;

IT IS THIS 19th day of September, 2011;

O R D E R E D as follows:

1. That the motion of the plaintiff for summary judgment is denied without prejudice owing to the failure to strictly comply with the Fair Foreclosure Act.

2. The defendants' motion to dismiss is granted in part and defendants request for summary judgment on their counterclaim is denied, and the counterclaim is dismissed with prejudice owing to waiver.
3. A copy of this Order is being mailed to the parties by the court.

ROBERT P. CONTILLO, P.J.Ch.

Rider to Order
Indymac Venture v. Giordano, F-61269-09

This matter is before the court upon Plaintiff Indymac Venture, LLC motion for summary judgment and defendants Sheryl and Carmine Giordano's, cross-motion to dismiss and for summary judgment. These motions were initially before the court in October of 2010. At that time, the motions were to be held in abeyance while the homeowner sought relief through the New Jersey Foreclosure Mediation program. During a case management conference held thereafter, the parties advised that the mediation program would not be of use to these parties because the lender would only consider entering into a loan modification agreement with the homeowner, and thereby dismiss the foreclosure suit, if the homeowner would similarly dismiss her counterclaim claim for damages against the lender. Because of the homeowner's insistence that her counterclaim proceed regardless of whether the parties entered into a loan modification, further mediation was foregone, and these motions re-listed for oral argument.

For the reasons stated herein, the defendant's motion to dismiss the complaint is granted.

Statement of the Case

On October 30, 2003, the defendants Carmine and Sheryl Giordano executed and delivered a Note to Indymac Bank, FSB in the sum of $340,000.00. The note was payable over a 30 year period with interest accruing at an adjustable rate.

To secure the note, the Giordano's executed and delivered a mortgage against the property located at 98 Forest Road Dumont, New Jersey.

On December 20, 2004, Indymac Bank, FSB, and the Giordano's entered into a modification agreement that amended the note and mortgage to change the principal balance secured by the note and mortgage to $360,000.00

On February 6, 2008 Indymac and the Giordano's entered into yet another modification agreement that amended the mortgage and note to amend the principal balance secured by the note and mortgage to $423,850.00 and extended the required completion date set forth in the Construction Loan Agreement to April 15, 2008.

On June 24, 2009, the Federal Deposit Insurance Corporation as Receiver for Indymac Bank assigned its interest in the note, construction loan agreement and mortgage to Indymac Venture, LLC. The assignment was recorded on August 27, 2009.

The Giordano's stopped making payments on July 1, 2009, however the lender maintains that they were already in default as they failed to complete construction by the April 15, 2008 deadline.

Plaintiff's Motion for Summary Judgment

Plaintiff's motion consists of a short brief that asserts that this case is "a routine foreclosure of a first mortgage on premises owned by the defendants." Pl. Br. at 1. In support, Plaintiff has attached copies of the Note, Mortgage, and Construction Rider, as well as a certification from a representative of the lender that states, "I have examined the records of the plaintiff concerning the above referred to obligation and mortgage, and I find from said records that the principle balance is $419,452.65, together with interest in addition to any escrow advances made, is due plaintiff." See Konkowski Certification,¶ 8.

Defendant's Opposition

Defendants argue that the Plaintiff does not have the right to foreclose for several reasons. First, they allege that the Notice of Intent that was sent to them on June 12, 2009 was insufficient as a matter of law, since the information contained therein did not comply with the Fair Foreclosure Act. Specifically, the letter does not tell Defendants (1) that if defendant fails to cure the default that the lender may initiate foreclosure proceedings; (2) that the defendant does cure that it shall be responsible fro the reasonable fees of the lender; (3) that the defendants have the right to transfer the real estate and that the transferee shall have the right to cure the default. Defendants claim that this particular mortgage did in fact require Plaintiff to comply with the Fair Foreclosure Act's requirements, although Plaintiff's counsel has stated that such a requirement is not needed here. Ms. O'Donnell has stated, "the notice of intent to foreclose isn't applicable in this case because it's for a construction loan and not a permanent loan." July 23, 2010, page 2, lines 16-20. She continues, "All of the key requirements that are requirements by the Fair Foreclosure Act for notice of intent to

foreclose are included in that letter ... but it's not officially a notice of intent to foreclose. Id.

Next, Defendants assert that the Plaintiff lacks standing in the case since it is the servicer of the loans and does not possess any kind of beneficial interest in the loans by virtue of a receivership agreement between Indymac and the FDIC.

Additionally, Defendant asserts that the Plaintiff should not be permitted to foreclose because the "Plaintiff caused Defendants to default by Plaintiff's failure to make timely advances which caused delays." Defendants contend that "because Plaintiff did not make the advances, Plaintiff waived defaults and extended the construction period." As of the date of these motions, the construction is complete, and Dumont has issued a certificate of occupancy.

Defendants' Reply

Defendants reply and assert that Plaintiff's Summary Judgment application must be denied because Plaintiff failed to send a Notice of Intention to Foreclose prior to the commencement of the foreclosure procedures. Defendant notes that the failure to timely send the notice was a violation of the Fair Foreclosure Act, which mandates strict compliance. See Bank of New York Mellon v. Elghossain, F-13402-10, 2010 WL 419 N.J. Super. 336; (App. Div. 2010) 6490011 (N.J. App. Div. Dec. 23, 2010). Furthermore, Defendant disputes the contention that a Notice of Intention to Foreclose was sent to 98 Forest Road, Dumont, New Jersey 07628. It is contended that only a Notice of Default and not a Notice of Intention to Foreclose was ever received. While Plaintiff argues that a Notice of Intention to Foreclose was unnecessary provided that the loan was for a construction loan, the Defendant disagrees. The Defendants contend that by the terms of the mortgage instruments, the loan was for residential purposes.

Next, Defendants maintain that the Plaintiff does not have possession of the note. According to the Defendants, while Plaintiff claims that the note was assigned by IndyMac, FSB, there is no proof that the Note was ever physically transferred to the Plaintiff. The failure to have possession of the Note, it is asserted, is fatal to the Plaintiff's case. See In re Kemp, 440 B.R. 624 (Bankr. D. N.J. 2010) (citing N.J.S.A. 12A:3-201(b)). Based upon the standing issue, Defendants request that this Court dismiss the Complaint without prejudice.

Finally, Plaintiff has argued that Defendants defaulted by virtue of not completing construction by the required completion date. Defendants maintain that Plaintiff intentionally reduced the project's completion percentage to prevent the project from being finished. Moreover, Defendants contend that Plaintiff failed to provide monetary advances as agreed to by contract. As a result, it asserted that Defendants were forced to use personal funds for construction. Because Plaintiff failed to provide a rationale for not providing prompt advances, Defendants maintain that Plaintiff breached the contract and caused the Defendants' default.

Plaintiff's Supplemental Brief

Plaintiff asserts that a mortgagee has the right to foreclose upon a mortgagor when there is proof of execution, recording and non-payment of the note and mortgage. See Thorpe v. Floremore Corp., 20 N.J. Super. 34 (App. Div. 1952). Because Defendant purportedly executed the note and mortgage in question, recorded said mortgage, and defaulted on the loan, Plaintiff maintains that it is entitled to foreclose upon the property as a matter of law.

Plaintiff opposes the arguments set forth in the Defendants' Opposition to Summary Judgment and cross-motion to Dismiss. First, Plaintiff asserts that it has standing to pursue this foreclosure action based upon its stake in the outcome of the case. See Erny v. Russo, 333 N.J. Super. 88 (App. Div. 2000), reversed on other grounds, sub. nom, Erny v. Estate of Merola, 171 N.J. 86 (2002). Moreover, Plaintiff maintains that it is the owner of the original note, and was the owner prior to the filing of the Complaint, and as such can foreclose upon the property. See N.J.S.A. 12A:3-301.

Second, Plaintiff argues that the Defendants' loan was a construction loan and not a residential mortgage loan. Thus, Plaintiff contends that a Notice of Intent to Foreclose was not necessary. Nevertheless, if said mortgage was considered a residential loan, Plaintiff maintains that a Notice of Intent to Foreclose was sent on June 12, 2009. While Defendant considers the Notice of Default insufficient to meet the notice requirements set forth in the Fair Foreclosure Act, the Plaintiff disagrees. Plaintiff argues that the letter properly notified the Defendant that if she failed to cure the default by July 17, 2009, the Plaintiff would accelerate the loan and commence foreclosure. Based upon the language of the Notice, Plaintiff argues that it complied with the terms of the Fair Foreclosure Act.

Finally, Plaintiff contends that Defendants' counterclaim for breach of contract must be dismissed because Defendants waived their right to such claims. Even if Ms. Giordano did not waive her rights, it is asserted that Plaintiff made timely advance payments when requested.

Analysis

In order to make a prima facie case for foreclosure, the mortgagee must establish "execution, recording, and non-payment of the mortgage." See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). In the case at bar, it is undisputed that Carmine E. Giordano and Sheryl A. Giordano executed to Indymac Bank FSB, a mortgage on the property at 98 Forest Road, Dumont, New Jersey, as security for the residential construction loan received from the bank. The mortgage, dated October 30, 2003 was recorded in the Office of the Bergen County Clerk/Register on August 2, 2004 in Mortgage Book 13732, Page 205c. Modifications to the original loan agreement were made on December 20, 2004, March 10, 2006[1] and February 6, 2008[2] with the effect of raising the principal balance secured by the note and mortgage to $423,850.00. According to the Plaintiff, Defendant defaulted on April 15, 2008 after not completing the required construction improvements. However, it wasn't until June 12, 2009 that Plaintiff sent a Notice of Default and notified the Defendants that if they didn't cure the default, which included completing the project and paying interest and costs, Plaintiff would accelerate the debt and Defendants would be required to pay the outstanding principal of $419,452.65. See Konkowski Certification; see also Caldwell Certification, Exhibit H.

Furthermore, New Jersey Courts require that the foreclosing party prove they "own or control the underlying debt." See Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010); see also Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592 (Ch. Div. 2011). Defendants do not dispute the amount of money that is in default. Rather, Ms. Giordano opposes Summary Judgment on standing grounds because, according to the Defendants, Plaintiff neither owns nor possesses the note and mortgage.

[1] The loan modification was recorded in the office of the Clerk of Bergen County on May 23, 1006, in Book 1045 at Page 480&c. See Caldwell Certification, Exhibit D.
[2] The loan modification was recorded in the office of the Clerk of Bergen County on April 1, 2008, in Book 1110 at Page 216&c. See Caldwell Certification, Exhibit E.

However, the Defendants neglect to mention that Plaintiff was authorized to foreclose upon the note and mortgage based upon an Assignment of Mortgage granted to Indymac Venture, LLC from the FDIC as receiver for Indymac Bank, FSB. See Caldwell Certification, Exhibit F. The Assignment, recorded on August 27, 2009, which predates the filing of Plaintiff's foreclosure Complaint, granted all of "Assignor's right, title and interest in, to and under that certain Mortgage dated October 30, 2003 and executed by Carmine Giordano and Sheryl Giordano. . . ." Even if the instrument was assigned without the endorsement of the issuer, Plaintiff would be entitled to foreclose. See N.J.S.A. 12A:3-203(c). While the lack of the endorsement prevents the person with possession of the instrument from becoming a holder, the transfer "vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." See N.J.S.A. 12A:3-203(b). As such, Plaintiff possesses the requisite standing to pursue this action.

Defendants also oppose this Summary Judgment motion by stating that Plaintiff did not comply with the Fair Foreclosure Act's requirements that a Notice of Intent be provided to the Defendants. On this issue, Defendants have a legitimate argument. The Fair Foreclosure Act requires that a mortgagee notify a residential mortgagor of an intention to accelerate a mortgage loan and to commence a mortgage foreclosure action at least 30 days before doing so. N.J.S.A. 2A:50-55. The default which forms the basis of a notice of intention to accelerate and foreclose may be monetary or non-monetary. N.J.S.A. 2A:50-56(a). In either event, the nature of the default must be specified in the notice of intention. If a notice is inaccurate or misleading, another notice should be sent to correct the mistake.

A residential foreclosure complaint should include an allegation that the foreclosing mortgagee has served the required pre-action notice of intention to foreclose. In the absence of such an allegation, the complaint may be dismissed. Where compliance with the FFA has been pled, but cannot thereafter be established, it had previously been the practice of some Superior Courts to require the foreclosing plaintiff to send a new notice of intention to foreclose, to give the mortgagor 30 days from mailing to cure, and to permit the mortgagee to proceed with his foreclose action if cure is not timely effected. This practice is no longer the procedure mandated by the appellate division, which

instead has read the Fair Foreclosure Act to require the notice to be in strict compliance with the statute, the failure of which shall result in a dismissal without prejudice. See, Bank of New York v. Laks, No. A-4221-09T3, 2011 N.J. Super. Lexis 153 (App. Div., August 8, 2011) (Ch. Div. 2011) (slip. op. at 12).

Plaintiff has not pled compliance, instead asserting that the Fair Foreclosure Act does not apply because this is a construction loan. However the act does provide that a residential mortgage is "a mortgage, security interest or the like, in which the security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor.... This act shall apply to all residential mortgages wherever made, which have as their security such a resident ... provided that the real property which is the subject of the mortgage ... shall be, or is planned to be, occupied by the debtor...." N.J.S.A. 2A:50-55 (emphasis added. Additionally, the Rider to the mortgage itself does state that the loan is a "residential construction loan rider," which acknowledges that the bank was aware that this loan was intended to be used to construct or improve the defendants' own residential property.

There is countervailing support for the proposition that a notice of Intent is not required where the loan has matured, and the full amount is due and owing. See, 30 New Jersey Practice, Law of Mortgages § 24.12, at 264 (Myron C. Weinstein) (2d ed. 2000) (stating "Where the mortgage obligation has matured, so that all sums secured by the mortgage are immediately due and payable, acceleration is not required in order to foreclose. The [Fair Foreclosure Act's] own terminology makes the notice of intention inapplicable in this instance."); See also, Midcountry Bank v. Smart, No. A-5123-09T4 (App. Div., May 24, 2011) (stating that where the Construction Rider specifically stated that "The loan is payable at full at maturity, and the lender is under no obligation to refinance or modify the loan at that time," a NOI was not required to accelerate the obligation). Here, the obligation was to roll over into a permanent loan if completion was achieved. However, if completion did not occur before a specified date, then the borrower was in default under the terms of the Note. That Note specifically states that "If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration." Because the loan does require notice to the borrower prior to

accelerating the obligation, the loan does appear to fall within the purview of the Fair Foreclosure Act.

Because the act does apply, it is necessary to examine the notice that was sent. Specifically, subsection (c) sets forth the written notice shall indicate "clearly and conspicuously" and "in a manner calculated to make the debtor aware of the situation" the following:

> (1) the particular obligation or real estate security interest;
>
> (2) the nature of the default claimed;
>
> (3) the right of the debtor to cure the default as provided in section 5 of this act;
>
> (4) what performance, including what sum of money, if any, and interest, shall be tendered to cure the default as of the date specified under paragraph (5) of this subsection c.;
>
> (5) the date by which the debtor shall cure the default to avoid initiation of foreclosure proceedings, which date shall not be less than 30 days after the date the notice is effective, and the name and address and phone number of a person to whom the payment or tender shall be made;
>
> (6) that if the debtor does not cure the default by the date specified under paragraph (5) of this subsection c., the lender may take steps to terminate the debtor's ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction;
>
> (7) that if the lender takes the steps indicated pursuant to paragraph (6) of this subsection c., a debtor shall still have the right to cure the default pursuant to section 5 of this act, but that the debtor shall be responsible for the lender's court costs and attorneys' fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey;
>
> (8) the right, if any, of the debtor to transfer the real estate to another person subject to the security interest and that the transferee may have the right to cure the default as provided in this act, subject to the mortgage documents;

(9) that the debtor is advised to seek counsel from an attorney of the debtor's own choosing concerning the debtor's residential mortgage default situation, and that, if the debtor is unable to obtain an attorney, the debtor may communicate with the New Jersey Bar Association or Lawyer Referral Service in the county in which the residential property securing the mortgage loan is located; and that, if the debtor is unable to afford an attorney, the debtor may communicate with the Legal Services Office in the county in which the property is located;

(10) the possible availability of financial assistance for curing a default from programs operated by the State or federal government or nonprofit organizations, if any, as identified by the Commissioner of Banking and Insurance. This requirement shall be satisfied by attaching a list of such programs promulgated by the commissioner; and

(11) 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.

[N.J.S.A. 2A:50-56(c).]

Based on the idea that the FFA "mandate[s] that lenders must first serve the notice to allow homeowners 'every opportunity to pay their home mortgages, and thus keep their homes,'" the Appellate Division has held that the "Legislature specifically intended that lenders faithfully comply with the FFA provisions," and that "courts are not free to deviate from the unambiguous statute." EMC Mortgage Corp. v. Chaudri, 400 N.J.Super. 126, 137-139 (App. Div. 2008). In The Bank of New York v. Elghossain, the Court found that disclosing the loan's servicer while failing to disclose the identity of the lender goes against the clear language of N.J.S.A. 2A:50-56(c). See The Bank of New York v. Elghossain, ___, N.J. Super. ___, ___ (Ch. Div. 2011) (slip. op. at 5). This holding was also reached in Laks, supra, (slip op. at 14), wherein the court specifically addressed subsection (c)(11) and determined that "[t]he Legislature has required lenders to serve a notice of intention that conforms with subsection (c)(11), and the wisdom of that requirement is not a question for a court to decide." Laks at 12.

A review of this notice shows that while the Lender is *identified* in compliance with subsection (c)(11), the notice fails to disclose it's address, merely providing the name, address, and phone number of the *servicer* of this loan. The notice is therefore violative of the language of the Fair Foreclosure Act and its interpretation in Laks. Because the Plaintiff has failed to disclose the address of the lender, this Court must dismiss the Complaint without prejudice. Because the foreclosing plaintiff has neither pled, nor been in compliance with the act, the complaint will be dismissed, without prejudice.

I note that the defendant has suffered no prejudice as a result of the failure to disclose the address of the lender, and that by dismissing the case, even without prejudice, the harm to plaintiff is palpable. However, the FFA, as interpreted, clearly requires the notice of intent to state the name and address of the lender. It was not. That defect mandates a dismissal without prejudice to the right to re-file.

Finally, the Defendants have argued that they have a defense to foreclosure and affirmative damage claims, based upon Plaintiff's purported breach of contract. Plaintiff, on the other hand, argues that the Defendants agreed to release Plaintiff from "any and all claims, demands, suits, causes of action, cross-complaints, assertions, liabilities or debts of any nature whatsoever, whether known or unknown, absolute or contingent, presently existing or hereafter discovered, pertaining to, connected with or arising out of the transactions so described in this Agreement." See Caldwell Certification, Exhibit C. The release notwithstanding, Plaintiff maintains that the loan advance history evidences that it timely provided the advances and was not the cause of the construction delays. See Caldwell Certification, Exhibit H. Aside from Defendants' brief, there does not appear to be a basis to conclude that Plaintiff's actions somehow caused the delays that precipitated the default. The Plaintiff's business records reflect that between December 2003 and June 2009, forty-six requests for withdrawal were made and a total of $165,685.96 was advanced. Moreover, the Plaintiff retained the right to withhold advances. The Residential Construction Loan Agreement states,

> Lender shall have no obligation to make any advance hereunder if, at the time of the request for such advance, Borrower is in default with respect to any provisions

> of this Agreement or any of the instruments referred to herein. Each request for an advance hereunder shall be deemed a representation and warranty by Borrower that no default exists under the Security Instrument or under this Agreement. If at the time any such draw request is made Lender determines that there are insufficient funds remaining to be advanced to complete the Improvements in accordance with the Contract, Lender shall have no obligation to advance funds hereunder until such time as Borrower has deposited sufficient funds with Lender which, when added to the remaining funds to be advanced, are sufficient in the opinion of the Lender to complete said Improvements in accordance with the Contract. [See Caldwell Certification, Exhibit G].

The Defendants do not dispute that they signed a waiver and release in favor of the lender in the Modification Agreement. See Caldwell Certification, Exhibit C; see also Investors Savings & Loan Association, 174 N.J. Super. 356, 362 (Ch. Div. 1980) ("When a contract is clear and unambiguous a court is bound to enforce its terms as they are written and the court may not make a better contract for either of the parties. A court has no right to rewrite the contract by substituting new or different provisions from those clearly expressed in the contract."). Based upon the release and waiver, Defendants breach of contract counterclaim is dismissed, with prejudice.

ROBERT P. CONTILLO, P.J.Ch.

Dated: September 19, 2011