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1 of 2 DOCUMENTS

JOHN T. DOMINY, Plaintiff-Appellant, and JOSEPHINE DOMINY, Plaintiff, v. GREENTREE MORTGAGE COMPANY, L.P., Defendant, and BANK OF AMERICA, N.A., Defendant-Respondent.

DOCKET NO. A-4698-13T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2016 N.J. Super. Unpub. LEXIS 1918

October 7, 2015, Submitted
August 17, 2016, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from Superior Court of New Jersey, Chancery Division, Camden County, Docket No. C-97-13.

COUNSEL: John T. Dominy, appellant, Pro se.

Sills Cummis & Gross P.C., attorneys for respondent (Joshua N. Howley, of counsel and on the brief; David J. Marck, on the brief).

JUDGES: Before Judges Koblitz and Kennedy.

OPINION

PER CURIAM

Plaintiffs, John and Josephine Dominy, filed a complaint to quiet title on their property in Winslow Township after receiving notice of default and intent to foreclose from the mortgage holder. The trial court granted summary judgment in favor of defendant, Bank of America, N.A. (defendant or BOA), holding that, as a matter of law, plaintiffs failed to establish a genuine issue of material fact in support of their complaint. Plaintiff, John Dominy, now appeals. We affirm.

I.

The following facts are derived from the record on summary judgment.

On April 30, 2009, plaintiffs executed and delivered to Greentree Mortgage Company, L.P. (Greentree) a note and mortgage securing the note on their property located in Winslow Township. Greentree recorded the mortgage on May 18, 2009, and on February 27, 2012, assigned the mortgage and endorsed the note to defendant. The assignment was recorded on [*2] March 1, 2012. Melissa Davidson, a vice president of BOA, has certified that defendant possesses the original note and mortgage.

Plaintiffs ceased making their monthly payments on the loan in October 2011 and remained in default thereafter. On June 3, 2013, defendant sent plaintiffs a notice of default and intent to foreclose (NOI). Plaintiffs responded by filing this complaint to quiet title, arguing an invalid assignment by Greentree to defendant. Thereafter, defendant moved for summary judgment and the trial court determined that defendant had a valid lien on the property, and that, consequently, *N.J.S.A. 2A:62-1* precluded plaintiffs from bringing an action to quiet title.

Plaintiff, John Dominy, now asserts two arguments on appeal, which were not raised below. While, generally, unless such arguments contest the jurisdiction of the trial court, or concern matters of substantial public interest, we will not address them, Pressler, *Current N.J. Court Rules*, comment 2 on *R. 2:6-2* (2016) (citing *Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973))*, we shall briefly address each argument.

First, plaintiff argues that because defendant filed its answer before being properly served with process, the trial court erred by ruling on the summary judgment motion. While [*3] this argument is jurisdictional in nature, it is, nevertheless, devoid of merit because defendant was well within its rights to waive service of process and file an answer. "A defendant can waive the service of process and file his answer voluntarily, but if he does so it must be done unequivocally." *Forstmann & Hoffman Co. v. United Front Comm. of Textile Workers, 99 N.J. Eq. 696, 701, 133 A. 774 (Ch. 1926)*; *see also R. 4:4-6*. At the case management conference on January 13, 2014, defendant explicitly waived service of process.

Second, plaintiff submits that the trial judge erred in denying him an opportunity to amend the complaint. A plaintiff may amend his or her complaint "as a matter of course at any time before" an answer is served. *R. 4:9-1*. After the answer is served, a plaintiff may amend his or her complaint "only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice." *Ibid.* "[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion." *Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457, 713 A.2d 411 (1998)*.

Plaintiffs filed their motion for leave to amend after defendant filed its motion for summary judgment, and in doing so, sought to raise issues that would not have survived the granting of the motion. Therefore, plaintiffs' motion for leave to amend the complaint was [*4] not an impediment to the granting of summary judgment. *See Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57, 696 A.2d 744 (App. Div. 1997)* ("[T]here is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." (quoting *Mustilli v. Mustilli, 287 N.J. Super. 605, 607, 671 A.2d 650 (Ch. Div. 1995))*).

Finally, plaintiff argues that the trial judge erred in granting defendant's motion for summary judgment, and avers that defendant's counsel submitted a statement of material facts not based on personal knowledge.

II.

As always, we begin our analysis with the standard of review. This court reviews a motion for summary judgment de novo. *Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 601, 129 A.3d 1111 (App. Div. 2016)*. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" upon appellate review. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995), superseded on other grounds by statute, N.J.S.A. 40:55D-10.5*.

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)*.

The motion judge must decide:

> [W]hether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient [*5] to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for the purposes of *Rule 4:46-2*.
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> [*Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986))*.]

Here, the judge held that plaintiffs' application to quiet title was improper under *N.J.S.A. 2A:62-1* because defendant had a valid lien on the property. The statute provides in relevant part:

> Any person . . . may, when his title [to possession of real property in New Jersey] . . . is denied or disputed, or any other person claims . . . to hold a lien or encumbrance thereon, and when no action is pending to enforce or test the validity of such . . . encumbrance, maintain an action in the superior court to settle the title to such lands and to clear up all doubts and disputes concerning the same.
>
> [*N.J.S.A. 2A:62-1*.]

However, where a mortgagee holds a valid lien on the property, a trial court must grant summary judgment and dismiss a plaintiff's action to quiet title. *Suser v. Wachovia Mortg., FSB, 433 N.J. Super. 317, 324-25, 78 A.3d 1014 (App. Div. 2013)*.

In order to establish a valid lien on property, the mortgagee must produce evidence of: (1) the validity of the mortgage and note; (2) [*6] the default itself; and (3) the right to foreclose. *See Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394, 622 A.2d 1353 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542, 642 A.2d 1037 (1994)*. On a motion for summary judgment, a foreclosing mortgagee establishes the validity of its lien by demonstrating the execution, delivery, and nonpayment of the mortgage. *See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37, 89 A.2d 275 (App. Div. 1952)*.

The validity of the note and mortgage and its assignment to defendant were certified by Melissa Davidson, a vice president of BOA, who had personal knowledge of the documents. Plaintiffs failed to pay their mortgage since October 2011 and are therefore in default. Defendant delivered the NOI to plaintiffs multiple times. Ms. Davidson also certified that defendant is in possession of the loan documents. Plaintiffs have not provided any facts that would warrant a different conclusion. Therefore, defendant has standing to proceed with a foreclosure action. Accordingly, plaintiffs were not entitled to maintain an action to quiet title pursuant to *N.J.S.A. 2A:62-1*, and summary judgment was properly granted.

Affirmed.