

S-Commercial Fin. v. Khajana Inc.

Superior Court of New Jersey, Appellate Division

November 29, 2022, Submitted; February 21, 2023, Decided

DOCKET NO. A-0847-21

Reporter

2023 N.J. Super. Unpub. LEXIS 235 *; 2023 WL 2125280

S-COMMERCIAL FINANCE, LLC, as assignee of BCB COMMUNITY BANK, the successor by merger and acquisition of INDUS AMERICAN BANK, Plaintiff-Respondent, v. KHAJANA INC. and DOLLY K. PATEL, Defendants-Appellants, and RIA REALTY LLC and STATE OF NEW JERSEY, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY [RULE 1:36-3](#) FOR CITATION OF UNPUBLISHED OPINIONS.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 the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. F-002422-18.

Core Terms

sheriff's sale, reconsideration motion, final judgment, defendants', amount of the judgment, reconsideration, adjourned, defense counsel, mortgage, deed, principal and interest, cross-motion, attorney's fees, motions, vacated, confirmed, ten-day, payoff, taxes, delivery, parties, sheriff, costs

Counsel: Walter Toto, attorney for appellants.

Sills Cummis & Gross PC, attorneys for respondent (Joshua N. Howley, on the brief).

Judges: Before Judges Gummer and Paganelli.

Opinion

PER CURIAM

In this commercial-foreclosure action, defendants Khajana, Inc. (Khajana) and Dolly Patel appeal an order granting plaintiff's motion for reconsideration of a previous order setting aside the sheriff's sale of the

mortgaged property and denying defendants' cross-motion for reconsideration to reduce the amount of the final judgment. Because the judge did not abuse his discretion in granting plaintiff's motion and denying defendants' cross-motion, we affirm.

I.

On January 3, 2019, a judge issued a final judgment in favor of then-plaintiff BCB Community Bank (the bank) after default had been entered against defendants. The judgment provided that the bank was "entitled to have the total sum of \$482,804.20, being the principal, interest, fees, taxes and advanced payments secured by the mortgage" and directed that the mortgaged premises would be sold to "raise and satisfy" that amount. The judgment was subsequently assigned [*2] to plaintiff S-Commercial Finance LLC.

After defendants had used two statutory adjournments, the sheriff's sale of the property was scheduled for August 7, 2019. Without objection from plaintiff and "with the understanding . . . that [p]laintiff would be entitled to make application to amend the final judgment to include the additional interest and costs related to the holding off [of] the [s]heriff's [s]ale of the property," defendants filed an emergent application to stay the sale. The judge granted the application and issued an order staying the sale until September 11, 2019 .

On September 11, 2019, the judge issued an "amended final judgment amount by consent," which increased the amount of the judgment from \$482,804.20 to \$564,923.18 and adjourned the sale of the property "for a date after October 2, 2019." According to the amended final judgment, the sheriff's sale had been adjourned several additional times "to accommodate the [d]efendants at their explicit request" Defense counsel executed the amended final judgment, stating defendants had consented to its entry.

The sheriff's sale was adjourned several times while the parties attempted to negotiate a settlement. After [*3]

negotiations failed, plaintiff moved for an order amending the final judgment and permitting the sheriff's sale to proceed. Plaintiff argued the judgment should be amended to include additional costs plaintiff had incurred, such as insurance premiums and taxes, and accrued late fees and interest. Plaintiff supported its motion with a "spreadsheet," which was not included in the appellate record. In opposition, defendants objected to plaintiff's demand for post-final judgment interest and argued plaintiff was requesting excessive maintenance fees and had failed to mitigate its damages by collecting rent. Nothing in the record about this motion indicates plaintiff sought to increase the final judgment amount by additional principal payments or that defendants objected on that basis.

On February 12, 2021, the judge issued an order amending the final judgment by increasing the judgment amount from \$564,923.18 to \$721,269.46. The order provided that the sheriff's sale, which had "been adjourned several times by plaintiff's counsel to accommodate the defendants," was "adjourned until a date in March 2021"

In the statement of reasons accompanying the February 12, 2021 order, the judge [*4] made the following factual findings:

[S]ince 1992, the [d]efendant corporation has had its charter revoked several times, most recently in 2016. As of August 2020, the charter had not been reinstated, nor has there been any indication that their taxes have been filed and paid. Currently, the "owner" Dolly Patel resides in India pending criminal proceedings for land fraud and stealing files from the Gujarat High Court.

The judge also found "the initial cause for adjournment and delay [was] primarily the fault of the [d]efendant and their [sic] bad-faith efforts to extend the stay of the sale."¹ The judge found defendants' mitigation argument to be "misleading" because plaintiff's eviction proceedings had been delayed due to the COVID-19 pandemic.

The judge recognized the well-settled law that "upon foreclosure, the mortgage agreement merges with the final judgment of foreclosure and 'such decree represents the final determination of the debt'" (quoting Virginia Beach Fed. v. Bank of N.Y./Nat'l Cmty. Div., 299 N.J. Super. 181, 184, 690 A.2d 1040 (App. Div.

1997). The judge determined plaintiff would experience "significant prejudice" if the motion were denied, finding "[p]laintiff's courtesy to delay the sale should not be rewarded by having to pay the additional costs of insurance payments, taxes, [*5] and maintenance fees attributable to the [d]efendant's behavior." Citing Resolution Trust Corp. v. Griffin, 290 N.J. Super. 88, 91, 674 A.2d 1032 (Ch. Div. 1994), the judge held he had the authority to amend the judgment amount to include those costs and that amending the judgment to include them would not adversely impact defendants' rights because "their bad-faith in negotiation is the primary blame for the delay in the [s]heriff's sale." The judge concluded "[a]n inequitable and unjust result would be reached if the [p]laintiff were not able to be relieved of the additional costs incurred due to the bad-faith negotiating of the [d]efendant an[d] the [s]ale were not to proceed." Referencing only real-estate taxes, insurance premiums, and maintenance fees, the judge did not hold that he was including additional principal payments in the amended judgment amount.

The sheriff's sale was scheduled for March 3, 2021. On that day, defendants moved for reconsideration of the February 12, 2021 order pursuant to *Rule 4:49-2*. In support of that motion, defendants submitted the certification of their counsel, who asserted his office had requested "a payoff of the [f]inal [j]udgment/[n]ote from lender's counsel" on January 4, 2021, and at least five times in 2020 when the judgment amount was [*6] \$564,923.18. Defense counsel certified:

Defendant has received a loan commitment from a private lender for up to \$575,000.00 and is ready, willing and able to pay off the [f]inal [j]udgment/[l]oan based upon the [f]inal [j]udgment of \$564,923.18 plus additional real estate taxes, liability insurance payments and other reasonable expenses as permitted under the case law.

Defense counsel argued "the court [had] made an error in adding additional principal and interest payments under the [n]ote of over \$80,000.00 . . . in light of the fact that the [m]ortgage and [n]ote merged with the original [f]inal [j]udgment dated September 11, 2019." Defendants did not provide any documentary evidence in support of that argument. Defendants also moved to stay the sheriff's sale based on the reconsideration motion filed earlier that day.

The sheriff's sale was conducted as scheduled on March 3, 2021. Plaintiff was the winning bidder at \$100. During the ten-day redemption period, which ended on March 13, 2021, defendants did not turn over the required funds or move for a hearing of an objection to

¹ Whether the judge meant to say "defendants" or intended to reference one particular defendant in the statement of reasons is not clear.

the sale. See [R. 4:65-5](#) (requiring sheriff to deliver deed pursuant to a sheriff's sale "unless a motion for the [*7] hearing of an objection to the sale is served within [ten] days after the sale or at any time thereafter before the delivery of the" deed); see also [Mercury Cap. Corp. v. Freehold Off. Park, Ltd.](#), 363 N.J. Super. 235, 239-40, 832 A.2d 369 (Ch. Div. 2003). On March 17, 2021, the Middlesex County Sheriff delivered to plaintiff a sheriff's deed of foreclosure regarding the mortgaged property. The deed was recorded on March 29, 2021.

After the deed was delivered to plaintiff, defendants on March 26, 2021, moved to set aside the sheriff's sale. In support of that motion, defendants submitted another certification of their counsel. Defense counsel certified that on the day of the sale, his assistant "went online" to determine if the mortgaged property was listed for sale that day. After seeing the "status" as "adjourned," the assistant called the sheriff's office and learned the sale had not been adjourned. Defense counsel filed the emergent application to stay the sale, "but the court did not reach out to [his] office until 1:45 p.m., and at that time the sale had occurred"

On April 30, 2021, the judge heard argument on defendants' three pending motions: the motion for reconsideration, the motion to stay the sheriff's sale, and the motion to set aside the sheriff's sale. During argument, [*8] defense counsel withdrew the stay motion; asserted the parties previously had consented to including principal and interest in amending the judgment amount as "consideration for allowing this to move forward and to adjourn the sale" and "in equity" because plaintiff "had no ability to actually go to sale," presumably because of the COVID-19 pandemic; and represented his "client" was prepared to close with the understanding plaintiff's counsel would add "some element of attorney's fees, or some component to the existing final judgment." Plaintiff's counsel responded he would "cap the attorney's fees so that the top . . . won't be more than anything over the 900 mark." Defense counsel confirmed his client would be able to pay that amount by the end of the next week. The judge held he was granting "defendant . . . the right to redeem the mortgage for the amount of the judgment, plus attorney's fees." As for defendants' argument that he had erred in increasing the amount of the final judgment, the judge found: "[T]his is a court of equity. I do believe that — and my recollection is that there was a discussion that the defendant did agree to allow for the increase in the judgment . . . [*9] ." The judge asked defense counsel to prepare the order.

Defense counsel submitted the proposed form of order on May 11, 2021. The judge executed and issued that day defense counsel's form of order, granting in part the reconsideration and set-aside motions and vacating the February 21, 2021 order. The judge directed plaintiff to transfer the mortgaged property to Khajana and Khajana to pay plaintiff \$739,078.29, with the "clos[ing]" to happen by May 19, 2021.

In a letter dated the same day, plaintiff's counsel asked the judge to vacate the order he had just issued because defense counsel had not given plaintiff an opportunity to review the form of order, included "inaccurate calculations" in the order, and failed to follow the judge's instructions about including "an itemization of [p]laintiff's additional charges and expenses as well as the cost and attorneys' fees to convey the subject property"

After conducting a telephone conference with counsel on May 12 or 13, 2021, the judge issued an "amended order" on June 2, 2021, which "vacated in its entirety" and superseded the May 11, 2021 order. In the June 2, 2021 order, the judge moved the closing date to June 30, 2021, and specified [*10] that plaintiff "may transfer title" in the property to "defendant" if "defendant" on that date gave plaintiff "\$763,137.16 in certified fund[s], which includes \$41,868.56 of fees and costs that [p]laintiff incurred since February 21, 2021, which is . . . subject to further increase," referencing the following paragraph of the order. That paragraph provided that plaintiff was "entitled to any additional reasonable attorneys' fees that may be due under the terms of the [n]ote and [m]ortgage" and directed plaintiff's attorneys to "submit a certification of services and a proposed form of [o]rder within thirty (30) days of the date of the entry of this [o]rder, which shall be paid in certified funds as part of the [c]losing"

After the telephone conference but before the judge issued the June 2, 2021 order, plaintiff on May 26, 2021, moved pursuant to "Rules 4:43 and 4:49 to [r]econsider the [o]rder entered on May 7, 2021, as well as any amendments to that [o]rder (collectively, the 'Order'), or, alternatively, for a stay of the Order pending the full and complete resolution of any appeal in this matter taken by [p]laintiff."² In a letter dated June 3, 2021, defense counsel asked the judge to adjourn [*11] plaintiff's motion by one cycle, representing that the parties had

² The record does not contain a copy of an order "entered on May 7, 2021." We understand the references to a May 7, 2021 order mean the May 11, 2021 order.

agreed to move the closing date to July 14, 2021. The judge granted that request. Defendants then cross-moved to "reconsider the . . . June 2, 2021 [o]rder [a]mending [f]inal [j]udgment . . ." Defendants sought reconsideration of the order "to reduce the amount of the [f]inal [j]udgment by the amount of mortgage principal and interest calculated in the . . . February 12, 2021 [o]rder and total[ing] \$721,269.46." Defendants supported that cross-motion with a certification of their counsel, who referenced their previous argument about the judge including additional principal and interest payments in the February 12, 2021 order. Defendants again did not support that argument with any documentary evidence.

The judge heard argument on that motion and cross-motion on June 25, 2021. In a series of letters beginning on July 9, 2021, plaintiff's counsel advised the judge that the parties consensually were asking for an adjournment of the closing date because "the options that directly impact the closing remain pending." The judge ultimately adjourned the closing date to November 12, 2021, in response to plaintiff's counsel's [*12] October 5, 2021 letter.

On October 27, 2021, the judge issued an order granting plaintiff's motion for reconsideration "in its entirety" and vacating "the [o]rder entered May 7, 2021 . . . in its entirety." The judge directed that title to the property "shall remain vested in [p]laintiff" pursuant to the sheriff's deed recorded on March 29, 2021.

In an attached statement of reasons, the judge reconsidered the May 11, 2021 order. He held he had erred in vacating the March 3, 2021 sheriff's sale and in ruling that title would be transferred to Khajana. The judge found that between the March 3, 2021 sheriff's sale and the sheriff's delivery of the deed to plaintiff on March 17, 2021, defendants had not objected to the sale. The judge held the sale was "automatically confirmed after the ten-day period" when defendants failed to object to the sale pursuant to [Rule 4:65-5](#). The judge rejected defendants' contention that their sale-day motions were "tantamount to an objection within the ten-day [redemption] period," noting defendants' reconsideration motion "did not address the portion of the [o]rder directing the sheriff's sale." The judge also rejected defendants' assertion that they had had "no effective [*13] notice of the sale," finding "[d]efendants knew of the sale in advance yet failed to take any action."

The judge denied defendants' cross-motion. The judge

noted defendants had presented the argument regarding reduction of the judgment amount "on three previous occasions — in their March 3, 2021 motion for reconsideration, during oral argument on April 30, 2021, and in the letters that led to the [a]mended [o]rder dated June 2, 2021." Finding defendants had "present[ed] nothing new for the [c]ourt to consider," the judge held "the [c]ourt's previous determination that equity called for the judgment to be amended to include principal, interest, and attorneys' fees is proper."

On appeal, defendants argue the judge erred in granting plaintiff's motion for reconsideration and in denying defendants' cross-motion because (1) plaintiff had denied defendants the right to satisfy the loan by breaching its duty to provide them with a payoff figure; (2) the amount of the amended final judgments had been increased contrary to law; (3) plaintiff's motion to stay the sale and for reconsideration were de facto objections to the sheriff's sale; and (4) by granting the motion for reconsideration, the [*14] judge effectively vacated a settlement. Unpersuaded by defendants' arguments and perceiving no abuse of discretion, we affirm.

II.

We review a trial court's order on a reconsideration motion under an abuse-of-discretion standard. [Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582, 243 A.3d 633 \(2021\)](#). "Motions for reconsideration are governed by [Rule 4:49-2](#), which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." [Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382, 113 A.3d 1217 \(App. Div. 2015\)](#). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue . . ." [Palombi v. Palombi, 414 N.J. Super. 274, 288, 997 A.2d 1139 \(App. Div. 2010\)](#). Rather, reconsideration

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt expressed its decisions based upon a palpably incorrect or irrational basis or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.

[*Ibid.* (quoting [D'Atria v. D'Atria, 242 N.J. Super. 392, 401, 576 A.2d 957 \(Ch. Div. 1990\)](#))].

"Thus, a trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." [Pitney Bowes, 440 N.J. Super. at 382](#).

The party moving for reconsideration may "point out 'the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.'" [*15] Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310, 942 A.2d 21 (App. Div. 2008) (quoting R. 4:49-2). The moving party may also bring additional information to the court's attention "in furtherance of [an] argument that the judge had expressed his decision on an incorrect basis." Id. at 311. "In short, a motion for reconsideration provides the court, and not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina v. Pitta, 442 N.J. Super. 1, 18, 120 A.3d 944 (App. Div. 2015).

Taking that opportunity, the judge concluded he had erred in the May 11, 2021 order by setting aside the March 3, 2021 sheriff's sale and ordering plaintiff to transfer title of the property to Khajana. We agree. The judge recognized in his October 27, 2021 decision what he had failed to consider in his May 11, 2021 decision: defendants had not objected to the sheriff's sale pursuant to Rule 4:65-5. Rule 4:65-5 is the "Court Rule dealing with sheriff's sales and objections thereto" Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 315, 787 A.2d 942 (App. Div. 2002). It provides:

A sheriff who is authorized or ordered to sell real estate shall deliver a good and sufficient conveyance in pursuance of the sale unless a motion for the hearing of an objection to the sale is served within 10 days after the sale or at any time thereafter before the delivery of the conveyance. Notice of the motion shall be given to [*16] all persons in interest, and the motion shall be made returnable not later than 20 days after the sale, unless the court otherwise orders. On the motion, the court may summarily dispose of the objection; and if it approves the sale and is satisfied that the real estate was sold at its highest and best price at the time of the sale, it may confirm the sale as valid and effectual and direct the sheriff to deliver a conveyance as aforesaid.

[(Emphasis added).]

Rule 4:65-5 expressly fixes a ten-day period for the submission of objections to a sheriff's sale. See Hardyston Nat'l Bank of Hamburg v. Tartamella, 56 N.J. 508, 513, 267 A.2d 495 (1970). A mortgagor may exercise the equitable right to redeem "within the ten-day period fixed by R[ule] 4:65-5 for objections to the sale and until an order confirming the sale if objections

are filed under the rule." *Ibid.* "A sheriff's sale is automatically confirmed after ten days without an objection being filed." Brookshire Equities, 346 N.J. Super. at 316.

Even though their counsel had been advised of the sheriff's sale on the day it occurred, defendants took no action in the ten days that followed. They did not exercise the right of redemption; they did not move for a hearing of an objection to the sale. With no objection filed, the sale was automatically confirmed after ten days and the sheriff [*17] was authorized to deliver the deed, which she did on March 17, 2020. In his May 11, 2021 decision setting aside the sheriff's sale and ordering plaintiff to transfer the property back to defendants, the judge did not consider defendants' failure to object to the sale pursuant to Rule 4:65-5. The judge corrected that error when he granted plaintiff's motion to reconsider the May 11, 2021 order. To have the opportunity to correct that error and to consider defendant's failure to comply with Rule 4:65-5 was an appropriate basis for reconsideration, and, therefore, the judge did not abuse his discretion in granting plaintiff's motion.

Defendants contend their motions are "tantamount to an objection within the ten-day period." Their motions for reconsideration of the February 12, 2021 order and to stay the sale were filed *before* the sale took place. Their motion to set aside the sheriff's sale was filed twenty-three days *after* the sale and nine days *after* the delivery of the deed. Motions filed before or after the applicable time period are not motions filed within the time period.

The judge rejected defendants' cross-motion for reconsideration of the June 2, 2021 order to reduce the amount of the judgment because [*18] defendants had made that argument before and had presented nothing new. The first time defendants made the assertion that the judge improperly had included over \$80,000 in principal and interest payments in the judgment amount was in their motion for reconsideration of the February 12, 2021 order. They did not support that assertion with any documentary evidence in that motion or when they repeated the assertion in their cross-motion for reconsideration of the June 2, 2021 order. Thus, the judge did not abuse his discretion in rejecting defendants' argument on the basis that they had made the argument before and had presented nothing new for him to consider.

In their reply brief on appeal, defendants claim it is undisputed the judge added principal and interest

payments to the judgment amount in the September 11, 2019 amended final judgment. They point out that the judgment amount in the September 11, 2019 amended final judgment (\$564,923.18) was \$82,118.98 more than the judgment amount in the January 3, 2019 final judgment (\$482,804.20). Perhaps defendants make that argument in a belated attempt to support their assertion that the judgment amount includes over \$80,000 in principal [*19] and interest payments. But in making that argument, defendants ignore the fact that the September 11, 2019 amended judgment increasing the judgment amount by over \$80,000 was entered "by consent" and was executed by their counsel who represented "defendants hereby consent to the entry of the amended [j]udgment."

We recognize the judge made the following comment in the statement of reasons attached to the October 27, 2021 order: "the [c]ourt's previous determination that equity called for the judgment to be amended to include principal, interest, and attorneys' fees is proper." Our review of the record does not reveal any support for the assertion that the judge in fact included principal and interest in the judgment amount without the parties' consent. The judge's statement clarifies that to the extent he included principal and interest in the amended judgment amounts, he did so not based on a misunderstanding of the law regarding the merger of a mortgage agreement into a final foreclosure judgment. Instead, he based that inclusion on equitable considerations unique to this case, in which he found defendants had acted in bad faith. On this record, we perceive no abuse of discretion [*20] in the decision granting plaintiff's motion for reconsideration and denying defendants' cross-motion.

Defendants fault the judge for granting plaintiff's reconsideration motion when plaintiff allegedly had acted in bad faith by, among other things, failing to provide defendants with a payoff figure. That argument is without merit. In his February 12, 2021 decision, the judge found defendants, not plaintiff, had acted in bad faith. Defendants did not ask the judge to compel plaintiff to provide a payoff figure in any of the motions they filed with the court. And, based on the record evidence, the last time defendants asked for a payoff figure was January 4, 2021, which was more than two months before the redemption period ended with the sheriff's delivery of the deed on March 17, 2021.

In an argument that directly contradicts their assertion they did not know the payoff amount because plaintiff wrongfully refused to disclose it, defendants contend

that during the April 30, 2021 argument, the parties reached a settlement, which the judge effectively vacated when he granted plaintiff's reconsideration motion. We decline to consider that argument, which defendants admittedly raised for the [*21] first time on appeal. See [J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 \(2021\), 252 A.3d 1052](#) (explaining why appellate courts decline to consider arguments that were not presented to the trial court).

Affirmed.

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