Genid v. J.P. Morgan Chase & Co.

Superior Court of New Jersey, Appellate Division

May 2, 2016, Submitted; December 12, 2016, Decided

DOCKET NO. A-2570-14T2

Reporter
2016 N.J. Super. Unpub. LEXIS 2636 *; 2016 WL 7190033

YOUSSEF GENID AND LINDA GENID, Husband and Wife, and their heirs, devisees, personal representatives, heirs or any of their successors in right, title or interest, Plaintiffs-Appellants, v. J.P. MORGAN CHASE & COMPANY, J.P. MORGAN CHASE BANK, N.A. d/b/a CHASE, Defendants-Respondents, and SETERUS, INC., Defendant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1192-14.

Core Terms

foreclosure action, counterclaims, germane, entire controversy doctrine, foreclosure, plaintiffs', modification

Counsel: Joseph A. Chang & Associates, LLC, attorneys for appellants (Joseph A. Chang, of counsel; Jeffrey Zajac, on the brief).

Parker Ibrahim & Berg, LLC, attorneys for respondents (John M. Falzone and Fred W. Hoensch, on the brief).

Judges: Before Judges Nugent and Higbee. The opinion of the court was delivered by HIGBEE, J.A.D.

Opinion by: HIGBEE

Opinion

The opinion of the court was delivered by

HIGBEE, J.A.D.

Plaintiffs, Youssef and Linda Genid, appeal from both the Law Division's November 13, 2015 order dismissing their complaint for failing to state a claim upon which relief can be granted and January 29, 2015 order denying reconsideration. The case was dismissed on a *Rule 4:6-2(e)* motion by defendant, J.P. Morgan Chase & Company (Chase Bank), who argued that plaintiffs' claims under the New Jersey Consumer Fraud Act (CFA) were barred by the entire controversy doctrine as set forth in *Rule 4:30A*.

On appeal, plaintiffs argue the judge erred in finding their claim was "germane" to the prior foreclosure action and plaintiffs were therefore precluded from bringing the instant CFA action. We have considered this argument in light of the record and applicable **[*2]** legal standards and reverse.

We discern the facts from the motion record. On March 15, 2007, plaintiffs executed a note to secure $367,900 with respect to a property in Barnegat, New Jersey. Defendant acquired the note from the original holder the following year. On November 18, 2009, defendant filed a foreclosure complaint alleging that Mr. Genid defaulted on August 1, 2009. Mr. Genid never responded to this complaint, and Chase Bank took no further action for several years.

Plaintiffs allege they contacted defendant about the possibility of refinancing when they began experiencing difficulty making loan payments in 2011. Plaintiffs claim defendant informed them no loan modification programs could be offered until a borrower was late on a payment. Plaintiffs further allege they relied on this advice and purposefully defaulted on the loan soon after. Plaintiffs claim that although they dutifully complied with all of defendant's subsequent requests for information for

refinancing, they were repeatedly told their application was deficient in some way. In June 2013, defendant ultimately denied plaintiffs' loan modification application.

On February 4, 2014, final judgment was entered by default **[*3]** in favor of Chase Bank in the 2009 foreclosure matter. More than a year later, on July 9, 2015, Mr. Genid moved to vacate the final foreclosure judgment. In support of his motion, Mr. Genid argued defective service prevented him from becoming aware of the foreclosure action until 2014, when he received notice that a sheriff's sale of the mortgaged property had been scheduled. The motion was denied; on appeal, we affirmed the motion judge's conclusion that Mr. Genid had not rebutted the presumption of proper service established by Chase Bank. *JP Morgan Chase Bank, N.A. v. Genid, No. A-1230-14T2, 2015 N.J. Super. Unpub. LEXIS 2980, *8 (App. Div. Dec. 22, 2015)*.

Plaintiffs initiated the instant case in the Law Division on or about April 28, 2014, several months prior to Mr. Genid's filing a motion to vacate the foreclosure judgment. In this complaint, plaintiffs allege defendant violated the CFA by failing to properly review their application for a loan modification. Defendant filed a motion to dismiss plaintiffs' complaint pursuant to *Rule 4:6-2(e)*. After oral argument, the motion judge granted defendant's motion and dismissed plaintiffs' complaint on November 13, 2014. Plaintiffs' subsequent motion for reconsideration was denied by **[*4]** the motion judge on January 29, 2015. Written opinions accompanied both decisions.

We exercise plenary review of a trial court's grant of a motion to dismiss a complaint under *Rule 4:6-2(e)* by evaluating the motion under the same standards used by the trial court. *Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186, 912 A.2d 168 (App. Div. 2006)*. Accordingly, we must determine if after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff" the plaintiff is, nonetheless, not entitled to relief at law. *Ibid.* "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)* (citations omitted).

Before we can determine if dismissal was erroneous under *Rule 4:6-2(e)*, we turn to the threshold issue. Specifically, the question before us is whether plaintiffs are precluded from bringing a CFA claim related to the 2009 foreclosure in a separate action if they failed to raise it in a counterclaim in the prior action.

Plaintiffs assert the motion judge erred in three ways when dismissing this case. Of the three arguments, two do not warrant substantial discussion. Plaintiffs first argue their claim should not have been precluded because the cause of action **[*5]** had not accrued at the time the foreclosure complaint was filed. We do not address this argument because it was not raised prior to appeal. *See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973)*.

Plaintiffs also argue their CFA claim, based on defendant's allegedly improper denial of their loan modification application, should not be precluded by the federal Home Affordable Modification Program (HAMP), a program created by the Emergency Economic Stabilization Act, *12 U.S.C.A. §§ 5201-5261 (2008)*. This is a response to defendant's contention during oral argument that plaintiffs' claim is merely a HAMP claim repackaged as a CFA claim. Indeed, although HAMP does not provide borrowers a private right of action, we have held it does not bar all State law claims. *Miller v. Bank of Am. Home Loan Servicing, L.P., 439 N.J. Super. 540, 547, 110 A.3d 137 (App. Div.)*, *certif. denied*, *221 N.J. 567, 115 A.3d 834 (2015)*. Moreover, the trial judge did not rely on this theory of claim preclusion in either of his written decisions.

Finally, plaintiffs argue the motion judge erred by finding the CFA claim was "germane" to the foreclosure action, and therefore barred by the entire controversy doctrine. We conclude that regardless of the judge's finding that a CFA claim is "germane," it was error to categorically conclude the entire controversy doctrine bars the claim without further analysis.

Rule 4:30A codifies **[*6]** the entire controversy doctrine as it applies to all types of actions but contains an exception limited to foreclosure actions. It provides: "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by *R. 4:64-5* (foreclosure actions)[.]" Thus, it is clear *Rule 4:64-5* controls in foreclosure actions. The purpose of this equitable doctrine of entire controversy is "to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness." *Aetna Ins. Co. v. Gilchrist Bros. Inc., 85 N.J. 550, 556, 428 A.2d 1254 (1981)* (quoting *Barres v. Holt, Rinehart and Winston, Inc., 74 N.J. 461,*

465, 378 A.2d 1148 (1977) (Schreiber, J., dissenting)).

Rule 4:64-5 however modifies the scope of the entire controversy doctrine in foreclosure cases:

> Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Non-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees. A defendant who chooses to contest the validity, priority or amount of any alleged prior encumbrance shall do so **[*7]** by filing a cross-claim against that encumbrancer . . ..

On its face, *Rule 4:64-5* establishes two categories of counterclaims that may arise in a foreclosure action. First, the rule explains that "non-germane" claims cannot be brought as counterclaims in the foreclosure action, and thus they must be exempt from preclusion under the entire controversy doctrine. For example, because a claim for unpaid rent is non-germane to a foreclosure action, it cannot be joined as a counterclaim in that same foreclosure action; naturally, a later suit for rent would not be barred by the entire controversy doctrine. *Luppino v. Mizrahi, 326 N.J. Super. 182, 184-85, 740 A.2d 1111 (App. Div. 1999)*.

Plaintiffs first argue the entire controversy doctrine does not affect the instant CFA claim because it was non-germane to the foreclosure case. Both parties acknowledge that there is no published case on point that squarely decides whether a CFA claim is germane to a foreclosure action for *Rule 4:64-5* purposes. To determine which types of claims are germane, "a liberal rather than a narrow approach" should be used. *Leisure Tech.-Ne. Inc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 358, 349 A.2d 96 (App. Div. 1975)*. Despite explicitly being a rule of limitation, *Rule 4:64-5* has been interpreted broadly enough to permit foreclosure defendants to raise defenses to the foreclosure action. *See Sun NFL Ltd. P'ship v. Sasso, 313 N.J. Super. 546, 550-51, 713 A.2d 538 (App. Div. 1998)*.

We agree with the motion **[*8]** judge to the extent he found plaintiffs' CFA claim to be germane to the foreclosure action. However, we find his ultimate conclusions to be in error. As explained above, *Rule 4:64-5* establishes two categories of counterclaims in foreclosure actions. The second category, "germane" counterclaims, are merely a species of permissive counterclaims. *Rule 4:64-5* ("Only germane counterclaims . . . *may* be pleaded in foreclosure actions without leave of court.") (emphasis added). After determining that plaintiffs' CFA claim was germane to the foreclosure action, the trial judge made a categorical determination that the CFA claim must therefore have been brought in the foreclosure action: "Plaintiffs' claim is germane to the previous foreclosure action and was therefore properly precluded by New Jersey's Entire Controversy Doctrine. . . . Plaintiffs' desired relief must be found, if at all, in their pending appeal of the denial of their motion to vacate."[1] The motion judge's reasoning for dismissing plaintiff's claim on a *Rule 4:6-2(e)* motion rested entirely on finding that a CFA claim was barred under the entire controversy doctrine because it was "germane" to the foreclosure action and therefore could have been brought as a counterclaim. **[*9]**

We acknowledge that we have previously stated the "failure to raise the defenses and counterclaims in the foreclosure action very well [may bar] assertion of those claims and defenses in a subsequent action" in the foreclosure context. *Sasso, supra, 313 N.J. Super. at 551* (citing *Joan Ryno, Inc. v. First Nat'l Bank of S. Jersey, 208 N.J. Super. 562, 506 A.2d 762 (App. Div. 1986)*. However, defendants' reliance on *Joan Ryno* is misplaced. *Joan Ryno* involved a foreclosure action followed by a Law Division action in which the foreclosure defendant alleged the plaintiff bank improperly refused to honor a mortgage commitment. *208 N.J. Super. at 566-67*. In that case, the trial judge invoked the single controversy doctrine[2] to bar the introduction of evidence of damages incurred during foreclosure. *Id. at 567*. We held that by barring only some of the damage claims the trial judge defeated the purpose of the entire controversy doctrine. *Id. at 571*. In so holding, we relied on *Hadley v. Baxendale*, 9 *Ex.* 341, 156 *Eng.Rep.* 145 (1854), and its progeny to bar recovery where damages are too remotely connected to the breach. *Joan Ryno, supra, 208 N.J. Super. at 571*.

More importantly, the weight of *Joan Ryno* is further diminished considering the portion of *Rule 4:64-5* regarding claim joinder in foreclosure actions was not adopted until September 1992, more than five years after the *Joan Ryno* decision. While *Sasso* itself was decided after this **[*10]** date, this case merely quotes

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[1] The appeal mentioned by the judge refers to *Genid, supra, No. A-1230-14*. This appeal was denied.

[2] In *Joan Ryno*, we refer to the "single controversy doctrine"; both names refer to the same doctrine. *208 N.J. Super. at 570, n. 3*.

Joan Ryno in dicta without reference to the applicable rule.

Beyond this, the parties do not cite any reported cases in which the entire controversy doctrine and *Rule 4:64-5* were used to preclude a foreclosure defendant from bringing an arguably germane counterclaim in a separate suit at a later time. Further, the plain language of *Rule 4:64-5* unambiguously establishes counterclaims brought in foreclosures actions must be germane, but that they remain permissive. Nothing in *Rule 4:64-5* mandates all germane counterclaims must be brought in the foreclosure action.

The abundance of foreclosure actions has resulted in substantial delays in the resolution of these actions. We conclude that requiring every possible germane counterclaim be raised as part of foreclosure actions is not consistent with the entire controversy doctrine's purpose. In foreclosure actions some litigants may be tempted to file counterclaims only to delay the loss of a property, where they reside at no cost, because they have defaulted on their payments, sometimes for years. In addition, attorneys may feel compelled to raise every possible counterclaim in the foreclosure action to avoid malpractice claims. Requiring a party **[*11]** to raise all possible germane counterclaims would further bog down the foreclosure process in a manner inconsistent with both the text of *Rule 4:64-5* and the entire controversy doctrine. *Rule 4:64-5* limits the issues that may be litigated within the foreclosure action, and does not require that all germane claims must be raised during the foreclosure action. It was therefore error for the motion judge to categorically conclude the entire controversy doctrine barred plaintiffs' claim merely because it was a germane counterclaim. As such, we conclude the order dismissing plaintiff's complaint must be reversed.

Reversed.

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