

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4643-10T3

WELLS FARGO BANK, NA dba  
AMERICA'S SERVICING COMPANY,

Plaintiff-Respondent,

v.

SANDRA CRESPO,

Defendant-Appellant.

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Submitted: February 8, 2012 - Decided: April 11, 2012

Before Judges Axelrad and Ostrer.

On appeal from the Superior Court of New  
Jersey, Chancery Division, Bergen County,  
Docket No. F-042822-10.

Sandra Crespo, appellant pro se.

Shimberg & Friel, PC, attorneys for  
respondent (Kevin B. Golden, on the brief).

PER CURIAM

In this mortgage foreclosure case, defendant Sandra Crespo appeals from an order of April 15, 2011, granting the motion of plaintiff, Wells Fargo Bank, NA, dba America's Servicing Company (Wells Fargo), for summary judgment striking defendant's answer and dismissing her counterclaims, and order of May 13, 2011, denying defendant's motion to vacate plaintiff's motion for

summary judgment. Defendant argues there were genuine issues of material fact regarding standing, plaintiff failed to authenticate its documents, and she generally presented sufficient factual and legal bases to withstand summary judgment on her counterclaims. We affirm in part and reverse in part.

On August 2, 2005, defendant borrowed \$264,000 from Credit Suisse First Boston Financial Corporation (Credit Suisse) to purchase a residential property located in Ridgefield Park, secured by a note and purchase money mortgage to Credit Suisse.<sup>1</sup> The mortgage was recorded with the Bergen County Clerk on December 8, 2005. On March 1, 2010, defendant defaulted on the loan.

On August 23, 2010, MERS as nominee for Credit Suisse assigned the mortgage and underlying obligation to plaintiff. The assignment was recorded by the Bergen County Clerk on September 13, 2010.

On September 2, 2010, plaintiff filed a foreclosure complaint against defendant. Plaintiff recited the aforementioned history. Defendant was served with the complaint in October.

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<sup>1</sup> The mortgage listed Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for Credit Suisse and its successors and assigns.

In December 2010, defendant filed an answer and asserted the affirmative defenses of lack of personal jurisdiction due to failure to properly serve process (first), failure to state a cause of action (second), lack of subject matter jurisdiction (third), lack of standing (fourth), statute of limitations bar (fifth), failure to join a necessary party (sixth), and failure to mitigate damages (seventh). She also asserted counterclaims alleging violations of the Truth in Lending Act, Home Ownership Equity Protection Act, Real Estate Settlement Procedures Act and Deceptive Practices Act.

In March 2011, plaintiff filed a motion for summary judgment to strike defendant's answer and dismiss her counterclaims. The motion was unopposed and granted on April 15, 2011. In the motion disposition sheet, the court found defendant was properly served and summarily rejected defendant's second, third, fifth, sixth and seventh affirmative defenses as a matter of law. The court also explained the legal basis for its grant of summary judgment in favor of plaintiff on each of defendant's counterclaims.

In addressing and rejecting defendant's standing defense, the court noted that plaintiff submitted a note containing an allonge endorsed in blank, a mortgage, and a Truth in Lending Disclosure Statement, all dated August 2, 2005 and signed by

defendant, an assignment of mortgage dated August 23, 2010, and a notice of intention to foreclose dated April 11, 2010. The court found the certification of plaintiff's counsel, to which the documents were attached, to be legally insufficient under Rule 1:6-6 because there was no indication he had "personal knowledge sufficient to certify [their] accuracy." However, the court was satisfied the documents were sufficiently authenticated by Erin A. Hirzel Roesch, a litigation specialist with plaintiff, who subsequently certified that she reviewed defendant's loan file. The court further noted Roesch's certification that America's Servicing Company, a division of plaintiff, was "still the holder and owner" of the subject note and mortgage, thereby finding plaintiff had standing to maintain the action.

A week later, defendant filed a motion to vacate the order, claiming she appeared at the courthouse on April 1 and told the clerk she intended to file opposition to plaintiff's motion, but was not advised of the deadline. According to defendant, when she appeared on April 20 to file opposition, she was told a decision had already been made. Defendant asserted the following three grounds for denial of plaintiff's motion: (1) lack of standing; (2) failure of plaintiff to present a prima facie case by presenting admissible evidence by a competent

witness; and (3) there were genuine issues of fact regarding her defenses.

As to standing, defendant argued plaintiff failed to present properly authenticated evidence that Credit Suisse authorized MERS to assign its mortgage to plaintiff. She noted the assignment of mortgage was executed by Judith T. Romano, "Assistant Secretary and Vice President" of MERS as Credit Suisse's nominee. Defendant expressed her belief that Romano was an attorney in the law firm representing plaintiff in the foreclosure and noted the absence of any resolution from MERS or Credit Suisse authorizing Romano to act on its behalf. Defendant additionally argued that plaintiff failed to present properly authenticated evidence that it acquired ownership or control of the note prior to the foreclosure complaint, i.e., it was the holder of the note or a nonholder in possession with rights of the holder under N.J.S.A. 12A:3-301 as we required in Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597-99 (App. Div. 2011). See also Bank of N.Y. v. Raftoqianis, 418 N.J. Super. 323, 327-32 (Ch. Div. 2010). Defendant emphasized that Roesch merely certified she "reviewed the loan file" and disclosed no source of knowledge, supporting details, or documentary evidence for her statement that America's Servicing Company acquired the note and mortgage from Credit Suisse in a

transaction dated December 5, 2005, or that America's Servicing Company was still the holder of the note and mortgage. Defendant noted the assignment of mortgage made no mention of the December 5, 2005 date, and Roesch's certification made no mention of the August 23, 2010 date reflected on the assignment of mortgage. Defendant also pointed out that the allonge to the note was undated and there was an illegible signature under the legend "PAY TO THE ORDER OF \_\_\_\_\_ WITHOUT RECOURSE" identified to represent "Lydian Data Services Its: Attorney-in-Fact for Credit Suisse []," raising other material issues of fact respecting the note. Defendant then questioned the discrepancy of charges on her Good Faith Estimate of Settlement Charges and Truth in Lending Disclosure Statement, and generally claimed there were violations on the face of the documents that would grant her the right to the counterclaims. Defendant also certified about the pending Home Affordable Modification Program (HAMP) application she had submitted to plaintiff.

Plaintiff's opposition primarily argued that defendant failed to comply with Rule 4:50-1 entitling her to vacate the judgment. As explained in its motion disposition sheet, the court found sufficient excusable neglect to examine the substantive merits of defendant's opposition, but by order of May 13, 2011, denied defendant's request to vacate the summary

judgment dismissal. The court incorporated its prior findings. It additionally found that in weighing Roesch's certification and documents against defendant's lack of a claim "that some other lender was making a competing demand for payment" and her acknowledgement that she was dealing with plaintiff in attempting to obtain a loan modification, "defendant's arguments and lack of evidential support pale in comparison to the documentary evidence submitted by plaintiff to support the fact that it has standing in this matter." The court further noted that defendant did not dispute that she was in default of the loan, and her defenses appeared to relate to charges at the time of closing in July 2005, which were barred by the statute of limitations. This appeal ensued.

On appeal, defendant renews her arguments regarding the genuine issues of material fact regarding standing, emphasizing Roesch's lack of personal knowledge of the facts and plaintiff's lack of authentication of the documents. Defendant repeats her general allegations that there were genuine issues of fact respecting her counterclaims and explanation respecting the estimate and settlement charges, referencing, for the first time, the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20.

Plaintiff counters that Roesch had sufficient personal knowledge to satisfy Rule 1:6-6 because she reviewed defendant's

loan file. See Claypotch v. Heller, 360 N.J. Super. 472, 488-89 (App. Div. 2003). According to plaintiff, Roesch's certification authenticates the note and mortgage, establishes plaintiff acquired the note and mortgage in December 2005, and because the endorsement in blank permits the note to be transferred and negotiated by delivery alone to a bearer, Raftogianis, supra, 418 N.J. Super. at 336, plaintiff demonstrated it was the holder of the note and mortgage. Plaintiff further asserts that although the Uniform Commercial Code does not require a corporate resolution or other documents to prove standing, if defendant had opposed plaintiff's motion for summary judgment, plaintiff would have produced documentation authorizing Romano to execute the assignment and power-of-attorney or similar documentation respecting the endorsement on the note. Plaintiff additionally addresses the legal bases supporting the court's dismissal of defendant's separate defenses and counterclaims.

We commend the court's willingness to accept defendant's inadvertent failure to timely respond to the summary judgment motion and consider her opposition on the merits. Based on our review of defendant's arguments in the context of the record and applicable law, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), we are satisfied summary judgment was



appropriate and the court correctly ruled that defendant's separate defenses, with the exclusion of standing, and her counterclaims, were legally without merit. Accordingly, we affirm those aspects of the orders under appeal striking defendant's first, second, third, fifth, sixth, and seventh affirmative defenses, and the four counterclaims. As defendant did not plead violations of the Consumer Fraud Act as a counterclaim, we will not consider that issue on appeal. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (holding that appellate courts will decline to consider issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions involve the trial court's jurisdiction or concern matters of great public interest).

We reverse and remand, however, with respect to the issue of standing. We are not persuaded the documents relied upon by plaintiff to establish its status as a holder were properly authenticated. Roesch's certification is woefully deficient. First of all, she does not even certify that the attached documents are "true copies." Moreover, Roesch provides no indication how she obtained the alleged knowledge that America's Servicing Company acquired defendant's note and mortgage from Credit Suisse "in a transaction dated December 5, 2005," and she

provides no specifics or supporting documentation. If that information were contained in defendant's loan file, it should not have been omitted from the foreclosure complaint. Moreover, no explanation is provided as to why the assignment of mortgage is dated August 23, 2010 and contains no reference to the earlier date. Finally, Roesch does not explain how her review of defendant's loan file provides her sufficient information to conclude that "America's Servicing Company is still the holder and owner of the subject note and mortgage."

Although plaintiff may not be required to produce all of the documentation referenced by defendant in her opposition to summary judgment, it still must present sufficient competent evidence to establish standing to pursue this foreclosure action to be granted summary judgment as a matter of law. Plaintiff's flip response that it would have provided explanations or supporting documentation if defendant had filed opposition to the summary judgment motion is unacceptable.

This is not a situation where defendant failed to respond to the complaint and on the eve of sheriff's sale moved to vacate default, challenging plaintiff's standing and demanding production of documents. Rather, defendant filed an answer to the complaint promptly raising legitimate questions of fact regarding whether plaintiff established that it acquired

ownership or control of the note from Credit Suisse as a matter of law to maintain the foreclosure action. Because plaintiff failed to submit facts and documentation to meet its burden to establish the bona fides of the purported assignment to establish standing as a matter of law, summary judgment should not have been granted on this ground.

Accordingly, summary judgment in favor of plaintiff limited solely to defendant's fourth affirmative defense, i.e., lack of standing, is reversed and the case is remanded to the trial court for further proceedings in conformity with this opinion. We leave to the trial court's discretion the parameters of further discovery and exchange of documentation.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION