

BANKING ALERT

April 2022

New Jersey Appellate Division Affirms Trial Court Order Denying Appellant's Motion to Set Aside Sheriff's Sale

In *Fulton Bank, N.A. v. David Mermelstein*, Docket No. A-1986-2020 (N.J. App. Div. April 11, 2022), the New Jersey Appellate Division ruled in favor of plaintiff finding that: (1) the sheriff sale could not be set aside; and (2) there was no basis for an order barring plaintiff's assignee from pursuing recovery on the existing judgment against appellant.

On September 12, 2006, defendant David Mermelstein ("Defendant") executed a commercial loan agreement (the "Loan") with plaintiff Fulton Bank, N.A., as successor in interest by merger to Premier Bank ("Fulton Bank"). Defendant had planned to use the Loan to finance a housing development on real property located in Egg Harbor Township (the "Property"). Defendant pledged the Property as collateral for the Loan. The loan documents, including the mortgage on the Property, were signed in Pennsylvania.

Thereafter, on October 1, 2010, Defendant defaulted on the Loan and Fulton Bank obtained a \$999,657.78 judgment by confession against Defendant in Pennsylvania on February 3, 2011. Fulton Bank then filed a complaint for foreclosure in Atlantic County upon the mortgage it held on the Property in an effort to collect the judgment. Default was later entered after Defendant failed to file an answer in the foreclosure action, and the court entered a final judgment of foreclosure in Fulton Bank's favor in March 2013.

Prior to the sheriff's sale, Fulton Bank assigned its interest in the judgments it held against Defendant to Autumn Lane Associates, LLC ("Autumn Lane"). Fulton Bank filed a motion to substitute Autumn Lane in the foreclosure action, but the court denied this request. Notwithstanding, on May 29, 2014, the property was sold to Autumn Lane at the sheriff's sale.

Defendant later filed a petition in Pennsylvania seeking an order marking the judgment of confession satisfied and discharged, but the Court of Common Pleas of Montgomery County denied Defendant's request and entered a deficiency judgment against Defendant. Defendant filed an appeal in the Pennsylvania Superior Court, and on June 30, 2020, the Pennsylvania Superior Court reversed the Court of Common Pleas' decision and vacated the deficiency judgment after finding that the Court of Common Pleas did not have authority to determine the market value of the Property or whether a deficiency existed.

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On December 28, 2020, Defendant filed a motion in the Atlantic County foreclosure action seeking to set aside the May 29, 2014 sheriff's sale. Defendant argued that Fulton Bank had assigned its interests to Autumn Lane prior to the sale, and, therefore, the sale should not have proceeded. Defendant argued that, as a result, Autumn Lane should be barred from attempting to collect on its judgment. The court held that Defendant's request to set aside the May 29, 2014 sheriff's sale was untimely pursuant to Rule 4:65-5 because he waited over six years to object to the sheriff's sale. In addition, the court found that there was no basis for an order barring Autumn Lane from pursuing recovery on its existing judgment against Defendant.

On appeal, Defendant repeated the same contentions raised in the foreclosure action. In considering Defendant's arguments and review of the record, the Appellate Division held that Defendant's arguments were without sufficient merit to warrant discussion in a written opinion. However, the Appellate Division highlighted that a motion to vacate a sheriff's sale is governed by Rule 4:65-5, which states that any objection to the sale must be served within ten days following the sale or before delivery of the deed, whichever is later. However, here, Defendant waited over six years to file a motion seeking to void the May 29, 2014 sheriff's sale. Hence, because the sheriff's sale could not be voided, the Appellate Division found that there were also no grounds for barring Autumn Lane from attempting to recover on its judgment. Finally, the Appellate Division noted that Autumn Lane was permitted to attempt to collect on its judgment even though it foreclosed on the property as this was a commercial foreclosure matter.

New Jersey Appellate Division Reinstates Final Judgment of Foreclosure Despite Defendant's Claim It Was Not Served With Foreclosure Complaint

In *TDJP Properties, LLC v. Adar Aleph, LLC, et al.*, Docket No. A-1198-20 (N.J. App. Div. April 13, 2022) the Appellate Division reversed an order that vacated a judgment of foreclosure by default. The Appellate Division further reinstated the judgment of foreclosure despite the defendant's claims it did not receive notice of the foreclosure.

Defendant Adar Aleph, LLC ("Defendant") owned property in Barnegat, New Jersey, which it used to secure a \$123,000 purchase money mortgage from co-defendant Ditmas Park Capital L.P. ("Ditmas"). Defendant subsequently defaulted on its loan payments and failed to pay several property tax installments. As a result, the Barnegat tax collector sold a tax sale certificate to a buyer who later assigned the certificate to plaintiff TDJP Properties, LLC ("Plaintiff"). Plaintiff initiated a foreclosure action and, after Defendant failed to answer the complaint, default was entered. Defendant failed to redeem the property and judgment of foreclosure was entered.

Defendant subsequently moved to vacate the judgment pursuant to Rule 4:50-1, arguing that it never received service of the foreclosure summons and complaint. Plaintiff vigorously opposed the motion and argued that Defendant received service and, even if Defendant did not receive service, it was due to Defendant's deliberate attempt to avoid service. Specifically, Plaintiff argued Defendant changed its registered agent after receiving notice of the intent to foreclose and improperly appointed an out-of-state registered agent in order to avoid service. The trial court granted Defendant's motion to vacate based on improper service but made no finding on the record to support its order. Plaintiff subsequently moved for reconsideration.

Upon reconsideration, the trial court found that Defendant changed its registered agent after receiving Plaintiff's notice of intent to foreclose and that service of the complaint was "effective." However, the trial court found that Defendant's certification that it never received notice of the complaint was sufficient to show excusable neglect, and that Defendant had a meritorious defense in that it expressed a willingness to satisfy the entire tax sale certificate amount. Accordingly, the trial court denied Plaintiff's motion for reconsideration and upheld the vacation of the foreclosure judgment.

Plaintiff appealed the trial court's denial of reconsideration. In reviewing the trial court's decision for an abuse of discretion, the Appellate Division focused on whether Defendant met its burden of showing excusable neglect and a meritorious defense warranting relief under Rule 4:50-1. The Appellate Division ruled that Defendant's certification stating that it never received notice of the foreclosure, without anything more, was insufficient to establish excusable neglect. The Appellate Division further held that there was nothing in the record to support "exceptional circumstances" that would warrant a vacation of judgment under Rule 4:50-1. The Appellate Court ruled that the trial court mistakenly exercised its discretion in vacating the foreclosure judgment. Accordingly, the final judgment of foreclosure was reinstated and the order denying reconsideration was rendered moot.

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