NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3650-13T2

MARCIA SLACK,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A.,
and FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

Defendants-Respondents.

Submitted June 2, 2015 – Decided June 24, 2015

Before Judges Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2650-13.

Barbour & Associates, L.L.C., attorneys for appellant (Roger A. Barbour, on the brief).

Reed Smith L.L.P., attorneys for respondents (Henry F. Reichner, of counsel and on the brief; Molly Q. Campbell, on the brief).

PER CURIAM

Plaintiff Marcia Slack appeals from a February 4, 2014 Law Division order dismissing her complaint with prejudice, and the related March 31, 2014 order denying reconsideration. We reverse and remand.

I.

Plaintiff filed this action on November 1, 2013. Plaintiff's complaint included: four counts of fraud under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 ("CFA"); one count of common-law fraud; one count of negligence; and one count under the Fair Debt Collection Practices Act, 15 U.S.C.A. §§1692 to -1692o ("FDCPA"). In lieu of an answer, defendants Wells Fargo Bank, N.A. ("Wells Fargo") and Federal National Mortgage ("Fannie Mae") moved to dismiss for "failure to state a claim upon which relief can be granted[.]" R. 4:6-2(e).

We derive the following facts from the motion record, which extends well beyond the four corners of plaintiff's complaint. Plaintiff's mother died intestate in January 1992. Plaintiff was appointed as administratrix of her mother's estate. In that capacity, on April 20, 1992, plaintiff transferred title to her mother's home (the "Property") in Maple Shade unto herself and her brother, Eugene Slack ("Eugene"), as joint tenants with rights of survivorship.

On October 26, 2006, Eugene opened a $100,000 line of credit at Wells Fargo, secured by a mortgage (the "Mortgage") on the Property. The parties dispute whether plaintiff was aware of the loan. Only Eugene signed the Mortgage on October 26, 2006. However, when the Mortgage was eventually recorded on

January 16, 2007, it included a separate "individual acknowledgment" page dated December 11, 2006, containing what purports to be plaintiff's notarized signature. Plaintiff asserts that her signature is a forgery. Eugene died, the loan went into default, and Wells Fargo sought to collect from plaintiff.

On September 27, 2012, plaintiff filed a verified complaint and order to show cause in the Chancery Division seeking to have Eugene's estate declared insolvent and to have herself declared "the sole owner" of the Property. The case was captioned "IN THE MATTER OF EUGENE SLACK, Deceased." Specifically, the second count of the complaint sought to "quiet title" to the Property and have "[a]ll claims against the property . . . removed," based upon plaintiff's allegations that she "had no knowledge of the legal obligations that [Eugene] incurred against the property[,]" and that "Wells Fargo [had not sought] [p]laintiff's consent . . . to encumber [her] interests in the property[.]" Notably, plaintiff's complaint did not name any defendants, and neither identified any particular mortgages nor included a request that any such mortgages be extinguished or

stricken from the public record. Plaintiff did provide Eugene's creditors with notice of the proceeding.[1]

Plaintiff alone appeared for oral argument on August 22, 2013. The Chancery Division found that Wells Fargo had a "credit card or an equity line against [Eugene's] estate in the amount of $77,206[.]" However, the court found that "when [Eugene] passed away, the debts passed away[,]" and "no longer attach[ed] to the real estate." Therefore, the Property became plaintiff's, "free of any obligations which [Eugene] may have created." Even though Wells Fargo was not a named defendant, the court entered default, nunc pro tunc, "against the defendant . . . Wells Fargo . . . on the mortgage that they [had]."

The Chancery Division memorialized its decision in an order dated August 30, 2013, entering default against "all [d]efendants," and finding that Eugene's estate was insolvent and that plaintiff was "the sole owner, in fee," of the Property.

By letter dated October 23, 2013, Fannie Mae informed plaintiff that, in connection with the Wells Fargo account, Fannie Mae was the creditor of a $41,255.70 lien on the

[1] Wells Fargo previously filed a proof of claim in relation to a separate credit-card debt, in April 2012, but then unexplainably withdrew the claim in February 2013.

Property.[2] Plaintiff disclaimed the debt, referencing the August 30, 2013 order. According to plaintiff's complaint, Fannie Mae responded by notifying plaintiff of its intent to foreclose on the Property.

The Law Division heard oral argument on defendants' motion to dismiss on February 4, 2014. Plaintiff failed to appear, and the court dismissed her complaint with prejudice. Plaintiff moved for reconsideration, and on March 28, 2014, the court allowed plaintiff to argue the underlying motion on its merits. Nevertheless, the court upheld its original ruling, and denied plaintiff's motion for reconsideration. The court indicated, contrary to plaintiff's complaint and the language of the Chancery Division's oral opinion, that the Chancery Division order had not discharged the Mortgage. The court also stated that, under In re Estate of Zahn, 305 N.J. Super. 260 (App. Div. 1997), the Mortgage survived Eugene's death, and dismissed plaintiff's complaint with prejudice without giving her an opportunity to amend.

On appeal, plaintiff argues that: (1) the trial court erred in dismissing her claims; (2) the Mortgage is null, void, and of

[2] Although not included in the record, it appears that Wells Fargo assigned the Mortgage to Fannie Mae.

no effect as a matter of res judicata; and (3) plaintiff is not liable for the debt and Mortgage at issue.

II.

We review de novo Rule 4:6-2(e) motions to dismiss for failure to state a claim. Rezem Family Assocs. L.P. v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.), certif. denied, 208 N.J. 366 (2011). We consider only "'the legal sufficiency of the facts alleged on the face of the complaint[.]'" Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)).

The issue is simply "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). We "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown, supra, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

Rule 4:6-2(e) dismissals "should ordinarily be without prejudice and . . . plaintiffs generally should be permitted to file an amended complaint . . . ." Nostrame, supra, 213 N.J. at

128; accord Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). Dismissal with prejudice should be limited to situations where the plaintiff's complaint cannot be amended to state a proper claim. See Nostrame, supra, 213 N.J. at 128 (affirming dismissal with prejudice where "plaintiff conceded that he had no further facts to plead").

If a Rule 4:6-2(e) motion includes material outside of the complaint, the trial court should convert it into a Rule 4:46 motion for summary judgment. Pressler & Verniero, Current N.J. Court Rules, comment 4.1.2 on R. 4:6-2 (2015); see also Roa v. Roa, 200 N.J. 555, 562 (2010). To the extent the motion is "based upon evidence, including certifications, outside of the pleadings . . . [w]e . . . view the record in a light most favorable to the non-moving party, which is the standard applicable to summary judgment." Roa, supra, 200 N.J. at 562.

From our review, we are satisfied that the motion court considered documents well beyond the four corners of plaintiff's complaint in deciding the motion. Because the court did not convert the motion into a Rule 4:46 motion for summary judgment and apply the appropriate standard, we are constrained to reverse and remand.

Granting summary judgment at this stage of the proceeding was premature. Generally, summary judgment is inappropriate

prior to the completion of discovery. Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). Moreover, the evidential materials before the court presented genuine issues of material fact, including whether the mortgage was signed by plaintiff or properly assigned to Fannie Mae.

Here, where defendants had not filed an answer, summary judgment was clearly premature. On remand, if defendants want to move pursuant to Rule 4:6-2(e), they may do so, but the court must limit its consideration to the legal sufficiency of the facts alleged on the face of the complaint.

We decline to address plaintiff's remaining arguments based upon the limited record before us.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.