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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1434-09T2

JYS INVESTMENTS, L.L.C.,

Plaintiff-Appellant,

v.

BILLY B. FISHER, ROSANNE FISHER, his wife, NEW CENTURY FINANCIAL SERVICES, EPSTEIN BIERNE, P.A., WCRSI INC., BOROUGH OF FRANKLIN LAKES, HOSPITAL & DOCTORS SERVICE BUREAU, and THE STATE OF NEW JERSEY,

Defendants,

and

CHASE BANK USA, N.A.,

Defendant-Respondent.

Argued October 6, 2010 - Decided June 22, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F-13420-08.

Daniel R. Bevere argued the cause for appellant (Piro, Zinna, Cifelli, Paris & Genitempo, attorneys; Mr. Bevere, of counsel and on the brief).

Derrick R. Freijomil argued the cause for respondent (Riker Danzig Scherer Hyland & Perretti, attorneys; Michael R. O'Donnell and

Mr. Freijomil, of counsel and on the brief;
Wendy Elsa Bozzolasco, on the brief.)

PER CURIAM

Plaintiff JYS Investments, L.L.C., filed this foreclosure action as a means of obtaining a judicial declaration that a mortgage issued by defendant Billy B. Fisher to plaintiff had priority over a mortgage issued by Fisher to defendant Chase Bank, U.S.A., N.A.

BBF Realty defaulted on a loan issued by plaintiff and secured by a mortgage on residential property owned by Fisher BBF's principal. To facilitate repayment, the parties entered into a forbearance agreement under which plaintiff agreed to discharge the residential mortgage, thus allowing Fisher to refinance the loan and apply the proceeds to the outstanding debt. Toward that end, plaintiff's counsel sent the original document discharging the Fisher mortgage to Gateway Title Insurance Company, which was acting as closing agent for the refinancing loan sought by Fisher.

When the refinance fell through, a representative of Gateway Title returned the discharge to plaintiff's counsel, unrecorded. Fisher thereafter used a copy of the discharge to secure a loan from defendant Chase Bank. Fisher did not use the proceeds of the loan from Chase to pay any part of his debt to plaintiff.

When plaintiff discovered the existence of the Chase loan, it filed a complaint for foreclosure against Fisher, arguing that under the terms of the forbearance agreement, the discharge was conditioned upon the initial refinancing through Gateway Title. Thus, plaintiff argues that because that refinancing did not occur, plaintiff's mortgage remained valid and had priority over the Chase mortgage.

After a two-day trial, in which most of the facts were stipulated by the parties, the Chancery Division, General Equity Part, held that the discharge executed by plaintiff and delivered to Gateway Title by plaintiff's counsel was unconditional, thereby making an unrecorded mortgage held in escrow by plaintiff's counsel pursuant to the forbearance agreement secondary and subordinate to the first lien mortgage issued by Fisher to Chase Bank. Plaintiff now appeals. We affirm.

I

On July 19, 2002, plaintiff issued a $1,800,000 loan to BBF in conjunction with a planned real estate venture. In exchange, BBF executed and delivered to plaintiff a mortgage note in which BBF agreed to repay the principal sum of $1,800,000 plus 12% interest per annum. Payment would be in monthly installments of $18,000, commencing on September 1, 2002, and continuing through

July 19, 2004, the date of final maturity of the note. A final payment of the principal and further sums as set forth in the note would become due on the date of maturity. As further security for BBF's obligations under the note, Fisher and his wife Rosanne executed and delivered to plaintiff a written personal guaranty for the full amount due under the note, as well as a mortgage secured by their residence in Franklin Lakes. The residential mortgage was recorded on August 2, 2002.[1]

BBF defaulted on the payments under the note. On July 19, 2005, JYS, BBF, and the Fishers executed a Note and Mortgage Modification Agreement and Reaffirmation of Guaranty which increased the principal amount of the note from $1,800,000 to $2,400,000, and decreased the annual interest from 12% to 9% per annum. Monthly payments in the amount of $20,140.71 would begin September 1, 2005, and continue through the new maturity date of July 19, 2015, when a final payment of all principal, interest, and other sums would be due. The original personal guaranty and residential mortgage were also amended to reflect

[1] In the interest of completeness, we note that at around the same time period, plaintiff also extended two separate loans totaling over $2,000,000 to Regency Car Wash & Quality Lube, LLC and BBF Bergenfield Realty, LLC, both of which are also owned by Fisher. The Regency and BBF Bergenfield loans were not, however, referenced or controlled by the terms of the note.

and secure the amounts indicated in the modification agreement. The modification agreement was recorded on August 31, 2005.

BBF again defaulted. In the fall of 2006, Fisher, Jesse Y. Sayegh (sole shareholder of JYS), and Brian Reid (the parties' mutual accountant), convened to discuss ways for Fisher to repay plaintiff. From these discussions the parties entered into a forbearance agreement through which plaintiff agreed to forbear foreclosing on the note and mortgage until November 15, 2007, provided that Fisher: (1) pay to JYS a lump sum of $300,000 to be applied against arrearages no later than two weeks following the execution of the forbearance agreement; (2) continue paying monthly principal and interest installments during the forbearance period; and (3) "diligently pursue all reasonable efforts to effect a refinance and full repayment . . . by no later than November 15, 2007."

The forbearance agreement also stated:

> Among the Collateral serving as security for the repayment of the BBF Indebtedness and the Regency Indebtedness is a mortgage in the original principal amount of $1,800,000 given by the Guarantors to the Lender on their principal residence located . . . [in] Franklin Lakes, New Jersey which mortgage . . . was modified and increased in principal amount to $2,400,000 by Note and Mortgage Modification Agreement and Reaffirmation of Guaranty . . . . The Guarantors have requested that the Lender terminate the Franklin Lakes Mortgage. The Lender has agreed to terminate the Franklin

> Lakes Mortgage provided the Guarantors execute and deliver to the Lender, in escrow, a new Franklin Lakes Mortgage . . . . Upon the occurrence of an Event of Default as set forth below, the Lender shall be automatically authorized to record the New Franklin Lakes Mortgage . . . whereupon the New Franklin Lakes Mortgage shall serve as security for the repayment of the BBF Indebtedness. (Emphasis added.)

Plaintiff retained attorney Kenneth Williams to draft the forbearance agreement. An initial draft of the agreement was independently reviewed by Fisher's counsel and the document was revised several times before reaching the final version that was executed by BBF and the Fishers on August 31, 2007, and by JYS on or about September 11, 2007. As called for in the agreement, the Fishers provided plaintiff with a mortgage, to be held by plaintiff in escrow and recorded only in the event of default.

By letter dated September 10, 2007, Williams sent a discharge of mortgage executed by plaintiff's representative to Gateway Title, the Fishers' closing agent. The cover letter accompanying the discharge, sent to the attention of Gateway title agent Stephanie Faillace, stated, in full:

> Re: JYS Investments, LLC to
> Billy B. and Rosanne Fisher
> Premises: Franklin Lakes, NJB&W Associates LLP to

> Dear Stephanie:
>
> We hereby transmit the original Discharge of Mortgage regarding the captioned matter which is to be delivered in connection with the refinance of the Fisher property located in Franklin Lakes, New Jersey.
>
> Very truly yours,
> E. Kenneth Williams, Jr.

The discharge, dated August 1, 2007, stated in relevant part:

> A certain Mortgage dated July 19, 2002, executed by and between Billy B. Fisher and Roseane [sic] Fisher, as mortgagor and JYS Investments, L.L.C., as mortgagee and recorded . . . on August 2, 2002 . . . was made to secure payment of a mortgage loan in the principal amount of $1,800,000. Said mortgage was modified to $2,400,000 by Note and Mortgage Modification Agreement and Reaffirmation of Guaranty dated July 19, 2005, and recorded on August 31, 2005 . . . .
>
> This Mortgage, as modified, has been SATISFIED. It may now be discharged or record. The Mortgage is now cancelled and void.

According to plaintiff, it expected Fisher to use this discharge to obtain a loan secured by a first lien mortgage on the Franklin Lakes residence. Fisher was then expected to use the proceeds from this loan to pay plaintiff the $300,000 lump sum payment due under the forbearance agreement. The loan, however, did not close as anticipated. Faillace returned the discharge to Williams via letter dated October 23, 2007.

Williams placed the unrecorded discharge of mortgage in plaintiff's file and took no further action at that time.

On November 15, 2007, BBF defaulted on the terms of the forbearance agreement by failing to make any monthly payments toward the principal and interest of the debt or pay the $300,000 lump sum. On that date, Williams notified the Fishers that they had defaulted on their obligation under the forbearance agreement, and plaintiff would proceed to foreclose under the residential mortgage and the terms of the forbearance agreement.

A short time thereafter, plaintiff discovered that Fisher's car wash business had been shut down by the State Division of Taxation for failure to pay sales taxes. On November 19, 2007, plaintiff's representative and Fisher met at Williams' law office to discuss the situation. Fisher expressed his wishes to continue to pursue refinancing options in order to pay the back taxes owed by the car wash and re-open the business. Toward that end, Fisher asked plaintiff's representative whether he would agree to allow Fisher to use the proceeds from a refinance to pay the tax arrears, rather than the $300,000 owed under the forbearance agreement. After consulting with Williams, plaintiff rejected this proposal and told Fisher that the only viable options were for BBF to turn over the real

property to plaintiff under the forbearance agreement or to declare bankruptcy.

On November 29, 2007, plaintiff discovered Fisher had re-opened the car wash business. The parties again met at Williams' law office to discuss this latest development. Fisher informed plaintiff that he had refinanced the Franklin Lakes property on November 21, 2007, and used the net proceeds to pay the business' back taxes. Fisher admitted he secured this loan from Chase Bank after he gave the lender a copy of the discharge of mortgage.

Fisher offered plaintiff $138,000, the balance remaining from the proceeds of the refinance, as partial satisfaction of his debt. Plaintiff refused this tender, arguing that the Chase loan and the mortgage securing it were subordinate to plaintiff's mortgage on the Franklin Lakes property because the original discharge document was returned to plaintiff's attorney on October 23, 2007, by Fisher's closing agent. Unable to reach an agreement, plaintiff filed a foreclosure action against Fisher, naming as defendants all individuals or entities having an interest in the Franklin Lakes property, including Chase Bank.

II

At the trial of plaintiff's foreclosure action, the General Equity judge decided to first focus on the legal significance of the delivery of the discharge document. Toward that end, plaintiff called attorney Williams as its first witness.

According to Williams, he first discussed the release of plaintiff's mortgage on the Franklin Lakes property with the parties' mutual accountant Reid. From these discussions, Williams drafted[2] the mortgage discharge in order to permit Fisher "to entice a mortgage lender to refinance [the Franklin Lakes] home." In response to the court's question, Williams conceded that, according to the Forbearance Agreement, the discharge "belonged to Mr. Fisher." Furthermore, although the discharge was sent to Gateway for the specific refinance it was working on, the discharge was not limited to that particular transaction and could have been lawfully used for any subsequent refinancing opportunity if the Gateway loan fell through.

Gateway title agent Faillace testified that she "thought the mortgage had been paid off when [she] received the discharge;" she was also "never given instruction to hold the discharge in escrow." Despite this, she did not record the

[2] Although the actual draft was prepared by a paralegal, this individual acted at all times under William's supervision as the attorney of record.

discharge because it was company policy to only record instruments upon closing to avoid the possibility of not being reimbursed the recording fees. In response to both the court's and counsel's questions, Faillace reaffirmed that she believed that the discharge was unconditional "on its face," because for a discharge to be conditional, Gateway would "have to have evidence that the condition had been met" before proceeding with a refinancing.

Sayegh was the third and final witness. His testimony reiterated the facts alleged in this suit. Chase moved to dismiss plaintiff's foreclosure action and for a judgment declaring its mortgage to be in a priority position to plaintiff's residential mortgage.

Against this evidence, the court found that the discharge of mortgage was unconditional and inured to Fisher's benefit at the time Williams delivered it to Fisher's agent, Gateway. In fact, the court noted that Williams originally intended to send the discharge directly to Fisher's attorney and changed his plans only when the attorney told him to send the discharge to Gateway. The court found that Fisher was free to record the discharge and seek to refinance the property under both the explicit terms of the discharge and the language of the Forbearance Agreement.

III

Plaintiff now appeals, arguing that the court erred in failing to find that the discharge was conditioned specifically upon that particular refinance closing through Gateway, and therefore the delivery was not absolute and unconditional as is required to effectively discharge the mortgage.

We disagree and affirm substantially for the reasons expressed by the court in its oral decision of July 22, 2009. As the court noted, despite receiving the original discharge back from Faillace after the Gateway refinancing fell through,

> Mr. Williams admitted that this discharge belonged to Mr. Fisher, in the sense that it was an unconditional discharge, that Mr. Fisher had met the conditions of the Forbearance Agreement to receive that discharge, which is that he had completed the mortgage to be kept in escrow, and everybody had signed off on the Forbearance Agreement. That was the only condition before the discharge of mortgage was to be prepared, and that had happened, and it was prepared and there were no strings attached to that discharge of mortgage.
>
> Mr. Williams chose to file that discharge of mortgage . . . . In any event, Mr. Williams did not reach out to Mr. Fisher, did not reach out to Mr. Fisher's attorney, did not reach out to anybody to say that this mortgage discharge had been returned to him. He just kept it.

In addition:

> [W]hen the Forbearance Agreement was signed, JYS knew . . . maybe would [sic] be better,

> that there was a risk that the discharge of mortgage would be used by Mr. Fisher to refinance the home and he would never pay them the $300,000 that he promised to pay, nor any other payment that he promised to pay, and . . . it was a rather large risk, because thus far [Fisher] had never completed any of his financial obligations.
>
> . . . .
>
> So JYS knew that Mr. Fisher could take the discharge of mortgage, refinance his home, realize hundreds of thousands of dollars and not turn it over to JYS. They knew that was a risk, and they went ahead with the Forbearance Agreement anyway. At the time that the Forbearance Agreement was signed and the discharge of mortgage was completed and signed and executed, that discharge of mortgage belonged to Mr. Fisher.
>
> Therefore, in my view, Mr. Fisher had the right to use it, and he did use it.
>
> . . . .
>
> [R]egardless whether or not people knew [the discharge] had been returned to Mr. Williams . . . the case law supports the proposition that that mortgage discharge was delivered to Mr. Fisher unconditionally and is therefore valid and that mortgage was discharged, and that's really the end of this scenario. I mean, once the mortgage is discharged, then JYS does not have a mortgage on that property, unless and until they put the new mortgage on, which they never did.

These findings are well-supported by the competent evidence and are thus binding upon this court. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484

(1974). The legal conclusion reached by the court is equally unassailable.

Finally, as a fallback position, plaintiff argues that the mortgage was not unconditionally discharged at the point of transmittal to Gateway because Fisher's failure to pay the $300,000 lump sum installment, and the entirety of the debt by November 15, 2007, constituted a material breach of the terms of the forbearance agreement. In support of this argument plaintiff cites Ingrassia Construction Co. v. Vernon Township Board of Education, 345 N.J. Super. 130, 136-37 (App. Div. 2001), in which we held that the material breach of a contract by one party excuses later performance by another party.

We reject this argument substantially for the same reasons expressed by the trial court. The discharge delivered by plaintiff to Gateway was unconditional on its face; there is nothing in the forbearance agreement that limits its effect upon delivery. If plaintiff's principal subjectively believed or expected a different outcome, that sentiment did not find its way into the documents controlling this transaction.

Affirmed.