

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1169-05T5

EFRAIN ROLON and MARIKSA
ROLON,

Plaintiffs-Appellants,

v.

LITTON LOAN SERVICING, LP,
AURORA LOAN SERVICES, INC.,
SIB MORTGAGE CORP.,

Defendants-Respondents,

and

COMPLETE TITLE, LLC,

Defendant.

Submitted November 8, 2006 - Decided December 21, 2006

Before Judges Lisa, Holston, Jr. and Grall.

On appeal from the Superior Court of New
Jersey, Chancery Division, Union County, C-
7-05.

Ludovico Aprigliano, attorney for appellants
(Mr. Aprigliano and Keith C. Northridge, on
the brief).

Powers Kirn, attorneys for respondent Litton
Loan Servicing, LP (Edward W. Kirn III, on
the brief).

Frank J. Martone, attorney for respondent Aurora Loan Services, Inc. (Janet Silver Rosen, on the brief).

Riker, Danzig, Scherer, Hyland & Perretti, attorneys for respondent SIB Mortgage Corp. (Michael P. O'Mullan, of counsel and on the brief; Joshua Pini, on the brief).

PER CURIAM

Plaintiffs, Efrain Rolon and his daughter, Marixsa Rolon, appeal from a summary judgment in favor of defendants dismissing their complaint. The dispute revolves around a \$171,000 mortgage loan from defendant SIB Mortgage Corp. to Efrain Rolon (plaintiff). Plaintiff signed the note and mortgage on April 26, 2002. The loan was payable over thirty years, with 9.5% interest, in equal monthly payments of principal and interest of \$1,437.86. The loan was secured by a first purchase money mortgage on plaintiff's home.

The other defendants, Aurora Loan Services, Inc. (Aurora) and Litton Loan Servicing, LP, are financial institutions that serviced this loan at various times. From the inception of the loan until about September 1, 2003, plaintiff failed to make many of the required monthly payments. The loan servicer was therefore required to make advances on plaintiff's behalf. The servicer prepared a mortgage foreclosure action.

Plaintiff and Aurora entered into a "Special Forbearance Agreement," dated June 24, 2003. The agreement recited that

plaintiff was in default. It provided that the mortgagee would forebear from prosecuting its anticipated foreclosure action if plaintiff paid all attorney's fees and costs, \$9,578.61, by July 3, 2003, and then made three additional payments of \$1,980.59 on or before the third day of each month commencing in August and continuing through October 3, 2003. These payments would be in addition to all payments regularly due on the mortgage. The agreement required that all payments be made in certified funds, with no grace periods, and provided that "time is of the essence."

The forbearance agreement did not provide for any forgiveness of the loan. It provided that in the event of default in making any required payments, all amounts then unpaid would be immediately due and payable and the mortgagee could immediately commence or continue its foreclosure action. The agreement provided that except as modified by the forbearance agreement, the loan documents were ratified and confirmed and remained in full force and effect.

The agreement further provided that if plaintiff complied with all obligations under the agreement, a subsequent work out plan would be made, by which there would be a modification agreement. The modification agreement would essentially add any remaining delinquency to the principal balance and recast the

loan to amortize that additional amount together with the balance of the debt.

The forbearance agreement required that plaintiff execute it and return it with the initial \$9,578.61 payment by July 3, 2003. The record contains a copy of the agreement bearing the signature of plaintiff and also the signature of his daughter, Marixsa C. Rolon, who apparently signed as his attorney in fact. Marixsa Rolon's signature is dated August 18, 2003. A check from plaintiff dated August 25, 2003 was submitted to Aurora with the signed forbearance agreement. It was credited to plaintiff's account on September 12, 2003.

According to plaintiff, the delay in making the initial payment was justified because of an oral modification to the agreement made by a representative of Aurora, Kevin Carradine. Due to an apparent illness of plaintiff, a delay was occasioned by the need for Marixsa Rolon to acquire power of attorney for her father. This was accomplished in July 2003, and plaintiff claims Carradine agreed to a delay in making the initial payment. Plaintiff claims there were further telephone conversations in which Carradine directed Marixsa Rolon to hold off on making the initial payment, which she was ready and willing to make, until he finally directed it be made in early September, which she promptly did. Plaintiff therefore reasons

that the agreement was orally modified and now required the three monthly installments to be made by the third day of each month beginning in October 2003.

Plaintiff made a payment on October 6, 2003. Even by plaintiff's reckoning, this payment was three days late. Further, it was for \$1,963.20, not \$1,980.59 as required by the agreement. Most significantly, it was not paid in certified funds, and the check was returned for insufficient funds. Plaintiff eventually replaced the check. Plaintiff made two additional payments, each in the incorrect amount of \$1,968.20, on November 4, 2003 and \$1,968 on December 10, 2003. These payments were not by certified check, and they were made beyond the third day of each respective month.

Defendants deemed plaintiff in default of the forbearance agreement. No work out plan or modification agreement was ever executed. Over the ensuing months, plaintiff failed to make monthly payments, and on other occasions checks were returned for insufficient funds.

On November 17, 2004, plaintiff transferred the property to his wife, Evelyn Rolon. He intended to pay off the mortgage balance from the proceeds of sale. The mortgagee submitted a pay off figure of \$196,000. The net proceeds of sale available to satisfy the mortgage were only \$194,000. Plaintiff disputed

the pay off amount. Rather than pay whatever amount plaintiff believed was justly due, or pay the entire amount demanded under protest, plaintiff caused the entire \$194,000 to be held in the title company's escrow account without interest.

On January 10, 2005, plaintiff began this action by filing a verified complaint and order to show cause in the Chancery Division. The first count alleged that defendants breached their contracts "by failing to accurately post all payments made by Plaintiffs towards its mortgage loan." The second count demanded injunctive relief barring defendants from demanding an incorrect pay off amount "without a complete and accurate audit detailing amounts owed and payments applied."

Plaintiff continued to allow the funds to remain in the non-interest bearing account at the title company until November 2, 2005, at which time he paid under protest the full amount demanded by defendants, including interest to that date, of \$212,598.26.

The litigation proceeded and discovery was conducted. Defendants prepared an accounting and moved for summary judgment. The matter came before Judge Lyons on July 8, 2005. One of the entries in the accounting challenged by plaintiff was on January 23, 2003, when plaintiff's account showed a payment in the amount of \$7,851.88. The next day, January 24, 2003,

another transaction identified as "Misapplication Reversal" reflected \$7,851.88 as withdrawn from plaintiff's account. The certification of Aurora's senior vice-president, Christopher Pitainello, identified the transactions as "phantom payments," which were made as a result of a change in investors and did not reflect a reversal of borrower payments. At oral argument, however, the judge believed he had inadequate information to evaluate that transaction. He therefore continued the summary judgment motion and directed that additional discovery be conducted. The judge also instructed plaintiff to be prepared to articulate specific errors in defendants' accounting, as opposed to the generalized allegations, unsupported by competent evidence, that had been made up to that time.

The matter came before the court again on September 9, 2005. Pitainello was deposed in the interim period. He explained that the \$7,851.88 represented four monthly installments of \$1,962.97, that were added to plaintiff's account because Aurora was about to transfer a loan to another servicer and needed to bring the principal balance up to date. This was done in order to facilitate the transfer. It was an internal bookkeeping entry designed to calculate what the principal balance should have been at the time of the transfer to the new servicer. Then, the following day, the accounting

entries were reversed. This is apparently a standard accounting practice in transactions such as this. No payments were received from plaintiff when the first entry was made, and no amount was deducted from payments made by plaintiff when the transactions were reversed. Plaintiff conceded that he could produce no checks or other evidence of payment to reflect that he had paid the \$7,851.88. The judge accepted Pitainello's explanation, which plaintiff could not refute.

Based upon the certifications and accounting spread sheets, all of the entries were drawn from business records of defendants. Plaintiff presented no competent evidence to refute any of the entries. Plaintiff presented no competent evidence to show that any payments he made were not credited or that any charges against his account, such as late fees, were not properly made.

With respect to the forbearance agreement, the judge found that no material facts were in dispute. Viewing the facts most favorably to plaintiff, the delay in making the initial payment and the three subsequent monthly payments was justified. However, payments were not made in certified funds. One check was returned for insufficient funds, and the three monthly payments were each made beyond the third day of the respective month in which they would have been due if the agreement was

orally modified as contended by plaintiff. Thus, plaintiff was in default of the forbearance agreement. No modification agreement was entered into by the parties. The terms of the original loan remained in full force and effect. Plaintiff continued to be in arrears and continued to commit further acts of default. Thus, no trial was necessary with respect to the forbearance agreement, and all that needed to be resolved in this litigation was the correctness of the pay off figure submitted to plaintiff by defendants.

Judge Lyons thoroughly reviewed the accounting, certifications, and other documents in the motion record, and concluded that the accounting was consistent with the business records of defendants and that plaintiff presented no competent evidence to refute any of the entries it contained. He therefore determined that plaintiff failed to raise any genuine issue of material fact and that defendants were entitled to judgment as a matter of law, because they had not breached any contracts with plaintiff and they produced an unassailable accounting of plaintiff's mortgage loan.

On appeal, plaintiff presents the following arguments:

POINT ONE

SUMMARY JUDGMENT WAS INAPPROPRIATE AS THERE WERE ISSUES OF MATERIAL FACT IN DISPUTE.

POINT TWO

IN DECIDING THE SUMMARY JUDGMENT MOTION THIS TRIAL JUDGE INAPPROPRIATELY ADJUDICATED ISSUES OF DEFENDANTS' MISAPPLICATION OF PAYMENTS TOGETHER WITH THE EXISTENCE OR NONEXISTENCE OF A MODIFICATION/FORBEARANCE AGREEMENT.

POINT THREE

IT WAS ERROR FOR THE JUDGE TO DECIDE THE SUMMARY JUDGMENT MOTION WITHOUT CONSIDERING THE TERMS OF THE MODIFICATION AGREEMENT, THE CONDUCT OF THE DEFENDANTS RELATED THERETO AND THE AVAILABLE DOCUMENTARY AND TESTIMONIAL EVIDENCE.

POINT FOUR

THE COURT INCORRECTLY ADJOURNED THE MOTION TO PERMIT DEFENDANTS TO SUPPLEMENT THEIR ACCOUNTING.

POINT FIVE

SUMMARY JUDGMENT WAS INAPPROPRIATE AS THE SUIT WAS NOT FULLY DEVELOPED AND NOT RIPE.

POINT SIX

THE COURT ERRED IN NOT STOPPING INTEREST ACCRUAL ON THE LOAN FROM THE ESCROW DATE UNTIL THE RESOLUTION OF THE DISPUTE BETWEEN THE PARTIES.

POINT SEVEN

THE TRIAL COURT DID NOT APPLY LAW THAT WAS ON POINT.

On appeal, we apply the same standard that governs trial courts in reviewing summary judgment motions. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.),

certif. denied, 154 N.J. 608 (1998). A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In order to determine whether there is a genuine issue of material fact, that precludes summary judgment, the trial court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The motion must be granted only when the evidence is so one-sided that there is only one reasonable outcome. Ibid. If no genuine issue exists then this court must decide whether the trial court's ruling on the law was correct. Prudential, supra, 307 N.J. Super. at 167.

Based upon our review of the record, we are satisfied that Judge Lyons correctly applied the Brill standard and viewed the evidence in the light most favorable to plaintiff. He correctly determined there was no dispute as to any material fact. He correctly applied the governing legal principles in reaching the

conclusion that defendants were entitled to judgment as a matter of law. Plaintiff's appeal arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Lyons in his oral decision of September 9, 2005.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION