NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0003-12T4

METROPOLITAN NATIONAL BANK,
A NATIONAL BANK,

Plaintiff-Respondent,

v.

ROBIN JEMAL; DAVID S. W.
VAUGHN; ISRAEL DISCOUNT BANK
OF NEW YORK, IDB FACTORS
DIVISION;

Defendants-Respondents,

and

BNY MELLON, N.A.

Defendant-Appellant.

___

Argued September 10, 2013 – Decided September 23, 2013

Before Judges Alvarez and Carroll.

On appeal from Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. F-52618-10.

Corrine LaCroix Tighe argued the cause for appellant (Finestein & Malloy L.L.C., attorneys; Ms. LaCroix Tighe and Russell M. Finestein, on the brief).

William C. Sandelands argued the cause for respondent (Sandelands Eyet, LLP, attorneys; Mr. Sandelands, of counsel and on the brief; Maria A. Kershaw, on the brief).

Respondent, Robin Jamal, has not filed a brief.

Respondent, Israel Discount Bank, has not filed a brief.

Respondent, S.W. Vaughn, has not filed a brief.

PER CURIAM

The narrow issue on appeal in this mortgage foreclosure action involves a dispute between plaintiff, Metropolitan National Bank (Metropolitan), and defendant, BNY Mellon, N.A. (BNY), over the priority of their respective mortgages on the subject property. BNY appeals from October 4, 2011 orders of the trial court determining that the Metropolitan mortgage held priority. We conclude, based on the facts presented, that Metropolitan's receipt of a credit report during its mortgage application process was insufficient to establish notice of BNY's prior, unrecorded mortgage. Accordingly, we affirm.

I.

The essential facts are substantially undisputed. On April 29, 2003, defendants Marvin and Robin Jemal (the Jemals) borrowed $1,300,000 from BNY[1]. BNY secured the 2003 loan with a mortgage on the Jemals' residential property in Allenhurst, New

[1] The Jemals, the defaulting debtors, have not participated in this appeal.

Jersey (the property). Inexplicably, BNY's mortgage was not recorded in the Monmouth County Clerk's Office until November 10, 2010[2].

During the intervening seven-year period between the execution and recording of the BNY mortgage, Robin Jemal (Jemal) applied for, and obtained, a $3,270,000 loan from Metropolitan. The Metropolitan loan was similarly secured by a mortgage on the property, which was dated April 10, 2006, and promptly recorded in the Monmouth County Clerk's Office on April 17, 2006.

In March 2006, as part of its application process, Metropolitan obtained, and reviewed, a Transunion credit report on Jemal. Included in this four-page credit report was a reference to "Alliance Mtg F," an account number, and the notations "4/03," "$1.3M," and "conventional real." It is the significance to be attached to this credit report which frames the priority dispute between the parties.

Prior to closing its loan, Metropolitan also secured a title commitment which, of course, failed to reveal the existence of the unrecorded BNY mortgage. Additionally, Jemal failed to list the BNY mortgage, both in the personal financial statement that she submitted to Metropolitan during the loan

[2] The mortgage was assigned from the Bank of New York to BNY Mellon, N.A. For purposes of this appeal we refer to both entities collectively as BNY.

application process, and in the affidavit of title that she executed at the 2006 loan closing.

Ultimately, Jemal defaulted on the Metropolitan loan, causing Metropolitan to commence this foreclosure action in November 2010. According to Metropolitan, it first became aware of the BNY mortgage when it ran a foreclosure search preparatory to filing its foreclosure complaint. Metropolitan then amended its complaint in December 2010 to join BNY as a defendant by virtue of its junior lien status. BNY filed a contesting answer, along with a counterclaim asserting that BNY should have first lien status because Metropolitan had actual notice of the 2003 BNY loan at the time Metropolitan closed its 2006 mortgage loan.

Following a period of discovery, BNY moved for partial summary judgment (1) declaring that BNY had a mortgage lien on the property which was superior and prior to any interest of Metropolitan, and (2) dismissing Metropolitan's foreclosure complaint as to BNY. BNY argued that, prior to closing the 2006 mortgage loan, Metropolitan had actual knowledge of the April 2003 BNY mortgage loan, by virtue of having received and reviewed the credit report, which disclosed its existence.

Metropolitan cross-moved for partial summary judgment, asserting that its mortgage had priority because it was recorded

first, well prior to the recording of the BNY mortgage. Metropolitan further argued that the credit report was not ordered for the purpose of ascertaining the existence of any liens on the property, nor were the contents of the report sufficient to provide notice of BNY's mortgage. Metropolitan thus sought to strike BNY's contesting answer.

Upon considering the lenders' competing arguments, the motion judge granted summary judgment in favor of Metropolitan, and held that Metropolitan's mortgage had priority over the BNY mortgage. In his oral decision, the judge canvassed jurisprudence involving New Jersey's recording statutes, and the policy underlying the enactment of those statutes. The judge also applied equitable principles and concluded, among other things, that BNY was in the best position to have avoided the loss by timely recording its mortgage. This appeal by BNY follows.

II.

When a party appeals from a trial court order granting or denying a summary judgment motion, we "'employ the same standard [of review] that governs the trial court.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Thus, we must determine whether there was a genuine issue of material

fact, and if not, whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We review legal conclusions de novo. Henry, supra, 204 N.J. at 330.

We recently recognized that:

> Mortgage priorities are generally governed in New Jersey by our recording statutes. N.J.S.A. 46:26A-1 to -12. New Jersey is a "race-notice" jurisdiction, meaning that when two parties are competing for priority over each other's mortgage, the party that recorded its mortgage first will normally prevail, so long as that party did not have actual knowledge of the other party's previously-acquired interest. Cox v. RKA Corp., 164 N.J. 487, 496 (2000) (citing Palamarq Realty Co. v. Rehac, 80 N.J. 446, 454 (1979)).
>
> [Sovereign Bank v. Gillis, ___ N.J.Super. ___, ___ (App. Div. 2013) (slip op. at 9-10).]

Specifically relevant to our analysis is N.J.S.A. 46:21-1, which provides, in pertinent part, that

> whenever any deed or instrument . . . which shall have been or shall be duly acknowledged or proved and certified, shall have been or shall be duly recorded or lodged for record with the county recording officer of the county in which the real estate . . . is situate or located such record shall, from that time, be notice to all subsequent . . . mortgagees of the execution of the deed or instrument so recorded and of the contents thereof.

Additionally, N.J.S.A. 46:22-1 provides that

> [e]very deed or instrument . . . shall, until duly recorded, . . . be void and of no effect against . . . all subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded or whose mortgage shall have been first duly recorded or registered . . . .
>
> [(Emphasis added).][3]

The principal purpose in enacting these recording statutes "was to protect subsequent judgment creditors, bona fide purchasers, and bona fide mortgagees against the assertion of prior claims to the land based upon any recordable but unrecorded instrument." Cox, supra, 164 N.J. at 507 (citations omitted). "[T]he integrity of the recording scheme is paramount." Id. at 497. "Generally speaking, and absent any unusual equity, a court should decide a question of title . . . in the way that will best support and maintain the integrity of the recording system." Palamarg, supra, 80 N.J. at 453. See

[3] These recording statutes have undergone revision since the trial court's decision. N.J.S.A. 4:22-1 was superseded as of May 1, 2012, by N.J.S.A. 46:26A-12, which retains the use of the term "notice." N.J.S.A. 46:26A-12(c) now provides that "[a] claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document."

also Cox, supra, 164 N.J. at 497; Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990).

Under our statutory scheme, "as between two competing parties the interest of the party who first records the instrument will prevail so long as that party had no actual knowledge of the other party's previously-acquired interest." Cox, supra, 164 N.J. at 496 (citing Palamarg, supra, 80 N.J. at 454). Here, BNY does not dispute that the Metropolitan mortgage was recorded prior to the recording of the BNY mortgage. Hence, to prevail on its priority claim, BNY must establish that Metropolitan had notice of the unrecorded BNY mortgage prior to or at the time of its loan closing in April 2006.

BNY argues that Metropolitan should be deemed to have had notice of the BNY mortgage by virtue of the credit report that Metropolitan obtained and reviewed prior to closing. This credit report, BNY maintains, referenced the existence of the BNY mortgage, and was sufficient to constitute adequate notice under the recording statutes. We disagree.

Here, based on the undisputed deposition testimony and certification of Metropolitan's vice-president and real estate lending officer, Thomas Mulhall, the lender's sole purpose in obtaining a credit report on a borrower such as Jemal is to examine her credit history and credit score; in short, to

establish her creditworthiness. Metropolitan did not obtain or review the credit report to identify liens on the property. Rather, the bank would then procure a title commitment for that purpose after a decision to lend was made. BNY offered no contrary evidence. Nor did BNY support its position with any expert opinion to establish (1) that the information customarily contained in a credit report is current, accurate, or reliable; (2) a standard of care in the industry pertaining to the review of credit reports; or (3) that the credit report is utilized to ascertain the existence of any liens on the property or, minimally, to impart a duty on the lender to inquire further as to the existence of such liens.

BNY also argues that the trial judge erred in failing to take judicial notice that a bank, through its employees, can review and understand credit reports and any coding on a credit report, and asserts that an expert was not necessary for such purpose. We decline to accept that argument, again especially in light of Mulhall's undisputed deposition testimony that he did not know what the codes stood for. Further, we do not conclude that the single, isolated reference in the four-page credit report was sufficient to constitute adequate notice of BNY's mortgage. It identifies the creditor not as BNY, but rather the loan servicer, Alliance Mortgage, and does not

identify the property that it relates to. It further bears repeating that it is undisputed that Metropolitan lacked any other indicia of notice, as Jemal failed to disclose the existence of the unrecorded BNY mortgage either in her personal financial statement or her affidavit of title.

We further conclude that the motion judge properly looked to the underlying purpose of the recording statutes and acted in a manner designed to preserve their integrity. The judge recognized the potential chaos that a contrary ruling could visit upon the title insurance industry, which might then be required to canvass not only the public records but also the lender's entire loan file prior to insuring title.

The trial judge also correctly applied equitable principles in rejecting BNY's priority claim. The judge acknowledged the position of another defendant, David S.W. Vaughn, who had also extended a $1,200,000 loan to the Jemals, secured by two mortgages, after the Metropolitan mortgage but prior to the recording of the BNY mortgage. Vaughn too lacked notice of the BNY mortgage due to its unrecorded status. The undisputed evidence was that Vaughn would not have made the loan nor agreed to take a third mortgage position had he been apprised of the BNY mortgage. In balancing the equities, the judge properly concluded that it would be unjust to penalize Vaughn and

Metropolitan, when it was BNY that was responsible for failing to timely record its mortgage, and was in the best position to develop procedures to verify the recording of its mortgages.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION