SUPREME COURT OF NEW HAMPSHIRE

The Bank of New York Mellon, as Trustee v. Eugene Dowgiert

169 N.H. 200 (2016) · No. Rockingham No. 2015-0485 · Decided June 28, 2016

SUMMARY

The Supreme Court of New Hampshire held that a mortgagor's plea of title challenging a foreclosure is an action rather than a defense and is subject to the time limits in RSA 479:25, II. The court also held that a challenge to the foreclosure notice was barred under RSA 479:25, II-a because it was filed more than one year and one day after recording of the foreclosure deed. The court affirmed dismissal of Eugene Dowgiert's plea of title.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Hicks, J.; Dalianis, C.J.; Conboy, J.; Lynn, J.; Bassett, J.
JURISDICTION	New Hampshire
DECIDED	June 28, 2016
DOCKET	Rockingham No. 2015-0485
DISPOSITION	affirmed
PROCEDURAL POSTURE	Dowgiert appealed the superior court's dismissal of his plea of title, filed in response to the bank's possessory action seeking to remove him from property acquired at a foreclosure sale.
STANDARD OF REVIEW	The court reviewed the grant of the motion to dismiss by determining whether the allegations were reasonably susceptible of a construction permitting recovery, assuming the pleadings were true and construing reasonable inferences in Dowgiert's favor. Statutory interpretation was reviewed de novo.
PRECEDENTIAL VALUE	Published New Hampshire Supreme Court opinion; precedential
PARTIES	Eugene Dowgiert v. The Bank of New York Mellon, as Trustee

TOPICS

foreclosure · title disputes · statute of limitations · statutory interpretation · motions to dismiss

PRACTICE AREAS

real estate | foreclosure | civil procedure | appellate procedure | statutory interpretation

QUESTIONS PRESENTED

1. Whether a plea of title challenging the foreclosing bank's authority to foreclose is an action or right of action subject to the pre-sale bar in RSA 479:25, II, rather than a defense exempt from the statutory limitation.
2. Whether a plea challenging the form or manner of foreclosure notice is subject to RSA 479:25, II-a's one-year-and-one-day limitation period.
3. Whether filing a plea of title in the circuit court tolls or preserves the statutory limitation period before the plea is filed in the superior court.
4. Whether the superior court properly dismissed Dowgiert's plea as time-barred.

HOLDINGS

1. A plea of title filed under RSA 540:17 is a separate action or right of action, not merely a defense, and RSA 479:25, II bars a mortgagor from bringing an action based on the validity of the foreclosure after the foreclosure sale.
2. A contention that the mortgagor did not receive foreclosure notice challenges the form or manner of giving notice and is barred if not brought within one year and one day after recording of the foreclosure deed.
3. Filing a plea of title in the circuit court does not toll RSA 479:25, II-a because the circuit court lacks jurisdiction to resolve title issues; the limitation period was not tolled until the plea was filed in superior court.

KEY QUOTATIONS

> *"We hold that Dowgiert's plea is an "action or right of action," RSA 479:25, II, not a defense, and, therefore, RSA 479:25, II applies to the plea to the extent that, in the plea, Dowgiert challenges the bank's authority to foreclose."* (169 N.H. at 203)

> *"We further hold that RSA 479:25, II-a applies to the contention in Dowgiert's plea that the foreclosure notice was inadequate because he did not receive it while he was incarcerated."* (169 N.H. at 204)

> *"Because, under the statute, the defendant must have already filed the plea of title in the superior court before the opportunity to enter and prosecute the "action" arises, the "action" cannot be the same as the "plea." Rather, it must refer to the possessory action."* (169 N.H. at 206)

FACTUAL BACKGROUND

In 2005, Dowgiert refinanced a mortgage on his home, giving a promissory note to Decision One Mortgage Company and a mortgage to MERS as Decision One's nominee. MERS assigned the mortgage to the bank in 2011; after Dowgiert defaulted, the bank foreclosed and purchased the property in September 2013, recording the foreclosure deed later that month. Dowgiert, who was incarcerated and did not receive foreclosure notice, later challenged the bank's authority to foreclose and the adequacy of the notice in a plea of title filed in superior court in April 2015.

PROCEDURAL HISTORY

The bank foreclosed on Dowgiert's mortgage and purchased the property in September 2013. After the bank brought a possessory action in circuit court, Dowgiert filed a plea of title challenging the bank's authority to foreclose and the adequacy of foreclosure notice. The superior court dismissed the plea as untimely under RSA 479:25, II and II-a, and the Supreme Court of New Hampshire affirmed.

DISPOSITION

affirmed

CASES CITED

- Plaisted v. LaBrie, 165 N.H. 194, 195 (2013)
- Favazza v. Braley, 160 N.H. 349, 351 (2010)
- Strike Four v. Nissan N. Am., 164 N.H. 729, 735 (2013)
- New Hampshire Health Care Assoc. v. Governor, 161 N.H. 378, 385 (2011)
- Friedline v. Roe, 166 N.H. 264, 266-267 (2014)
- Fed. Home Loan Mortg. Corp. v. Willette, 168 N.H. ___ (Jan. 12, 2016)
- Appeal of Town of Salem, 168 N.H. ___ (Feb. 18, 2016)
- Jackson v. Astrue, 506 F.3d 1349, 1358 (11th Cir. 2007)
- Gibson v. LaClair, 135 N.H. 129, 130 (1991)
- Appeal of Coos County Comm’rs, 166 N.H. 379, 386 (2014)