

Enter Search Terms

Search

Justia > US Law > US Case Law > New Jersey Case Law > New Jersey Superior Court, Appellate Division - Unpublished Decisions > 2007 > AMBOY NATIONAL BANK v. ZAHOR AHMED AND IFFAT AHMED

NEW - Receive Justia's FREE Daily Newsletters of Opinion Summaries for the US Supreme Court, all US Federal Appellate Courts & the 50 US State Supreme Courts and Weekly Practice Area Opinion Summaries Newsletters. **Subscribe Now**

AMBOY NATIONAL BANK v. ZAHOR AHMED AND IFFAT AHMED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4690-05T54690-05T5

AMBOY NATIONAL BANK,

Plaintiff-Appellant,

v.

ZAHOR AHMED AND IFFAT AHMED,

Defendants-Respondents.

Submitted January 9, 2007 - Decided February 7, 2007

Before Judges Lisa and Holston, Jr.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-3051-05.

Hill Wallack, attorneys for appellant (Meridith F.M. Mason, of counsel and on the brief).

Cohn, Bracaglia & Gropper, attorneys for respondent (John F. Bracaglia, Jr., of counsel and on the brief).

PER CURIAM

Plaintiff, Amboy National Bank, appeals the Law Division's April 12, 2006 order granting summary judgment in favor of defendants, Zahoor Ahmed and Iffat Ahmed, dismissing plaintiff's complaint with prejudice. We affirm.

On April 9, 2002, Iffe, Inc. (Iffe), a corporation owned by defendants, entered into a revolving line of credit loan agreement with plaintiff in the principal amount of \$100,000. On the same date, Iffe executed a revolving credit note to plaintiff in the principal amount of \$100,000. On April 9, 1999, the defendants executed and delivered a guaranty to plaintiff, wherein they guaranteed all amounts due to plaintiff by Iffe under the note. In order to secure their obligation to plaintiff under the guaranty, defendants executed and delivered a mortgage to plaintiff on commercial real estate (the property) owned by them at 10 Race Street in North Plainfield, which mortgage was recorded on April 16, 1999.

Daily Opinion Summaries

Subscribe to Justia's FREE Daily Newsletter Opinion Summaries

[Subscribe Now](#)



Find a New Jersey Lawyer

Legal Issue or Lawyer Name

New Jersey

Search



David S. Chase
Broker Fraud, Consumer Law
Short Hills, NJ



Paul W. Norris
Business Law, Construction Law, Employr
Lawrenceville, NJ



Jennifer C. Meusel
Business Law, Estate Planning, Real Estat
Totowa, NJ



William A. Nash Esquire
Personal Injury, Business Law, Bankruptc
Blackwood, NJ



Daniel A. Burton Esq.
Divorce, Domestic Violence, Family Law
Springfield, NJ

[See More Lawyers](#)

Lawyers - Get Listed Now!

Get a free full directory profile listing

Ask a Lawyer

Question:

Please Ask Your Question Here.
e.g., Do I need a Bankruptcy
Lawyer?

[Ask Question](#)

[About Legal Answers](#)

Iffe defaulted under the loan agreement and note by failing to pay the amount due and owing under the note by April 9, 2003. Defendants also failed to make payment to plaintiff under the guaranty. On July 16, 2003, default judgment was entered against defendants for \$85,182.30 plus interest in a Law Division action instituted by plaintiff against Iffe and defendants. Plaintiff also commenced a foreclosure action against the property on May 13, 2003, in the Chancery Division, Somerset County. On March 12, 2004, a final judgment of foreclosure was entered in the foreclosure action and plaintiff was able to schedule the property for sheriff's sale. The March 12, 2004 final judgment was in the amount of \$86,785.54, together with interest to be computed at the legal rate from February 28, 2004 and with costs to be taxed, which included a counsel fee of \$1,017.86, to be paid out of the mortgaged premises.

Subsequent to the final judgment and before sheriff's sale, the parties negotiated a forbearance agreement by which, in consideration of defendants making a schedule of payments on the final judgment to plaintiff, plaintiff agreed to forbear from proceeding with the sheriff's sale until after March 1, 2005, to give defendants an opportunity to sell the property privately. After defendants realized that they would not be able to sell the property before the forbearance agreement's March 1, 2005 deadline, after further negotiations, plaintiff agreed by a second forbearance agreement dated February 10, 2005, to extend the forbearance period until June 30, 2005, conditioned on defendants making certain monthly payments. The second forbearance agreement also provided that in the event the property was sold, plaintiff was to be paid in full from that sale.

Defendants failed to sell or refinance the property prior to the June 30, 2005 deadline. As a result, plaintiff applied to the Chancery Division for permission to sell the property at sheriff's sale. The court thereafter granted defendant's application to adjourn the sheriff's sale for two weeks. As a result of obtaining a buyer for the property, defendants then filed a motion to fix the amount of the foreclosure judgment. Defendants claimed that they owed \$10,615.89 as of July 31, 2005. Plaintiff cross-moved to amend the foreclosure judgment to include an award of attorney fees and costs plus post-judgment interest at the note rate. The motions were decided by Judge Williams in her oral opinion of September 23, 2005, which was memorialized in the Chancery Division order of the same date, which in applicable part ordered that:

- (a) Plaintiff must submit to this court within five (5) days upon receipt of this Order a detailed payment schedule for the defendants calculated at the judgment interest rate;
- (b) Plaintiff's cross-motion for attorney's fees and costs associated with this foreclosure action incurred after entering into the second forbearance agreement with Defendants to be "paid in full" is hereby granted as to liability;
- (c) Plaintiff must submit to this court a proper affidavit of services under Rule 4:42-9(b) within five (5) days upon receipt of this Order so this court may assess the amount of attorney's fees and costs to award Plaintiff;
- (d) Plaintiff's motion for attorney's fees and costs associated with any Law Division claims is hereby denied without prejudice and [Plaintiff] may make the appropriate motion in the Law Division;

....

On September 29, 2005, plaintiff's counsel provided a certification, which had attached thereto a series of billing statements itemizing the legal services and costs that counsel provided to plaintiff from February 10, 2005 through September 28, 2005, which totaled \$8,563.70.

Thereafter, on October 3, 2005, Judge Williams entered an order amending final judgment, which stated:

[T]he Court having determined, without limitation, that interest shall accrue on the Final Judgment at the rates set forth in Rule 4:42-11(a) and that the Final Judgment shall include the attorneys fees and costs incurred by Plaintiff associated with this action after February 10, 2005; and for good and other cause shown:

It IS on this 3rd day of October, 2005, ORDERED:

The amount due under the Final Judgment is hereby fixed at \$14,744.45 as of September 30, 2005.

Interest on the amount set forth in paragraph 1, shall continue to accrue at the rates set forth in Rule 4:42-11(a).

On November 8, 2005, the property was sold. After the sale, based on the October 3, 2005 order, three checks were delivered to plaintiff on behalf of defendants as follows: (a) \$14,756.56 in payment of the final judgment in full with accrued interest; (b) \$295.13 for sheriff's commissions in the foreclosure; and (c) \$19,948.30 made payable to "Hill Wallack, Attorney Trust Account."

On November 15, 2005, plaintiff filed a new Law Division action against defendants. Plaintiff's complaint sought damages for breach of the forbearance agreement of February 10, 2005 in the amount of \$22,691.20. The complaint alleges that the defendants' failure to pay all amounts due and owing under the note, including attorney's fees and costs, constitutes a breach of the forbearance agreement.

On December 30, 2005, defendants filed their answer denying the allegations of plaintiff's complaint. Defendants thereafter filed a motion for summary judgment contending that they had paid plaintiff all sums to which plaintiff was due and that plaintiff's complaint should be dismissed because it was a duplicate of the earlier Law Division complaint, which resulted in the July 16, 2003 default judgment, which it had satisfied in full by its payment of the October 3, 2005 order amending the final judgment of foreclosure. Defendant argued that the complaint seeks to recover the same attorney's fees and costs, which were the subject of plaintiff's cross-motion for attorney's fees and costs determined by Judge Williams' order of October 3, 2005.

Plaintiff cross-moved for summary judgment contending that through January 11, 2006, \$22,237.01 continued to be owed plaintiff under the note and mortgage. Plaintiff asserted that amount consisted of \$12,818.83 in principal, \$150.76 in interest, late charges of \$202.99, and escrow of \$9,064.43. The escrow was comprised of attorney's fees and costs incurred and paid by plaintiff in the amount of \$7,964.43 plus \$1,100 in sheriff's deposits related to the foreclosure. Further, plaintiff claimed it was due unpaid attorney's fees and costs through January 10, 2006 in the amount of \$3,763.92. Thus, plaintiff requested entry of summary judgment in the total amount of \$26,000.93 through January 11, 2006, plus per diem interest thereafter until the judgment is satisfied in full.

During the three days of oral argument on defendant's motion and plaintiff's cross-motion for summary judgment, defendant's attorney pointed out that plaintiff had filed a cross-motion in the foreclosure action before Judge Williams in which it sought attorney fees, interest and costs, which in addition to principal and accrued interest, it claimed totaled \$31,000. Defendant argued that Judge Williams made a determination that \$14,744.45 was the sum due and owing and that the sum included attorney's fees and costs awarded by her. Judge Mathesius agreed and concluded:

All of this comes down to the interpretation of the order to which I referred drawn again by [Plaintiff's attorney] and signed by Judge Williams. . . . I determine, I find that the only conclusion that can be drawn from the order amending final judgment of Judge Williams is that phraseology after relying upon the papers and the arguments, and the Court determines without limitation that interest shall accrue . . . and that the final judgment shall include the attorney's fees and costs incurred by [Plaintiff] associated

with this action after February 20, 2005 and for good cause and other cause shown that amount ultimately is determined to be \$14,744.45 ultimately resolving the final judgment of that amount. And I find that there are no fees and attorney's fees and costs due after that date on this judgment.

Plaintiff presents the following arguments for our consideration:

POINT I.

THE TRIAL COURT'S DECISION WAS INCONSISTENT WITH RULE 4:46-2 AND BRILL.

A. THE TRIAL COURT ERRED IN HOLDING A TRIAL ON THE PAPERS AND NOT APPLYING THE STANDARD FOR SUMMARY JUDGMENT UNDER RULE 4:46-2 AND BRILL.

B. HAD THE TRIAL COURT PROPERLY ADJUDICATED THE MOTIONS FOR SUMMARY JUDGMENT UNDER BRILL AND RULE 4:46-2, IT COULD NOT HAVE DETERMINED THAT A REASONABLE FACT FINDER COULD NOT HAVE FOUND IN APPELLANT'S FAVOR.

POINT II.

THE TRIAL COURT'S FINDINGS OF FACT WERE THEMSELVES ERRONEOUS.

This appeal arises from the grant of summary judgment to defendants. A moving party is entitled to summary judgment if there is no genuine issue as to any material fact in the record. R. 4:46-2. In deciding a summary judgment motion, we apply the standard articulated by the Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995):

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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.

If no genuine issue of material fact exists, then this court must decide whether the trial court's ruling on the law was correct. Estate of Nicolas v. Ocean Plaza Condo Ass'n, Inc., 388 N.J. Super. 571 (App. Div. 2006). "[A] trial court's interpretation of the law and the consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995).

Plaintiff contends that the trial judge erred in granting summary judgment because the judge conducted a trial on the papers, made findings of fact based solely on certifications and written submissions and without witnesses, credibility determinations, or testimony. We disagree. During oral argument on the parties' cross-motions for summary judgment, plaintiff's counsel agreed with the court that there were no factual issues in dispute, that the resolution of the cross-motions required a legal interpretation of Judge Williams' orders, and that the motions were, therefore, ripe for decision.

THE COURT: I mean there's going to be perhaps a legal issue, but there doesn't seem like any factual issues.

[PLAINTIFF'S ATTORNEY:] No, Your Honor, there doesn't.

See Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996) (the doctrine of judicial estoppel operates to bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted).

We are satisfied that the court properly interpreted the orders of Judge Williams to determine whether defendants owed plaintiff any principal, interest, legal fees or costs associated with the mortgage foreclosure action. Because there was no factual issue in dispute, we must conduct a de novo review of defendants' motion for summary judgment to determine whether there were any amounts, including attorney's fees and

costs owed to plaintiff that were not decided by Judge Williams' order of October 3, 2005.

The right to a counsel fee in an action for foreclosure of a mortgage is governed by Rule 4:42-9(a)(4). Rule 4:42-9(a)(4) provides:

In an action for the foreclosure of a mortgage, the allowance shall be calculated as follows: on all sums adjudged to be paid . . . upon the excess over \$10,000 at the rate of 1%, provided that the allowance shall not exceed \$7,500. If, however, application of the formula prescribed by this rule results in a sum in excess of \$7,500, the court may award an addition fee not greater than the amount of such excess on application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule.

[(emphasis added)].

It is well-settled that the limit in the calculation of attorney's fees in mortgage foreclosure actions contained in Rule 4:42-9(a)(4) is mandatory and the trial court has no discretion to depart from its strict application by increasing the attorney's fees awarded beyond the calculated amount. *Stewart Title Guar. Co. v. Lewis*, 347 N.J. Super. 127, 134-35 (Ch. Div. 2001); see 30A New Jersey Practice Law of Mortgages, 31.30, at 75 (Pocket Part 2006).

Furthermore, "[w]ith respect to multiple sources allowing an attorney's fee, if a mortgage debt is secured by a note providing for an attorney's fee for collection and the mortgagee proceeds to foreclose the mortgage, his attorney's fees are governed by this rule rather than by the note stipulation." Pressler, *Current N.J. Court Rules*, comment 2.4 on R. 4:42-9 (2007). Therefore, any attorney's fees associated with the foreclosure judgment were assessed within the foreclosure judgment and were limited by Rule 4:42-9. Those fees were clearly included in the Chancery Division's March 12, 2004 final judgment of foreclosure.

In the September 23, 2005 Chancery Division order, Judge Williams recognized the rule's limitation by limiting plaintiff's claim to any additional "attorney's fees and costs associated with this foreclosure action incurred after entering into the second forbearance agreement with defendants." Judge Williams in her oral decision, which was memorialized by the September 23, 2005 order, recited the parties' competing contentions and then determined that Rule 4:42-9 did not preclude the allowance of attorney's fees in connection with the forbearance agreement. The judge reasoned that the parties by their contractual agreement intended that plaintiff would be entitled to attorney's fees and costs arising out of the delays associated with the forbearance agreements. The judge limited, however, the attorney's fees recoverable to those associated with the second forbearance agreement. The judge concluded that she could not determine the correct amount of attorney's fees to award until a proper affidavit was provided as required by Rule 4:42-9(b). The judge stated:

Plaintiff seeks \$18,595.68 in attorney's fees and costs incurred as a result of Defendants' actions under the terms of the forbearance agreements. The letter written by Plaintiff's attorney and signed by Defendants detailing the second forbearance agreement reads in relevant part: "I have discussed this matter with my client and it is willing to extend the forbearance period until June 30, 2005 conditioned on monthly payment being made by Zahoor and Iffe Ahmed to it in the amount of \$600.00 per month commencing on March 1, 2005 and continuing on the first day of the month through June 30, 2005. In the event the above property is sold, Amboy is to be paid in full from that sale."

Clearly, Defendants had to realize that Plaintiffs were incurring substantial attorney's fees and costs as a result of their delay in selling or refinancing the property.

Defendants claim that R. 4:42-9 limits the amount of attorney's fees Plaintiff is entitled to in this foreclosure action.

....

However, R. 4:42-9 does not preclude the allowance of attorney's fees where the parties have agreed thereto in advance by contractual agreement.

Thereafter, plaintiff filed a certification in support of attorney's fees from February 10, 2005, the date of the second forbearance agreement, to September 28, 2005.

On October 3, 2005, the court entered its order fixing the amount due under the final judgment as of September 30, 2005 in the amount of \$14,744.45. That amount clearly included the amount of principal and interest that remained unpaid from the March 12, 2004 final judgment and included in addition the court's award of attorney's fees and costs in connection with the second forbearance agreement.

During argument on the cross-motions for summary judgment, the judge summed up the facts underlying the dispute.

[S]omewhere there's an application by someone to determine by Judge Williams an exact [] amount due [Counsel] submits a certification on September 14, 2005 calling for a judgment of \$10,614.89, attorney's fees of \$17,491.25, and costs of \$3,000, a total of \$31,000. Williams in response orders a payment of \$14,744.45 as a final judgment of amount due.

We are satisfied that the attorney's fees sought by plaintiff in the newly filed Law Division action are the same fees that were the subject of the cross-motion by plaintiff to amend the amount due under the foreclosure judgment, which Judge Williams decided on September 23, 2005. Judge Williams determined that plaintiff was entitled to attorney's fees "associated with this action after February 10, 2005." Plaintiff's counsel submitted a certification in support of attorney's fees and costs. The judge entered an order fixing the amount due at \$14,744.45 on October 3, 2005. That order was not appealed.

We are convinced that the doctrines of res judicata and collateral estoppel bar plaintiff's Law Division action for the same attorney's fees and costs sought by plaintiff in its cross-motion in the mortgage foreclosure action but which were not awarded by the court.

"Res Judicata is an ancient judicial doctrine which contemplates that when a controversy between parties is once fairly litigated, and determined, it is no longer open to re litigation." *Lubliner v. Bd. of Alcoholic Bev. Control*, 33 N.J. 428, 435 (1960). It is also well established that,

* * * a matter is not res judicata unless there be identity of the thing sued for, of the cause of action, of the persons and parties, of the quality of the persons for and against whom the claim is made, and the judgment in the former suit be so on point as to control the issue in the pending action." [*Templeton v. Scudder*, 16 N.J. Super. 576, 579 (App. Div. 1951).]

[*Franco v. Davis*, 112 N.J. Super. 496, 498 (Law Div. 1970).]

Collateral estoppel differs slightly from res judicata.

The doctrine of res judicata "refers broadly to the common law doctrine barring re litigation of claims or issues that have already been adjudicated." *Velasquez v. Franz*, 123 N.J. 498, 505, 589 A.2d 143 (1991) (citation omitted.) Likewise, "[t]he doctrine of collateral estoppel, or issue preclusion, 'bars re litigation of any issue [that] was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.'" *Zirger v. General Accident Ins. Co.*, 144 N.J. 327, 337, 676

A.2d 1065 (1996) (quoting State v. Gonzalez, 75 N.J. 181, 186, 380 A.2d 1128 (1977)).

[Aparin v. County of Gloucester, 345 N.J. Super. 41, 54 (Law Div.) aff'd o.b., 345 N.J. Super. 24 (App. Div. 2000).]

Under the principles cited above, plaintiff's Law Division action is barred because the amount due under the foreclosure judgment, including all attorney's fees payable by defendants, was determined by the October 3, 2005 order. The parties involved in both actions are the same parties. The "identity of the thing sued for" is the same note and the same mortgage, given as security for the guaranty of the note, which were before Judge Williams. See Franco, supra, 112 N.J. Super. at 498. Both the Law Division action and the foreclosure action involved attorney's fees for legal services provided in connection with the February 10, 2005 forbearance agreement. Further, the "judgment in the former [action, i.e., the foreclosure action] . . . control[s] the issue in the pending action."

In its cross-motion before Judge Williams, plaintiff sought attorney's fees and costs totaling \$18,595.68 and an amended judgment fixing the amount due on the judgment of foreclosure. Judge Williams entered an order amending final judgment fixing the amount due, including attorney's fees. The judgment recites that the final judgment in the amount of \$14,744.45 "shall include the attorney's fees and costs incurred by [plaintiff] associated with this action after February 10, 2005."

We are convinced, as was Judge Mathesius, that the subject of the Law Division action was previously decided by the Chancery Division's October 3, 2005 order. Therefore, the Law Division cause of action and the Chancery Division order represent the same claim. See Templeton, supra, 16 N.J. Super. at 579. Accordingly, the April 12, 2006 Law Division order granting defendant's motion for summary judgment and dismissing plaintiff's complaint with prejudice is affirmed.

Affirmed.

The Law Division's April 12, 2006 order requires the immediate return to defendants of the \$19,948.30 with any accrued interest being held in escrow by plaintiff.

Plaintiff's complaint avers that the sum of \$22,691.20 claimed to be due under the forbearance agreement continues to accrue interest per diem.

(continued)

(continued)

17

A-4690-05T5

February 7, 2007