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DEUTSCHE BANK TRUST COMPANY AMERICAS,  
TRUSTEE *v.* KEVIN R. BURKE ET AL.  
(AC 44906)

Moll, Clark and DiPentima, Js.

*Syllabus*

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant homeowners. The plaintiff had previously filed a foreclosure action, but the prior action was dismissed for dormancy after five years. More than three years after the prior action was dismissed, the plaintiff commenced the present action, seeking a judgment of foreclosure and possession of the property that secured the mortgage. The defendants offered several special defenses, including laches, alleging, *inter alia*, that the plaintiff inexcusably delayed bringing the present foreclosure action and caused the defendants to suffer prejudice by way of eroding both their equity in the property and their opportunity to modify the loan and sell the property to recover the equity before the market declined. The court, after a trial, rendered a judgment of strict foreclosure, finding, *inter alia*, that the defendants failed to prove their special defense of laches because the plaintiff's delay was not intentional, wilful, or done with an improper motive, and, therefore, the delay was not inexcusable. On the defendants' appeal to this court, *held* that the trial court's finding that the plaintiff's delay was not inexcusable was not clearly erroneous and, therefore, the court properly rejected the defendants' special defense of laches: the court properly placed the burden on the defendants to prove their defense, and, here, the unchallenged subordinate factual findings that the plaintiff's delay resulted from inattentiveness and that the defendants bore some responsibility for the delay supported the court's factual conclusion that the plaintiff's delay was not inexcusable.

Argued January 5—officially released April 4, 2023

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Cordani, J.*; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Affirmed.*

*Thomas P. Willcutts*, for the appellants (named defendant et al.).

*Marissa I. Delinks*, for the appellee (plaintiff).

*Opinion*

DiPENTIMA, J. The defendants Kevin R. Burke and Maura Lee Wahlberg<sup>1</sup> appeal from the judgment of strict foreclosure rendered in favor of the plaintiff, Deutsche Bank Trust Company Americas, as trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2005-QA10. On appeal, the defendants claim that the court improperly rejected their special defense of laches. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. On or about March 4, 2005, Burke executed and delivered a note for a loan in the principal amount of \$1,500,000 to a predecessor in interest to the plaintiff. The loan was used to refinance certain real property in Fairfield. On or about March 4, 2005, the defendants executed and delivered a mortgage on the property, which secured the indebtedness under the note, to the plaintiff's predecessor in interest. The mortgage was recorded in the Fairfield land records on March 10, 2005. In October, 2008, the note was modified at the defendants' request to reflect a new principal balance of \$1,545,133.75. The mortgage was assigned to the plaintiff, and that assignment was recorded in the Fairfield land records on June 25, 2009. The note was endorsed and delivered to the plaintiff prior to the initiation of the present action and has remained in the possession of the plaintiff. The defendants failed to make the January, 2009 payment due under the note and failed to make any subsequent payments. The plaintiff accelerated the mortgage debt sometime in 2009 and, in May, 2009, filed a foreclosure action on the note and mortgage. That prior action was dismissed for dormancy on May 8, 2014. The plaintiff commenced the present foreclosure action on July 3, 2017.<sup>2</sup> The value of the property at the time of trial was \$590,000, and the debt was \$2,752,982.71; there was no equity in the property.

In its amended complaint, the plaintiff alleged that it was the holder of the note and mortgage, the note was in default and it had elected to accelerate the balance due on the note. The defendants filed an answer to the amended complaint and several special defenses, including laches. In support of that special defense, the defendants alleged that the plaintiff inexcusably delayed bringing the present foreclosure action and caused the defendants to suffer prejudice by way of eroding both their equity in the property and their opportunity to modify the loan and sell the property to recover the equity before the market declined.

In its August 2, 2021 memorandum of decision, the court found that the defendants failed to prove their special defense of laches. Specifically, the court found that "[t]he plaintiff delayed in foreclosing on the prop-

erty and collecting on the note, but the plaintiff's delay was not intentional, not wilful, and not done with an improper motive. Instead, the plaintiff's delay resulted from mere inattentiveness. The plaintiff's delay was not inexcusable." (Footnote omitted.) The court further found that the defendants "bore some responsibility for the delays" and that the defendants "also added to delays by failing to timely submit information as required and in the form required, and, after December, 2014, in intentionally refusing to negotiate potential modifications in good faith" due to a possible statute of limitations defense. The court rendered a judgment of strict foreclosure and set the first law day as October 11, 2021.<sup>3</sup> This appeal followed.

We begin with the standard of review and law regarding laches. "The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has [not] been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law. . . . We must defer to the court's findings of fact unless they are clearly erroneous. . . . The defense of laches, if proven, bars a plaintiff from seeking equitable relief . . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The burden is on the party alleging laches to establish that defense." (Emphasis omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A. v. Fitzpatrick*, 190 Conn. App. 231, 244, 210 A.3d 88, cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019).

On appeal, the defendants claim that, in rejecting their special defense of laches, the court improperly (1) based its determination that there was no inexcusable delay on the plaintiff's intent and/or motives in causing the delay and (2) found that they did not suffer prejudice as a result of the delay. Because the defendants were required to prove *both* an inexcusable delay and prejudice to prevail on their special defense of laches; see *id.*; and because we agree with the plaintiff that the court's finding that the plaintiff's delay was not inexcusable was not clearly erroneous, we do not address the defendants' argument regarding prejudice.

In support of their challenge to the court's determination that the delay was not inexcusable, the defendants argue that the law requires the party responsible for the delay to first explain or excuse the delay and that the plaintiff here never did so. The defendants further argue that the court's finding that the plaintiff's delay was not intentional, not wilful, and not done with improper motive was the sole basis for its factual determination that the delay was not inexcusable and, "[a]s such, the trial court imposed a burden of proof upon the defendants relative to demonstrating 'inexcusable

delay' that heretofore has not been recognized or approved by this court or the Connecticut Supreme Court—that a failure of proof that a delay was undertaken intentionally and/or with improper motive will defeat a claim of laches.”<sup>4</sup>

The defendants rely on *Caminiis v. Troy*, 112 Conn. App. 546, 963 A.2d 701 (2009), *aff'd*, 300 Conn. 297, 12 A.3d 984 (2011), in support of their argument that the court erred in finding that the delay was not inexcusable because the plaintiff failed to offer an acceptable excuse for the delay. The defendants' reliance on *Caminiis* is misplaced because *Caminiis* plainly does not support the defendants' argument. In *Caminiis*, this court rejected the plaintiffs' claim that the trial court improperly found that, in proving their defense of laches, the defendants established that the plaintiffs' protracted delay in asserting a violation of their littoral rights was inexcusable. *Id.*, 553. Although we noted that “neither in their briefs nor at oral argument before this court have the plaintiffs offered a satisfactory explanation for their long inaction”; *id.*; our decision in *Caminiis* does not stand for the proposition that it is the burden of the party accused of laches to offer a plausible excuse for the delay. Instead, this court in *Caminiis* recognized the burden of the plaintiff-appellants to establish their claim on appeal that the trial court's factual finding was clearly erroneous but did not alter the well established precedent that “[t]he burden is on the party alleging laches to establish that defense.” *Id.*, 552. In the present case, the trial court properly placed the burden on the defendants to prove their laches defense.

The defendants are also mistaken in their argument that, in finding that the plaintiff's delay was not done intentionally, wilfully or with improper motive, the court imposed an improper burden and, in effect, determined that a failure to prove intentional delay will defeat a defense of laches. We do not read the court's decision in such a manner. The court was faced with deciding a number of special defenses and counterclaims in addition to the laches defense. The court found facts relating to the defendants' special defenses and counterclaims in the fact-finding portion of its memorandum of decision. In its analysis, the court rejected the defendants' special defenses of laches, equitable estoppel and unclean hands without specifically stating which of its factual findings were attributable to each of these defenses. Nowhere in the court's decision, however, does it suggest that a finding of intent is required to prove inexcusable delay. Rather, the court examined the circumstances of the present case and, in exercising its discretion, determined that the defendants had not proven their special defense of laches. See *DeRose v. Jason Robert's, Inc.*, 191 Conn. App. 781, 805, 216 A.3d 699 (“whether a delay violates the doctrine of laches is an issue left squarely to the discretion of the trial court, to be determined on the basis of the circum-

stances presented”), cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

The court found that the plaintiff’s delay resulted from inattentiveness and that the defendants bore some responsibility for the delay. These subordinate factual findings are not challenged on appeal. We will not second-guess the court’s determination, on the basis of the facts found, that the delay was not inexcusable, as such a factual determination is left squarely to the discretion of the court. See *id.* Whether a party prevails on a defense of laches is a determination for the trier of fact and is not one for this court to make unless the subordinate facts found make such a conclusion inevitable as a matter of law. See *Federal Deposit Ins. Corp. v. Voll*, 38 Conn. App. 198, 211, 660 A.2d 358, cert. denied, 235 Conn. 903, 665 A.2d 901 (1995). We cannot say, as a matter of law, that the court here was compelled to conclude that the plaintiff was guilty of laches on the facts of the present case. See *id.* Rather, the court’s subordinate factual findings that the defendants contributed to the delay by, for example, refusing to negotiate potential modifications in good faith strongly support the court’s factual conclusion that the plaintiff’s delay was not inexcusable. See *Cohen v. Roll-A-Cover, LLC*, 131 Conn. App. 443, 450–51, 27 A.3d 1 (“In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court’s ruling.” (Internal quotation marks omitted.)), cert. denied, 303 Conn. 915, 33 A.3d 739 (2011). On the basis of the foregoing, we conclude that the court’s finding that the plaintiff’s delay was not inexcusable was not clearly erroneous, and, therefore, the court properly rejected the defendants’ special defense of laches.

The judgment is affirmed.

In this opinion the other judges concurred.

<sup>1</sup> Ridge Homeowners Association, Inc., and MorEquity, Inc., were also named as defendants in the complaint but are not involved in this appeal. Our references in this opinion to the defendants are to Burke and Wahlberg.

<sup>2</sup> The complaint initially sought, inter alia, money damages and a deficiency judgment, but by the time of trial, it sought only a judgment of foreclosure and possession of the property.

<sup>3</sup> The court also found that the defendants did not prove their other special defenses of equitable estoppel, statute of limitations and unclean hands, and rejected the defendants’ counterclaims of breach of contract, negligence and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

<sup>4</sup> The defendants additionally argue that the court, in concluding that the plaintiff did not act in bad faith, improperly failed to distinguish between the conduct of the plaintiff as the holder of the defendants’ note and that of the plaintiff’s mortgage servicers. Because this claim was raised for the first time on appeal, we decline to review it. See, e.g., *White v. Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014) (“[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court.” (Internal quotation marks omitted.)).

