IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

FIRST NIAGARA BANK, N.A. s/b/m/t HARLEYSVILLE NATIONAL BANK AND TRUST COMPANY,	:	
Plaintiff	:	
vs.	:	**No. 12-0688**
ALFONSO J. SEBIA and PAMELA G. SEBIA,	:	
Defendants	:	

Terrence J. McCabe, Esquire	Counsel for Plaintiff
Brian T. Lamanna, Esquire	Counsel for Plaintiff
Andrew L. Markowitz, Esquire	Counsel for Plaintiff
Cynthia S. Yurchak, Esquire	Counsel for Defendants

MEMORANDUM OPINION

Matika, J. – November , 2013

On August 23, 2013, this Court granted Plaintiff's Motion for Summary Judgment in a mortgage foreclosure action. Subsequently, Defendants, Alfonso J. and Pamela G. Sebia, (hereinafter "Defendants"), appealed this Court's order granting Plaintiff's summary judgment motion. This Memorandum Opinion is authored in accordance with Pennsylvania Rule of Appellate Procedure 1925(a).

FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2012, Plaintiff, First Niagara Bank, N.A. s/b/m/t Harleysville National Bank and Trust Company,

(hereinafter "Plaintiff"), instituted this instant action by means of a complaint asserted against Defendants. In the complaint Plaintiff averred that: Defendants are the mortgagors and real owners of the subject property to this mortgage foreclosure proceeding; on October 7, 2005, Defendants executed and delivered a mortgage upon the subject property to Plaintiff; the payment for the month of February 2011, and continuing every month thereafter, remain due and owing; that as of the date of inception of this action the total amount due under the mortgage was Two Hundred Seventy Thousand Nine Hundred Fifty-Seven dollars and Seventy-Eight cents ($270,957.78); and that the notice of intention to foreclosure required by Act 6 of 1974 was sent to each Defendant by certified mail.[1]

With the exception of one entire averment and part of another, Defendants, in response, filed an answer whereby they denied all the averments on the basis that such averments were legal conclusions. The one entire averment Defendants did not deny on the grounds that the averment was a legal conclusion was the allegation that on October 7, 2005, Defendants executed and delivered a mortgage upon the subject property in favor of

[1] Plaintiff also alleged that the notice under the Homeowner's Emergency Mortgage Assistance Act (Act 91) was not provided because at the time Plaintiff instituted this matter the provisions of the Act were not applicable.

Plaintiff; Defendants claimed they were without sufficient knowledge to admit or deny such claim made by the Plaintiff.[2]

After the pleadings were closed, Plaintiff filed a motion for summary judgment, which is the subject of this appeal. Attached to Plaintiff's motion was a copy of the note and mortgage, a certificate of merger, a copy of the Act 6 notice sent to both Defendants along with a UPS tracking confirmation printout, an affidavit of support authored by the Assistant Vice President of Plaintiff, and three letters issued to Defendants from Plaintiff requesting additional information needed so that Plaintiff could process Defendants' loss mitigation packet. Subsequent thereto, Defendants filed a response opposing Plaintiff's motion and an accompanying brief. Plaintiff's motion was then scheduled for oral argument before the Court.[3] Following oral argument, and after examining the record in its entirety, this Court, on August 23, 2013, granted Plaintiff's motion and issued an order entering an *in rem* judgment in favor of Plaintiff and against Defendants.

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[2] The partial averment denied on this same ground dealt with attorney's fees, property inspection costs, and escrow advances.

[3] Argument was originally scheduled to be heard on November 29, 2012; however, on November 26, 2012, Plaintiff filed a Suggestion of Bankruptcy claiming Defendant, Pamela G. Sebia, filed a voluntary Chapter 13 Bankruptcy petition on October 5, 2012 in the United States Bankruptcy Court for the Middle District of Pennsylvania. Thereafter, on April 1, 2013, Plaintiff filed with the Court a Suggestion of Termination of Bankruptcy along with the Court Order from the Bankruptcy Court dismissing Defendant Pamela G. Sebia's Bankruptcy petition for failure to attend the mandatory creditors meetings. Accordingly, upon notification that Defendant was terminated from bankruptcy, argument on Plaintiff's summary judgment motion was rescheduled.

Thereafter, Defendants filed this timely appeal and argue to the Honorable Superior Court that judgment was improperly entered as there were still genuine issues of material fact for the fact finder to resolve at the time of trial. By order dated September 5, 2013, the Court directed Defendants to file a Concise Statement of Matters Complained of on Appeal within twenty-one days of the date of entry of the order. A week later, Defendants filed such matters complained of, and this opinion will address those issues raised on appeal by Defendants.

While Defendants have raised numerous issues on appeal, this Court believes such issues can be grouped together for brevity purposes. In the concise statement, Defendants primarily object that this Court should not have granted Plaintiff's motion and entered judgment accordingly because there still remained unresolved material issues of fact based upon Defendants' denials of the averments in the complaint despite the allegations and evidences set forth in Plaintiff's summary judgment motion. More specifically, Defendants contend that their denials in response to the averments that they are mortgagors and that they have defaulted on the mortgage are properly denied as legal conclusions and thus those issues are still in dispute. Further, Defendants allege that their denial of certain averments on the grounds that they are without

sufficient knowledge or information to admit or deny those averments renders such facts in dispute.

Further, Defendants argue that the exhibits attached to Plaintiff's motion are individually flawed and consequently Plaintiff has not met its requisite burden of proof to allow this Court to enter summary judgment.

For the reasons stated below, such issues raised by Defendants are meritless and this Court respectively requests that the Honorable Superior Court affirm this Court's order dated August 23, 2013, accordingly.

DISCUSSION

Pennsylvania Rule of Civil Procedure 1035.2 states that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment . . . as a matter of law whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." Pa.R.C.P. 1035.2(1). Summary judgment may be granted only where the right is clear and free from doubt. *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279 (Pa. 1989).

The holder of a mortgage can legally proceed to enforce the mortgage either by foreclosure proceedings on the mortgage or by

obtaining judgment on the bond accompanying the mortgage and issuing a writ of execution. *See*, *Harper v. Lukens*, 112 A. 636 (Pa. 1921); *see also*, 22 Standard Pennsylvania Practice 2d § 121:3. "In a mortgage foreclosure action, the plaintiff must show the existence of an obligation secured by a mortgage and a default on the obligation." *Chemical Bank v. Dippolito*, 897 F. Supp. 221, 224 (E.D. Pa. 1995). Therefore, for a plaintiff to establish a prima facie case that a defendant has defaulted in a mortgage foreclosure action, plaintiff must prove that: there exists a valid mortgage; the plaintiff is the current holder of the mortgage and thus is entitled to enforce the mortgage; the original mortgagor and current real owner of the property are named defendants; the mortgage is in default; and that the recorded mortgage is in the specified amount. Pa.R.C.P. 1147; *see*, *Cunningham v. McWilliams*, 714 A.2d 1054 (Pa. Super. Ct. 1998).

In the case at bar, the documents attached to Plaintiff's summary judgment motion established a prima facie case that Defendants defaulted on the mortgage and note. Attached to Plaintiff's motion was a copy of the note and mortgage executed and delivered by the Defendants to Plaintiff's predecessor in interest. Further, such averments that Defendants executed and delivered a note and mortgage to Plaintiff's predecessor in interest is buttressed by an affidavit of support attached to

Plaintiff's motion. The affidavit of support is authored by the Assistant Vice President of Plaintiff who is also the custodian of the account and records of Defendants' account.[4]

Plaintiff, in demonstrating that it is the current mortgage holder, attached a copy of the Certification of National Bank Merger that states the original mortgagee, Harleysville National Bank and Trust Company, has merged with and into Plaintiff as of April 9, 2010. This documentation established Plaintiff's right to enforce the mortgage.

The affidavit of support executed by the Assistant Vice President of Plaintiff supports Plaintiff's averments that Defendants have defaulted on their mortgage by not tendering the required monthly payments since February 2011. The affidavit goes on to state how Plaintiff maintains and updates its records to ensure accuracy relative to payments made on an individual's account.

Additionally, in meeting its burden of proof, Plaintiff attached to its summary judgment motion a copy of the requisite notice of intention to foreclose pursuant to Act 6 of 1974 sent to both Defendants, along with copies of the envelopes in which the notices were sent, in conjunction with the printout tracking

[4] Defendants labeled this supporting affidavit, which is permitted pursuant to Pennsylvania Rule of Civil Procedure 1035.4, as a "self-serving" document and thus the Court should not give much weight to it. The Court found such characterization to be perplexing as the Court would assume any exhibit offered by a party would undoubtedly have a self-serving nature to it.

confirmations from USPS.com. *See*, Exhibits "D" & "F." The notice sent to both Defendants substantially complies with the prescribed statute, 41 P.S. § 403, and the requisite form as set forth in 10 Pa. Code § 7.4.

Lastly, as Plaintiff properly averred, the mandated provisions of Act 91 were not applicable when Plaintiff instituted this action; thus, Plaintiff was not required to send the required notice associated with the Act 91.

Defendants, in opposition to Plaintiff's summary judgment motion made various arguments, the most notable argument of which was that Plaintiff, in trying to satisfy its burden, asserted not factual averments but numerous legal conclusions that the Defendants had properly claimed to be "legal conclusions." Given the lack of factual evidence Plaintiff has set forth in trying to prove that Defendants defaulted on their mortgage, such conclusions could not be reached by the Court. More specifically, Defendants, in their response to Plaintiff's motion, proclaimed that Plaintiff's statements that they, the Defendants, are the mortgagors, Plaintiff is the current mortgage holder, and Defendants have defaulted on their mortgage and failed to cure such default are all legal conclusions and accordingly such issues remain unresolved in this matter.

Although the Court found Defendants' argument creative, it also found such argument lacking foundation as Defendants

confuse the difference between findings of fact and conclusions of law. As defined by Black's Law Dictionary, a finding of fact is "a determination by a judge . . . of a fact supported by the evidence in the record." FINDING OF FACT, BLACK'S LAW DICTIONARY (9th ed. 2009). Additionally, a conclusion of fact is "a factual deduction drawn from observed or proven facts; an evidentiary inference." CONCLUSION OF FACT, BLACK'S LAW DICTIONARY (9th ed. 2009); *see also*, Larry Howell, *Deconstructing CRAC: Teaching Proposed Findings of Fact and Conclusions of Law in a First-Year Legal-Writing Program*, 14 Scribes J. Leg. Writing 53, (2012). Based upon the exhibits attached to Plaintiff's motion, the Court found the following salient facts: Defendants are the mortgagors, and they have defaulted on the mortgage as defined in the security instrument.

In examining the mortgage attached to Plaintiff's motion, section (B) on page one identifies Defendants as the borrowers and states they are the mortgagors under this security instrument. *See*, Exhibit "B." Further, the note, which bears Defendants' signatures, defines "default" as not paying the full amount of each monthly payment on the date it is due, which is the first day of each month. *See*, Exhibit "A." As a result, and in conjunction with Plaintiff's averments and the supporting affidavit from its Assistant Vice President that it, Plaintiff, has not received the monthly payment from Defendants starting on

February 1, 2011, and continuing each month thereafter, the Court is permitted to find and conclude that Defendants are in fact the mortgagors, and they have defaulted on such mortgage.

Even if the Court were to accept Defendants' representation that such findings of fact are conclusions of law, the facts and evidence proffered to the Court via Plaintiff's attached documents support such findings. *See*, CONCLUSION OF LAW, BLACK'S LAW DICTIONARY (9th ed. 2009). However, the classification of such averments as findings of fact or conclusions of law is nothing more than a red herring as the documents presented by Plaintiff established a prima facie case that Defendants have defaulted on their mortgage and Plaintiff is entitled to foreclose on such mortgage.

Additionally, Defendants claim that their denials of certain averments in Plaintiff's complaint and summary judgment motion on the basis that they, Defendants, are without sufficient knowledge to admit or deny the truth of such averments, raised a genuine issue of material fact and thus this Court should not have granted Plaintiff's motion.

Notwithstanding the fact Defendants in their answer to the complaint and the summary judgment motion denied such execution and delivery, their denial equates to an admission. Defendants, in their answer to the complaint, claimed they are "without sufficient knowledge to admit or deny" the averment that reads

"on October 7, 2005, mortgagors made, executed and delivered a mortgage upon the premises hereinafter describe to Plaintiff." Despite such denial, the Court was compelled to treat such response as an admission pursuant to Pennsylvania Rule of Civil Procedure 1029.

Rule 1029 of Pennsylvania Rules of Civil Procedure explains the effect of a denial, such as proffered by the Defendants, in a responsive pleading. Subsection (c) states:

> (c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.
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> **Note**
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> Reliance on subdivision (c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. *See Cercone v. Cerone*, 245 Pa.Super. 381, 386 A.2d 1 (1978).

Pa.R.C.P. 1029(c).

Additionally, in mortgage foreclosure actions the case law is clear that general denials by mortgagors that they are "without sufficient information to form a belief as to the truth of averments" in regards to the principal and interest owing on the mortgage must be considered an admission of those facts. *New York Guardian Mortgage Corp. v. Dietzel*, 524 A.2d 951 (Pa. Super. Ct. 1987).[5] The rationale of the *Dietzel* Court was,

[5] Defendants do not claim that they are without sufficient knowledge to admit or deny the principal and interest remaining on the note and mortgage, but rather claim the averment stating the remaining balance due as a "legal

"apart from [plaintiff], [defendants] are the only parties who would have sufficient knowledge on which to base a specific denial. *Id.* at 952. In essence, a party cannot deny what it should know.

In *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688 (Pa. Super. Ct. 1995), the Superior Court, examining the same issue, found further support in the *Dietzel* Court's rationale in the note under subsection (c). That note states, "reliance upon subsection (c) does not excuse a failure to deny or admit factual allegations when it is clear that the pleader must know if the allegations are true or not." Pa.R.C.P. 1029(c).

Although *Dietzel* and *Strausser* dealt with general denials as they related to principal and interest due and owing on a mortgage, the rationale that a defendant cannot hide behind the excuse that he or she is without sufficient information to admit or deny an averment when knowledge of such is within their province is still applicable to the case at bar. Defendants, being an alleged party to the transaction, are the only persons besides Plaintiff to know whether or not they executed a mortgage in favor of Plaintiff on October 5, 2005. Therefore, Defendants' general denial to the averment that they executed and delivered a mortgage to Plaintiff on October 5, 2005 must be

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conclusion." The Court will address such denial later within this Memorandum Opinion.

regarded as an admission of such.

Similarly, Defendants' assertion that they are without sufficient knowledge to admit or deny Plaintiff's averment that Plaintiff would be entitled to recover attorney fees, property inspection costs, and escrow advances in the event of Defendants' default on the mortgage and note, is without credence. Defendants should, by reading the mortgage and note, two documents that they both signed, be aware of the impact and financial consequences in the event that they defaulted on the mortgage and note. Therefore, following the rationale of *Dietzel* and *Strausser,* Defendants claim that they were without sufficient information to admit or deny Plaintiff's averment regarding Plaintiff's entitlement to attorney fees, property inspection costs, and escrow advances must be deemed admissions to such.[6]

Lastly, Defendants, in their answer to Plaintiff's summary judgment motion and in their concise statement on appeal, contend that Plaintiff's assertion that the Act 91 notice was

[6] Besides denying such fees claimed on the basis that they, Defendants, are without sufficient knowledge to admit or deny such, Defendants also challenge the amount due and owing in the mortgage and note. Notwithstanding the fact that the contest of damages and the reasonableness of attorney fees does not preclude a court from entering summary judgment as such dispute is more properly raised at a subsequently hearing, *see*, *Cunningham*, 714 A.2d at 1056; *Beal Bank v. PIDC Financial Corp.*, 02522 AUG. TERM 2001, 2002 WL 31012320 (Pa. Com. Pl. Sept 9, 2002), Plaintiff has met its burden of supporting its claim of damages by way of a supporting affidavit from its Vice President who is also the keeper of the business records for Plaintiff. The affidavit, along with the mortgage and note, state how Plaintiff attained its total claim for damages.

not sent due to the provisions of the Act not being applicable at the time of commencement of this action was a conclusion of law. Even if the Court were to accept Defendants' representation that such assertion is a conclusion of law, that conclusion is based upon certain facts that allow the Court to make such conclusion.

On July 21, 2011, Pennsylvania Housing Finance Agency issued a letter stating that the Agency will have insufficient money available in the Homeowner's Emergency Mortgage Assistance Program (HEMAP). Accordingly, as of August 27, 2011, mortgagees were able to take legal action to enforce a mortgage without sending the necessary Act 91 notice. However, in the August 18, 2012, Pennsylvania Bulletin, the Agency published a formal notice of the resumption of HEMAP starting October 2, 2012, and thus from that date forward a mortgagee would be required to send such notice to a mortgagor before commencing a mortgage foreclosure proceeding.

Turning to the case before the Court, Plaintiff instituted this action on March 28, 2012, a time when the Act 91 notice need not be sent before instituting a mortgage foreclosure action. Thus, the Court concurred with Plaintiff's conclusion that the Act 91 notice was not required to be sent before

commencing this mortgage foreclosure action.[7]

Defendants, in believing Plaintiff failed to satisfy its burden of proof, did not proffer any evidence in opposition to Plaintiff's summary judgment motion and merely relied upon its pleadings and allegations. As stated in Pennsylvania Rule of Civil Procedure 1035.3(a), "the adverse party may not rest upon the mere allegations or denials of the pleadings" but rather must present evidence in support of its position or cite to a flaw in the moving-party's evidence that creates a genuine issue of material fact or law. Pa.R.C.P. 1035.3. Having failed to do so, the Court was proper in granting Plaintiff's motion and entering judgment in its favor.

Accordingly, since the issues raised on appeal mirror those

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[7] Defendants also attacked Plaintiff's evidence insofar as they ask the Court to examine Plaintiff's supporting documentation in a vacuum. However, the court in determining whether to grant or deny a party's summary judgment motion, must examine the entire record in determining whether there is genuine issue of material fact. *See*, *White v. Owens-Corning Fiberglas, Corp.*, 668 A.2d 136 (Pa. Super. Ct. 1995).

For example, Defendants claimed Plaintiff was unable to prove that it sent the Act 6 notice by certified mail to each Defendant. In making such assertion, Defendants scrutinize exhibits "D" and "F" in claiming that those documents by themselves do not prove Plaintiff sent the requisite Act 6 notice. The court would agree with Defendants that each exhibit by itself does not establish a prima facie case that Plaintiff sent the Act 6 notice; however, when examining the copy of the envelope containing the Act 6 notice Plaintiff sent, the tracking number on the envelope matches the UPS.com tracking and confirmation page stating such notice was delivered to Defendants, a prima facie case is then established.

Defendants, in claiming that Plaintiff has not proven the elements necessary to show entitlement to the relief requested, make similar arguments to the remaining exhibits. Although innovative, in Defendants' arguments they ask the Court to examine each exhibit exclusive of the next in rendering its decision. As stated previously, the Court must examine all the exhibits in conjunction with each other in rendering a decision on whether or not to grant Plaintiff's motion. Having done so, the Court finds the evidence persuasive and granted Plaintiff's motion for summary judgment.

issues Defendants argued before this Court, and those issues were determined to be meritless by this Court, it is respectively requested that the Honorable Superior Court affirm this Court's Order of Court dated August 23, 2013.

BY THE COURT:

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Joseph J. Matika, Judge