IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

SOUTHWEST CAPITAL INVESTMENTS, LLC, Plaintiff	:	
vs.	:	No. 06-3560
CLARENCE GIMBI, JR. and, SHARON ANN GIMBI Defendants	:	

Jill M. Wineka, Esquire — Counsel for Plaintiff
William Schwab, Esquire — Counsel for Defendant

Nanovic, P.J. – July 18, 2011

MEMORANDUM OPINION

In this suit in which Plaintiff seeks to foreclose on a residential mortgage, the Defendant, Clarence Gimbi, Jr., contends that the owner of the mortgage has failed to establish the following: (1) his execution of the underlying note secured by the mortgage; (2) its standing as the current holder of the note entitling it to begin these mortgage foreclosure proceedings; (3) its compliance with the pre-foreclosure notice statutes in effect prior to the commencement of suit; and (4) his failure to make monthly mortgage payments due since December 9, 2001, until the present time. In all but one instance, we rule against these contentions.

Procedural and Factual Background

On June 5, 1995, the Defendants, Clarence Gimbi, Jr. and Sharon Ann Gimbi (referred to collectively as "the Gimbis"),

borrowed $31,500.00 from Keystone State Mortgage Corporation, mortgaging their home in Beaver Meadows, Carbon County, Pennsylvania, as security. This property was acquired by the Gimbis, as husband and wife, by deed dated March 21, 1988. Through a series of assignments, three in number, the mortgage and underlying note were assigned to the Plaintiff, Southwest Capital Investments, LLC, on October 15, 2002.

On November 1, 2006, Plaintiff filed a complaint in mortgage foreclosure against the Gimbis alleging, *inter alia*, the mortgage was in default for failing to pay all monthly mortgage payments beginning with the payment due October 9, 2006, that the unpaid principal balance due was $23,635.87, and that the total amount then due and owing - consisting of the unpaid principal balance, accumulated interest and late charges, and attorney fees - was $38,907.54. Default judgment in this amount for failing to file an answer was entered against the Defendant, Sharon Ann Gimbi ("Wife"), on June 8, 2007.

On December 1, 2008, Plaintiff petitioned pursuant to Pa.R.C.P 2056 (b) to have a guardian ad litem appointed for the Defendant, Clarence Gimbi, Jr., ("Husband"), as an alleged incapacitated person. Following a hearing held on February 17, 2009, William G. Schwab, Esquire was appointed guardian ad litem for Husband. Thereafter, the complaint was reinstated and served upon Attorney Schwab, preliminary objections were filed,

and an amended complaint was filed to which Husband responded. Husband's answer admitted only his current residence at St. Luke Manor,[1] the appointment of Attorney Schwab as guardian ad litem, his co-ownership with Wife of the mortgaged premises, and that he was not an active member in the United States military. All other averments were denied. A non-jury trial on Plaintiff's claim against Husband was held on December 18, 2010.

At trial, Plaintiff called two witnesses: Cheryl Winschuh, the notary for the mortgage, and Ronald C. Hester ("Hester"), Vice President of Default Servicing for InSource Financial Services, LLC, the servicing agent for Plaintiff. Ms. Winschuh testified that Husband personally appeared before her on June 5, 1995, provided proof of his identity, and that she notarized his execution of the mortgage. Hester explained that Plaintiff purchases non-performing assets - loans in default - and that InSource is employed by Plaintiff, *inter alia*, to collect and foreclose on these loans.

According to Hester, InSource began servicing Defendants' loan for Plaintiff in May 2006. Previously, Select Portfolio Servicing, Inc. had been the servicing agent. Payment histories during the period Select Portfolio was servicing the

[1] In the original complaint filed on November 1, 2006, the last known address for each Defendant was alleged to be Box 457, 126 Route 93, Beaver Meadows, Pa. 18216. In the amended complaint filed on April 28, 2009, Husband's then current address was identified as St. Luke Manor, 1711 East Broad Street, Hazleton, Pa. 18201.

loan (i.e., August 15, 2000 through June 20, 2006) and thereafter, from July 18, 2006 until the date of trial, when InSource was servicing the loan, were identified by Hester and marked as exhibits. (Plaintiff Exhibits 12 and 17, respectively). Using these two exhibits, Hester testified, without objection, that the mortgage was in default, that the most recent mortgage payment made by the Gimbis was credited to the payment due on November 9, 2001, that the next mortgage payment due from the Gimbis was the December 9, 2001 payment, that no payments were received after the payment credited to November 9, 2001, and that the unpaid principal balance remaining due after the last payment by the Gimbis was $23,635.87. Hester further testified that the payoff amount of the Gimbis' loan as of December 8, 2011 was $57,803.27, with a per diem of $7.15, computed as follows:

Unpaid principal balance	$23,635.87
Interest from 11/9/01 through 12/8/10	$23,713.71
Late Fees	$1,884.78
Property Inspection Fees	$50.00
Attorney's Fees[2]	$7,777.50
Legal Costs	$741.41
Total	$57,803.27

(N.T. 12/8/10, pp.41-42).

In addition, Hester testified that the written notice requirements of Act 6 (41 P.S. § 101 et seq.) and Act 91 (35

[2] **The reasonableness and necessity of this amount was stipulated to by Husband. (N.T. 12/8/10, p.40; Plaintiff Exhibits 18, 19, 20 and 24).**

P.S. § 1680.401c et seq.) were complied with and that, in accordance with Act 160 of 1998, a written notice combining the requisite notice requirements of Act 6 and Act 91, was sent to Husband, at his last known residence, by both regular and certified mail.[3] (Plaintiff Exhibits 13 and 14, respectively). The notice by certified mail was returned to Plaintiff, marked by the United States Postal Department as having been refused. (Plaintiff Exhibit 16).

Husband objected that notwithstanding Hester's identification of the notices which he claimed were sent to Husband, the evidence which Plaintiff presented to show the actual date of mailing of these notices to Husband by regular and certified mail - Plaintiff Exhibit 15 - failed to prove either mailing: that with respect to the service by certified mail, only the receipt for the notice sent by certified mail to Wife was post-marked, not the receipt for certified mail to Husband; and that with respect to the service by regular mail, the certificate of mailing for the notices sent by first class mail improperly combined in one certificate proof of mailing for the separate notices claimed by Plaintiff to have been sent to Husband and Wife, and contained a single postage paid amount of $1.90, which Husband argued, according to its placement on the

[3] "Act 6 relates to the foreclosure of residential mortgages, and Act 91 deals with state-funded emergency assistance to homeowners who are facing foreclosure on their mortgages." Bennett v. Seave, 554 A.2d 886 (Pa. 1989).

certificate, evidenced only that postage was paid for the notice to Wife. (N.T. 12/8/10, pp.62-64, 67-76). Husband's objections were overruled and Plaintiff's Exhibit 15 was admitted.[4]

After Plaintiff's witnesses completed their testimony, Plaintiff moved for the admission of Plaintiff's Exhibits 12 and 17, the history of the Gimbis' loan payments as maintained by Select Portfolio and Plaintiff, respectively. Husband objected. Specifically, Husband contended that the business record exception to hearsay (Pa.R.E. 803(6)) had not been met with respect to the payment history prepared by Select Portfolio,[5] and that the payment history prepared by Plaintiff was objectionable because it relied upon and carried forward the unpaid principal ending balance from Select Portfolio's payment history.

[4] Plaintiff Exhibit 15 contains two U.S. Postal Service form "Receipts for Certified Mail" - one addressed to Wife, which is post-marked, and one addressed to Husband, which contains no postmark, and corresponds to the written notice addressed to Husband which has been marked as Plaintiff Exhibit 14. Exhibit 15 also includes a certificate of mailing - purporting on its face to conform with U.S. Postal Service Form 3817 - offered to support the mailings of the combined Act 6/91 notices to each Defendant by first class mail. As pertains to Husband, this certificate of mailing corresponds to the written notice marked as Plaintiff Exhibit 13.

In reviewing the written transcript of the trial with respect to Exhibit 15, the certificate of mailing was expressly admitted (N.T. 12/8/10, p.70), however, while discussed, no ruling was made on the two receipts for certified mail. Also, no rulings were made at the time of trial with respect to Plaintiff Exhibits 8 (settlement statement) and 16 (the actual envelope and its contents sent to Husband by certified mail, stamped refused). To close this unintended gap in the record, each of these exhibits is hereby formally admitted.

[5] On cross-examination, Hester admitted that he did not know how Select Portfolio or previous servicers of the Gimbis' loan created or maintained their business records and that he could not vouch for the accuracy of any of the information appearing in these records prior to the time InSource became the servicing agent.

Husband's objection to Exhibit 12 was sustained and that to Exhibit 17 overruled.

Neither Defendant testified nor was present at the trial. Nor did Husband present any evidence or witnesses on his behalf.

DISCUSSION

In Husband's post-trial memorandum, Husband raises two issues which merit discussion: (1) whether Plaintiff complied with the written notice requirements of Act 6 and Act 91 prior to the institution of this foreclosure action, and (2) whether Plaintiff proved by competent evidence that Husband was in default on the loan.[6] Because the answer to the second issue has

[6] Husband has also raised two additional issues which require little discussion: (1) that Plaintiff failed to prove the underlying note, which is secured by the mortgage, was executed by Husband, and (2) that Plaintiff failed to prove it is the current holder of the note and, therefore, entitled to foreclose on the mortgage. *See* 13 Pa.C.S. § 3301; *see also* Deutsche Bank National Trust Co. v. Smith, No. 08-3089 (C.P. Delaware Co. July 22, 2010) (holding that standing to foreclose in other than the original mortgagee exists provided the foreclosing party is the holder of the mortgage note and that the mortgage has been assigned to it); and Girard Trust Co. v. City of Philadelphia, 87 A.2d 277, 279 (Pa. 1952) (noting that because a mortgage which secures an accompanying note or bond serves primarily as collateral for such underlying debt, the mortgage is not independently enforceable).

As to the first of these two issues, at trial the original note was identified by Hester and admitted into evidence without objection. (N.T. 12/8/10, pp. 23, 57-58; Plaintiff Exhibit 7). This note is dated the same date as the mortgage and contains a signature very similar to Husband's signature which appears in both the mortgage and in Ms. Winschuh's notary book. Husband has presented no evidence to the contrary. Finding no reason to dispute the authenticity of Husband's signature on the note, we find Plaintiff has met its burden as to this issue.

As to whether Plaintiff is the current holder of the note and mortgage, this fact was stipulated to at trial. (N.T. 12/8/10, pp. 21-22). Further, the original note was produced by Plaintiff at the time of trial and made part of the record. The original note, on its face, has been assigned by Keystone State Mortgage Corporation to Contimortgage Corporation, and both Contimortgage's assignment to Manufacturers and Traders Trust Company, as trustee, and Manufacturers and Traders Trust Company's assignment to

a bearing on whether Act 91 notice was required, we discuss it first.

Default

Contrary to Husband's argument, the evidence is sufficient to find, and we so find, that Husband is in default as of December 9, 2001, on the loan originally taken with Keystone State Mortgage Corporation.

Hester testified not only that no payments have been received since InSource began servicing the loan in May 2006, but also that no payments have been received since the payment due November 9, 2001, and that the unpaid principal balance of $23,635.87 has remained the same since December 9, 2001, until the present. While Hester may very well have not been competent to testify with respect to the payment history as reported by Select Portfolio and the unpaid principal balance derived from that payment history, Commonwealth Financial Systems, Inc. v. Smith, 15 A.3d 492 (Pa.Super. 2011), the fact remains he did, without objection. Jones v. Spidle, 286 A.2d 366, 367 (Pa. 1971) ("[H]earsay evidence, admitted without objection, is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question."); *see also* Commonwealth v. Foreman, 797 A.2d 1005, 1012, 1015-16

Plaintiff expressly include an assignment of the note, as well as the mortgage.

(Pa.Super. 2002) (recognizing that a factfinder may make findings of fact based upon unobjected hearsay).

Notice

With respect to the first issue, Husband does not challenge the sufficiency of the contents of the combined Act 6/91 Notice. Rather, Husband's challenge is to whether Plaintiff complied with the service requirements of Act 6 and Act 91 for each notice.

Act 6 provides that before a mortgagee commences a legal action against the grantor of a residential mortgage, it must first send written notice, by registered or certified mail, to the mortgagor at his last known address and, if different, at the residence which is the subject of the residential mortgage. 41 P.S. § 403(b). Act 91 requires a mortgagee who intends to foreclose to send written notice to the mortgagor at his last known address. 35 P.S. § 1680.403c(a). The Act 91 notice is to be sent by regular mail and documented by a certificate of mailing obtained from the United State Postal Service, if notice is to be deemed to have been received on the third business day following the date of mailing. 35 P.S. § 1680.403c(e); *cf.* Donegal Mutual Insurance Company v. Insurance Department, 719 A.2d 825 (Pa.Cmwlth. 1998) (discussing the "mailbox rule"). The written notice sent under the combined Act 6/91 provisions of Act 160 of 1998 is required to be sent to the homeowner's last

known residence by regular and either registered or certified mail, and to the mortgaged premises, if different. 12 Pa.Code § 31.203(a)(1).[7]

The combined Act 6/91 notice of intention to foreclose was sent to Husband by first class mail at RR 93, Box 457, Beaver Meadows, Pennsylvania 18216 on September 21, 2006. The notice to Husband by certified mail was addressed to the same address. This address is virtually identical to that which appears in Husband's deed for the property (Plaintiff Exhibit 5), as well as that in the mortgage (Plaintiff Exhibit 1), the note (Plaintiff Exhibit 7), the settlement statement for Husband's financing of the mortgage (Plaintiff Exhibit 8), Husband's loan application (Plaintiff Exhibit 10) and the address given by Husband to the mortgage notary, Cheryl Winschuh (Plaintiff Exhibit 6).[8] This address was both the property address and Husband's residence at the time of the loan.

The certificate of mailing evidencing service of the Act 6/91 notice on Husband by first class mail combined in one

[7] As a matter of law, the need to comply with the service requirements of Act 91 is misleading in this case. A mortgage debtor is not entitled to an Act 91 notice where the mortgage is delinquent in excess of twenty-four months. 35 P.S. § 1680.403c(f)(1). Since the Gimbis' delinquency occurred with their failure to make the December 9, 2001 payment, as of September 21, 2006, the date the notices are claimed to have been mailed by Plaintiff, almost five years had passed from the date of default. For this reason, the statutory notice provided by Act 91 was not required to be sent. Accordingly, we concentrate our discussion primarily on whether the requirements of Act 6 were met.

[8] The only difference is that in several of these documents, in addition to the box number, the street address is given as 126 Route 93, rather than simply RR 93.

document a certificate of mailing for both Husband and Wife. Without offering any authority to support his position that the use of a single certificate of mailing certifying to the separate mailing of the same notice to two different people at the same address is prohibited, Husband asks us to place form over substance. This we will not do. We further take judicial notice that at the time of this mailing the postal rates for one certificate of mailing was $0.95 and for two, $1.90.

As to service of the certified mail, while Husband is correct that only the receipt for the certified mail addressed to Wife is post-marked by the United States Postal Service, the evidence nevertheless shows that the notice was in fact also sent to Husband by certified mail. Plaintiff placed in evidence the actual envelope and its contents sent to Husband by certified mail. (Plaintiff Exhibit 16). This notice was returned to Plaintiff with a red postal stamp stating the mail had been refused.[9] Still, Plaintiff's evidence does not show when this certified mail was sent to Husband.

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[9] Neither Act 6 nor Act 91 requires that the certified mail be sent restricted delivery. Therefore, it is impossible to determine whether this mailing was refused by Husband, by Wife, or by some third party. Regardless, provided the mortgagee complies with the notice requirements of the statute, which - with the one exception about to be discussed - we find Plaintiff has, actual receipt of notice is not required. Second Federal Savings and Loan Association v. Brennan, 598 A.2d 997, 1000 (Pa.Super. 1991); Beneficial Mutual Savings Bank v. Kertis, 36 Pa. D. & C.3d. 33, 36-37 (1985).

To the extent Husband contends he may have no longer been living at the property address at the time the notices were sent and if this were the case, notice should also have been sent to his place of residence, Husband argues in the subjunctive without any evidentiary support. As is evident from the

Act 6 requires that the written notice be sent to the mortgage debtor by registered or certified mail at least thirty days in advance of commencing an action in mortgage foreclosure and that the debtor be provided this time to cure the default and avoid foreclosure. 41 P.S. §§ 403(a) and 404(c). This Section 403 notice is mandatory. *See* General Electric Credit Corp. v. Slawek, 409 A.2d 420, 422 (Pa.Super. 1979); *see also* Potter Title & Trust Co. v. Berkshire Life Ins. Co., 39 A.2d 268, 270 (Pa.Super. 1944) ("Where notice in a specific manner is prescribed by statute, that method is exclusive."), and Ertel v. Seitzer, 31 Pa. D. & C.3d 332, 333 (1982) ("The service requirements of Act 6 must be strictly construed.").

The notices of intent to foreclose sent to Husband informed him of the amount in delinquency and Plaintiff's intention to begin foreclosure proceedings unless the default was cured within thirty days. Unfortunately, we cannot tell from Plaintiff's evidence when this notice was sent and therefore how much time Husband was given to cure the default.

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filing date of the original complaint, the notices were sent prior to November 1, 2006. Not until receipt of the sheriff's return dated June 26, 2007, with respect to service of the reinstated complaint on Husband - indicating Husband was residing at St. Luke Manor, a nursing home in Luzerne County - did Plaintiff have any reason to believe that Husband was no longer living at the property. Husband presented no evidence as to when he began residing at St. Luke Manor or why. As previously indicated, the address Plaintiff used was that which appeared in all the loan documents it acquired upon its purchase of the Gimbis' loan and the certified mail it addressed to Husband at this address was returned because it was refused, not because it was unclaimed.

The burden of strictly complying with the service requirements of Act 6 - service by registered or certified mail at least thirty days in advance of commencing an action - was upon Plaintiff. Plaintiff's failure to establish when the certified mail was sent to Husband is critical to its case, an omission which we regard as crucial and inexcusable given "the need to strictly construe the requirements of the [A]ct so as to more fully protect the debtor." Kennedy Mortgage Co. v. Washington, 12 Pa. D. & C.3d 476, 480 (1979).

One of the signal purposes of Act 6 is to provide protective safeguards to borrowers before a mortgage foreclosure action on a residential mortgage may be instituted. Slawek, 409 A.2d at 421-22. As stated by the Superior Court in Ministers & Missionaries Benefit Board v. Goldsworthy:

> A principal function of Section 403 notice is to make the mortgagor aware of the existence of a default and his right to cure it; he is not to be cursed by an inadvertent delinquency. After receipt of this notice, the mortgagor can prevent foreclosure and avoid acceleration by tendering the appropriate amount or performance specified in Section 404(b). Once the default is cured, a necessary element permitting acceleration and foreclosure is no longer present.

385 A.2d 358, 364 (Pa.Super. 1978), *overruled on other grounds by* Marra v. Stocker, 615 A.2d 326 (Pa. 1992); Slawek, 409 A.2d at 424. This cannot occur however if the debtor has been deprived, by time, of the opportunity to cure the default.

CONCLUSION

In accordance with the foregoing, we find Plaintiff has met its burden of proving default in Husband's payment obligation under the mortgage. However, we also find that Plaintiff has failed to comply with the mandatory notice provisions of Section 403 of Act 6. For this reason, Plaintiff's suit against Husband will be dismissed, without prejudice.

BY THE COURT:

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P.J.