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

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE for SERVERTIS FUND I TRUST 2010-1 GRANTOR TRUST CERTIFICATES, SERIES 2010-1,	:	
Plaintiff	:	
vs.	:	No. 11-2375
CLAYTON E. HUNSICKER,	:	
Defendant	:	

Erin Dyer, Esquire	Counsel for Plaintiff
Kim Roberti, Esquire	Counsel for Plaintiff
Jason M. Rapa, Esquire	Counsel for Defendant

MEMORANDUM OPINION

Matika, J. – September 24th, 2012

Before the Court is the Motion for Summary Judgment filed by U.S. Bank National Association, (hereinafter "Plaintiff"), in an action against Clayton E. Hunsicker, (hereinafter "Defendant") based upon a mortgage foreclosure complaint involving property located at 23 Evergreen Road, Lehighton, PA 18235 (hereinafter "Property"). For the reasons stated herein, Plaintiff's Motion for Summary Judgment is **DENIED**.

I. FACTUAL and PROCEDURAL BACKGROUND

On October 30, 2007, Defendant executed and delivered a promissory note in the amount of one hundred twenty-one thousand, eighth hundred thirty-six dollars ($121,836.00) at an

interest rate of 10.73% payable to ResMAE Mortgage Corporation. The promissory note called for monthly payments of one thousand one hundred thirty-five dollars and forty-nine cents ($1,135.49). To secure the note, Defendant executed and delivered to ResMAE Mortgage Corporation a mortgage on the Property.[1] ResMAE Mortgage Corporation assigned all of its rights, interest, and title in both the promissory note and mortgage to Plaintiff on April 29, 2011.[2]

Plaintiff avers that the mortgage went into default due to Defendant's failure to make the monthly required payment for July 2010, and every month thereafter. Based upon Defendant's failure to cure the defaulting mortgage and have it reinstated, or pay off the outstanding balance of the loan, Plaintiff, under the acceleration clause of the mortgage, elected to declare the entire balance of the promissory note due and payable immediately.

Plaintiff has commenced this mortgage foreclosure action against Defendant and seeks an *in rem* judgment. In Defendant's Answer, he admits to the execution of the promissory note and mortgage to ResMAE Mortgage Corporation, but states he is

[1] Defendant is the owner of the subject property involved in this action.

[2] Prior to that date, on May 28, 2010, Plaintiff and Green Tree Servicing LLC, (hereinafter "Green Tree"), entered into a mortgage pooling and servicing agreement whereby Green Tree would service all of Plaintiff's then existing loans, as well as any future loans acquired by Plaintiff.

without sufficient knowledge to admit or deny the outstanding balance Plaintiff claims is due.[3]

Plaintiff filed this Motion for Summary Judgment against Defendant on the basis that there are no genuine issues of material fact to present at trial.

II. 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). The moving party has the burden of proving that there is no genuine issue of material fact. *Thompson Coal Co., v. Pike Coal Co.,* 412 A.2d 466 (Pa. 1979). On a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, who must be given the benefit of all reasonable inferences. Furthermore, any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Davis v. Pennzoil Co.*, 264 A.2d 597 (Pa. 1970); *Lehigh Electric Products Co., Inc. v. Pennsylvania National*

[3] Defendant states, in his Answer, that he cannot admit or deny the outstanding balance Plaintiff claims is due on the promissory note because Plaintiff has failed to attach to the complaint any supporting documentation of the balance still owing on the note.

Mutual Casualty Ins. Co., 390 A.2d 781 (Pa. Super. 1978). 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).

"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). Defendant, in his answer, admits to the execution of the promissory note and mortgage. The Defendant, in response to Plaintiff's averment regarding the outstanding balance, denies that the outstanding balance is due and owing as claimed and responded with an averment stating he is "without sufficient knowledge to admit or deny such averment." The Court however, must treat such a response as an admission for the reasons stated below.

Rule 1029 of Pennsylvania Rules of Civil Procedure explains the effect of a denial, such as proffered by the Defendant, 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.
>
> **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).

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 Corporation v. Dietzel*, 524 A.2d 951 (Pa. Super. 1987). The rationale of the *Dietzel* Court was, "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. 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." Inasmuch as both the *Dietzel* and *Strausser* Courts deemed defendants' general denials of the amount owing on the promissory note as admissions, so will this Court. Therefore, the only issue left for the Court to determine is whether Defendant is in default of the mortgage.

In support of their motion, Plaintiff submitted an

affidavit from Green Tree's Operations Manager, who is also the "records custodian of the business records held by Green Tree." In the affidavit, the Operations Manager stated, in reviewing Green Tree's records, that beginning with July 2010's monthly payment, Defendant became sufficiently delinquent on his mortgage. Furthermore, since July 1, 2010, Defendant has been unable to satisfy all arrearages to make current the mortgage.[4]

Defendant argues that the business exception rule[5] does not apply to allow for this Court to simply accept Plaintiff's affidavit and as such the statements contained within the affidavit that concern the documentation of Defendant's mortgage are barred by the hearsay rule. Further, the Defendant argues that since such statements should be excluded by the hearsay

[4] In paragraph 20, Green Tree's Operations Manager affirms that Green Tree acquired the rights to foreclose on Defendant's mortgage on April 29, 2011, via ResMAE Mortgage Corporation's assignment of Defendant's mortgage to Plaintiff.

[5] The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

> **(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Pa.R.E. 803(6)

rule, that Plaintiff is unable to prove Defendant defaulted on the mortgage and thus its motion for summary judgment should be denied.

Defendant's argument relies upon a recent Superior Court case, *Commonwealth Financial Systems, Inc. v. Smith*, 15 A.3d 492 (Pa. Super. 2011). In *Smith*, plaintiff tried to collect on an after-acquired debt by submitting to the trial court documents created by the credit card company that plaintiff purchased defendant's debt from. The Superior Court upheld the Trial Court's decision to preclude the documents offered by plaintiff in ruling the documents inadmissible because the documents were prepared by a third party who was not present at trial to testify to the authenticity and trustworthiness of such documents and thus allowing such documents would violate the hearsay rule. The Superior Court reiterated that Pennsylvania has yet to adopt the rule of incorporation with regards to business records.[6] Although *Smith* is a debt buyer case involving a credit card debt, this Court finds its holding and rationale controlling in this case.

To establish trustworthiness, Pennsylvania's business exception rule requires "the authenticating witness [to] provide sufficient information relating to the preparation and

[6] The rule of incorporation provides that a record that a business takes custody of is considered "made" by that business so that the admissible hearsay exception of business records allows such records to be admitted.

maintenance of the records to justify a presumption of trustworthiness for the business records of a company" so that a sufficient basis is provided to offset the hearsay character of the evidence. *In re Indyk's Estate*, 413 A.2d 371 (Pa. 1979); *Ganster v. Western Pennsylvania Water Co.*, 504 A.2d 186 (Pa. Super 1985). The trial court may exclude an otherwise qualified record if "the source of information or other circumstances indicate lack of trustworthiness." *Commonwealth v. Schoff*, 911 A.2d 147 (Pa. Super. 2006). The comment to Pennsylvania Rules of Evidence 803(6) places the burden on the party opposing admissibility of the evidence to establish that the evidence lacks trustworthiness. Pa.R.E. 803(6). With the help of the Plaintiff itself, the Court believes that in this case Defendant has met his burden.

In Plaintiff's affidavit of support, along with the averments in the complaint, it is alleged that the Defendant defaulted on his mortgage in July of 2010, however, Plaintiff did not acquire the rights to service this mortgage until April 29, 2011. Included in Plaintiff's affidavit of support is obviously information claimed by Plaintiff "as its own," yet could not have been because Defendant's default on the mortgage occurred at a time <u>prior to</u> Green Tree's involvement. Therefore, this Court finds unreliable and conflicting Plaintiff's statement that Green Tree has been servicing

Defendant's mortgage since before the mortgage went into default and thus the documents it submitted to the Court as proof of Defendant's default are their own. If, up until the time of default, ResMAE had the rights to service the mortgage and not Plaintiff, Plaintiff's claim that it was servicing the mortgage before default goes against the averments in the complaint and its own affidavit of support. Therefore, the information contained in Plaintiff's documents submitted to the Court as proof of Defendant defaulting on the mortgage is not from the records of Green Tree but rather that of ResMAE. Consequently, Plaintiff's affidavit from Green Tree cannot be said to be trustworthy.

In examining the record, there is no affidavit of support from ResMAE stating such records were made contemporaneously with the events it purports to relate. *See*, *Isaacson v. Mobile Propane Corporation*, 461 A.2d 625 (Pa. Super. 1983); *Sauro v. Shea*, 390 A.2d 259 (Pa. Super. 1978).

Plaintiff's argument that "this is how the banking industry does it," in terms of assignments and successors, was addressed and discredited in *Smith*. The *Smith* Court, quoted Judge Boyko of Ohio who stated, "[t]he institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the

Court to stop them at the gate." *Smith*, 15 A.3d at 500 (quoting *In re Foreclosure Cases*, 2007 WL 3232430 at *3 (N.D. Ohio Oct. 31, 2007)).

Since Pennsylvania has not adopted the rule of incorporation and the documents Plaintiff submitted are relying upon information prepared by a third party, ResMAE, and no one from ResMAE has attested to the truthfulness and trustworthiness of the information concerning Defendant's defaulted mortgage, this Court is left with no other choice but to deny Plaintiff's motion for summary judgment.

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ORDER OF COURT

AND NOW, to wit, this 24th day of September, 2012, upon consideration of the Motions for Summary Judgment filed by Plaintiff and briefs in support thereof, the Plaintiff's response thereto, oral argument thereon, and after reviewing the record in this matter as defined by Pennsylvania Rule of Civil Procedure 1035.1, it is hereby **ORDERED and DECREED** that:

1. Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

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Joseph J. Matika, J.