

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

WELLS FARGO BANK, N.A.,	:	
Plaintiff	:	
vs.	:	NO: 12-1315
	:	
ROBERT SUAREZ, JR.,	:	
A/K/A ROBERT SUAREZ, AND	:	
PATRICIA A. CUNNINGHAM,	:	
Defendants	:	

Civil Law - Mortgage Foreclosure - Motion for Summary Judgment -
Standing of Plaintiff - Assignment of Mortgage -
Subject Matter Jurisdiction - Compliance with Act 91
as a Condition Precedent to Commencement of Suit -
Homeowner Assistance Settlement Act

1. Where a complaint in mortgage foreclosure fails to identify plaintiff's authority to enforce the mortgage, when plaintiff is not the original mortgagee and plaintiff's entitlement to prosecute the action is de hors the record as of the date judgment is taken, the judgment is properly stricken.
2. A non-moving party to summary judgment who disputes evidence presented by the moving party may not rest upon the pleadings, but must set forth specific facts demonstrating a genuine issue for trial. Consequently, a party who first raises the issue of the validity of signatures to a mortgage assignment or the identification in a document of record that a mortgage holder is the successor by merger to a prior mortgage holder after a motion for summary judgment has been granted, waives the issue.
3. A defendant in a mortgage foreclosure action who admits that Act 91 notices were sent, but denies, as a conclusion of law, that the notices comported with Pennsylvania law, without at any time identifying any deficiencies or defects in the notices, copies of which were attached to the motion for summary judgment, fails to raise an issue of disputed fact sufficient to overcome the motion for summary judgment.
4. Prior to enactment of the Homeowner Assistance Settlement Act, existent case law held that a failure to comply with Act 91's notice requirements deprived the trial court of

subject matter jurisdiction over an ensuing mortgage foreclosure action. Under the Homeowner Assistance Settlement Act, a failure to comply with Act 91 does not automatically deprive the court of subject matter jurisdiction. Instead, this statute requires the beneficiary of Act 91's notice requirements to identify and raise as an issue in the case in what respects the statute has not been complied with. If the court determines the statute has not been complied with and the owner has been prejudiced thereby, the court is authorized by the statute to exercise its discretion and to devise an appropriate remedy.

5. A property owner is not eligible for Act 91 assistance where the mortgaged property is not his principal residence and is not owner-occupied.

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A/K/A ROBERT SUAREZ, AND	:	
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Defendants	:	
Courtenay R. Dunn, Esquire		Counsel for Plaintiff
Robert Suarez, Jr.		Pro se
Patricia A. Cunningham		Pro se

MEMORANDUM OPINION

Nanovic, P.J. - September 5, 2013

The Defendant, Robert Suarez, Jr., has appealed our order of June 18, 2013, granting Plaintiff's Motion for Summary Judgment in this mortgage foreclosure action. This Opinion is written in accordance with Pa.R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

On June 19, 2012, the Plaintiff, Wells Fargo Bank, N.A. ("Bank"), commenced the instant action by complaint filed against the Defendants, Robert Suarez, Jr. and Patricia A. Cunningham. The complaint avers, *inter alia*, that the Defendants are the mortgagors and real owners of the property subject to these mortgage foreclosure proceedings; that the mortgage, dated February 25, 1994, is recorded in mortgage book 547, page 163, names as the mortgagee, America's Wholesale

Lender, and was assigned to Bank by an assignment recorded on April 24, 2007, in mortgage book 1572, page 93; that monthly payments owed on the mortgage have not been paid, beginning with the payment due and owing on August 1, 2010; that the total amount due as of May 21, 2012, as itemized in paragraph 6 of the complaint, is \$46,705.71; and that a notice of intention to foreclose in accordance with Act 6 of 1974 was sent to the Defendants on the dates set forth thereon. In answer to the averments identifying the mortgage and its assignment to Plaintiff, the Defendant, Robert Suarez, Jr. ("Husband") responded that the documents speak for themselves; as to the averment that the mortgage was in default for failure to make any payments, beginning with that due and owing on August 1, 2010, Husband asserted this was a conclusion of law; as to the amount owed, Husband answered he did not know; and as to the sending of the notice of intent to foreclose, Husband again responded that the documents speak for themselves, but that the balance of the averment was admitted. Husband was represented by legal counsel at the time this answer was filed.

The Defendant, Patricia A. Cunningham ("Wife"), did not file an answer to the complaint. In consequence, a judgment was entered against Wife only on January 21, 2013, with damages to be assessed at a later date.

A scheduling order was entered on November 5, 2012. In that order, the deadline for completing discovery was set at December 16, 2012, and the deadline for filing pretrial motions at February 14, 2013. A milestone, an approximate date, for a nonjury trial was set for April 15, 2013.

By order dated February 5, 2013, the case was scheduled for a nonjury trial on April 5, 2013. Prior to this date, on March 28, 2013, the Bank requested a continuance averring that the case was currently being reviewed for loss mitigation alternatives to foreclosure, that a continuance of ninety days was sought, and that opposing counsel joined in the request. The continuance was granted by order dated April 1, 2013, wherein we rescheduled the matter for trial on July 19, 2013.

On April 5, 2013, the Bank requested the deadline originally set for filing pretrial motions, February 14, 2013, be extended an additional ninety days to allow the filing of a motion for summary judgment and permit Husband time to respond. In this motion, the Bank further indicated that the case was still under review for loss mitigation alternatives to foreclosure. By order dated April 5, 2013, we granted the Bank's request and extended the original date for filing pretrial motions by ninety days.

On April 24, 2013, the Bank filed its motion for summary judgment, to which Husband, represented by counsel, filed a

response on May 14, 2013. In this motion, the Bank identified and attached copies of the original mortgage and promissory note dated February 25, 1994; identified and attached a copy of the assignment of the mortgage and note to Fleet Real Estate Funding Corp., on October 14, 1994; identified and attached a copy of the assignment of the mortgage and note from Washington Mutual Bank f/k/a Washington Mutual Bank, FA, successor to Washington Mutual Home Loans, Inc. f/k/a Fleet Mortgage Corp. f/k/a Fleet Real Estate Funding Corp., to Wells Fargo Bank, N.A. on April 13, 2007; attached an affidavit of its vice president of loan documentation stating the amount due on the loan as of December 6, 2012, was \$51,120.21, including an itemization of this figure; attached a copy of Husband's loan history evidencing the last payment made by Defendants was on August 2, 2010; and attached a copy of the Act 91 notices sent to Defendants at both their home address and the mortgaged premises on October 3, 2010, further averring that Husband was not eligible for Act 91 assistance because the mortgaged premises was vacant and was not the principal residence of Husband. In response, Husband asserted that all of the documents identified and attached to the Bank's motion spoke for themselves, and while admitting that the Act 91 notices were sent, denied, as a conclusion of law, that the notices comported with Pennsylvania law.

On June 18, 2013, we heard argument on the Bank's motion for summary judgment. At that time, the Bank was represented by counsel, however, Husband appeared on his own, without counsel. Although we extended Husband the courtesy of addressing the court, our order of April 26, 2013, which scheduled the matter for argument, clearly stated that counsel who failed to file briefs would not be permitted to orally argue in court. Husband's counsel had not previously filed a brief on his behalf.

Following argument, by order dated June 18, 2013, and filed on June 19, 2013, judgment was entered in favor of the Bank and against Husband in the amount of \$51,120.21, plus interest from December 6, 2012, and costs. On July 18, 2013, Husband filed his Notice of Appeal from the June 18, 2013, order. That same date, Husband also filed a petition for reconsideration of the grant of summary judgment. This petition was not acted upon as we were without jurisdiction to do so given the thirty day limitation imposed by 42 Pa.C.S.A. § 5505 and the pending appeal. PNC Bank, N.A. v. Unknown Heirs, 929 A.2d 219, 226 (Pa.Super. 2007).

By order dated July 19, 2013, we directed Husband to file a concise statement of the matters complained of on appeal within twenty-one days of the date of entry of the order. Husband failed to do so, however, in response to Husband's request for

an extension of this deadline, an extension was granted by order dated August 16, 2013. Within the time permitted by this extension, Husband filed his concise statement. We address each of the issues raised in Husband's concise statement below.

DISCUSSION

An action in mortgage foreclosure is an *in rem* proceeding and does not impose personal liability. Newtown Village Partnership v. Kimmel, 621 A.2d 1036, 1037 (Pa.Super. 1993); Signal Consumer Disc. Co. v. Babuscio, 390 A.2d 266, 270 (Pa.Super. 1978). Consequently, the *prima facie* elements of an action in mortgage foreclosure require proof of the existence of a valid mortgage, that plaintiff is the current holder of the mortgage entitled to enforcement, that the original mortgagor and current real owner of the property are named defendants, that there exists a default, and that an itemization of the amount claimed to be due is provided. Cf. Pa.R.C.P. No. 1144 (Parties. Release of Liability.); Pa.R.C.P. No. 1147 (The Complaint.).

In the current appeal, Husband does not dispute that he is a mortgagor and a present real owner of the property, that the mortgage is in default, or that the amount claimed in the complaint to be due is due. Instead, Husband appears to question whether the Bank is the current holder of the mortgage entitled to prosecute this action, and whether an Act 6 notice

was sent, contending that the failure to do so would deprive this court of subject matter jurisdiction.

As to the Bank's interest in the mortgage, the complaint avers that the mortgage was assigned to it by an assignment recorded on April 24, 2007, and docketed in mortgage book 1572, page 93. (Complaint, paragraph 3). The motion for summary judgment attaches a copy of this assignment which is marked as Exhibit A-3. Consequently, as of the date the mortgage foreclosure complaint was filed (June 19, 2012), and the date of entry of summary judgment (June 18, 2013), a completed and recorded written assignment of the subject mortgage to the Bank was identified in the complaint and was a matter of public record. Cf. Wells Fargo Bank, N.A. v. Lupori, 8 A.3d 919, 922 (Pa.Super. 2010) (holding that where the complaint failed to identify an assignment of mortgage to the plaintiff, which was not the original mortgagee, the existence of an assignment was *dehors* the record as of the date default judgment was taken, requiring that the judgment be stricken).¹

¹ In his motion for reconsideration, Husband questioned the validity of the signatures on the assignment from Washington Mutual Bank to Bank, and the lack of a separate assignment from Fleet Real Estate Funding Corp. to Washington Mutual Bank. Neither of these issues were raised by Husband as affirmative defenses in the pleadings, nor did Husband by any evidence of record demonstrate that a genuine issue of fact existed concerning the validity of these assignments, or that Washington Mutual Bank succeeded to the interest of Fleet Real Estate Funding Corp. DeSantis v. Frick Co., 745 A.2d 624, 626 (Pa.Super. 1999) (holding that a nonmoving party to summary judgment may not rest upon the pleadings, but must set forth specific facts demonstrating a genuine issue for trial).

Nor has Husband questioned how ownership of the mortgage passed from the

As to the sending of an Act 6 notice, Husband's answer to the complaint conclusively admitted that such a notice was sent, although the sufficiency or content of the notice was not admitted. (Complaint, paragraph 8 and Husband's answer thereto). Similarly, Husband's answer to the motion for summary judgment admitted the sending of the Act 91 notices to him, but did not concede that the contents of the notices comported with Pennsylvania law. (Motion for Summary Judgment, paragraph 9 and Husband's response thereto).² Furthermore, at no time has Husband identified to this court any deficiencies or defects in the notices the Bank attached to its motion for summary judgment.

Next, while the Superior Court in Beneficial Consumer Discount Co. v. Vukman, 37 A.3d 596 (Pa.Super. 2012), *appeal granted*, 55 A.3d 100 (Pa. 2012), held that a failure to comply with Act 91's notice requirements deprived the trial court of subject matter jurisdiction over the ensuing mortgage foreclosure action, subsequent to that decision, the Homeowner Assistance Settlement Act ("Act"), 35 P.S. §§ 1681.1 - 1681.7,

original mortgagee, America's Wholesale Lender, to Countywide Funding Corporation, the assignor to Fleet Real Estate Funding Corp. (Motion for Summary Judgment, Exhibit A-2). In this respect we note that unlike in Lupori, the Bank here has clearly claimed to be the owner by assignment of the mortgage, which assignment was pled in the complaint and is a document of record. In addition, Husband's pretrial memorandum filed on April 1, 2013, explicitly acknowledged that the mortgage to America's Wholesale Lender had been assigned to the Bank and further acknowledged the mortgage was in default.

² Act 160 of 1998 authorizes a combined Act 6/Act 91 notice which was done in this case. 35 P.S. § 1680.403c(b) (1).

was enacted. This Act, which is retroactive to June 5, 1999, expressly provides that the failure of a mortgagee to comply with the notice requirements of Sections 402-C and 403-C of the Housing Finance Agency Law (i.e., Act 91) does not deprive a court of jurisdiction over a subsequent legal action, including one for foreclosure. 35 P.S. §§ 1681.5(3), 1681.7. The Act further provides that if there has been a failure to comply with the notice requirements of Act 91, such failure must be properly identified and raised as an issue in the case, and if the mortgagor has been prejudiced thereby, "the court may dismiss the action without prejudice, order the service of the corrected notice during the action, impose a stay on [the] action or impose other appropriate remedies [] to address the interests, if any, of the mortgagor." 35 P.S. § 1681.5(1).

As is evident from the above-cited provisions of the Act, a failure to comply with the notice requirements of Act 91 no longer deprives the court of jurisdiction in an action to foreclose, as is argued by Husband. Further, the Act specifically requires the manner or area of noncompliance to be identified in order that the court can devise an appropriate remedy. Here, Husband's answer to the complaint and to the motion for summary judgment admitted that notice had been given, but as to the sufficiency of such notice, responded only that the documents speak for themselves and that whether the notices

comport with Pennsylvania law is a conclusion of law. At no time has Husband identified in what respects he contends the notices are defective. Finally, Husband is ineligible for Act 91 assistance since the mortgaged property is not his principal residence and is not owner occupied. 35 P.S. § 1680.401c(a)(1), (2).³

³ The remaining issues identified in Husband's concise statement are addressed as follows:

- (1) The court acted within its discretion in granting a continuance of the originally scheduled April 5, 2013, trial date upon application of the Bank, joined in by Husband's counsel.
- (2) The court acted within its discretion in extending the deadline for filing pretrial motions requested by the Bank to permit the filing of a motion for summary judgment, which motion recited that loss mitigation alternatives to foreclosure were then under review and that the original trial date had been continued for ninety days to allow time for this review and for the Bank to file a motion for summary judgment.
- (3) Husband's contention that at the time summary judgment was granted, the deadline to complete discovery was still open, is mistaken. The Bank's motion to extend the milestone dates and the resulting April 5, 2013, order, were limited to extending the date to file pretrial motions. The deadline for discovery originally set in the November 2, 2012, order, December 16, 2012, remained in place.
- (4) Husband's contentions that the complaint did not comply with the requirements of Rule 1019 (Contents of Pleadings), 1024 (Verification), 1147 (Contents of Complaint, Mortgage Foreclosure) and 2002 (Real Party in Interest) are nonspecific, fail to preserve any issue for review, were not raised by preliminary objection, and are waived.
- (5) Husband's request for discovery at the time of argument on the Bank's motion for summary judgment was untimely. Pursuant to our order of November 2, 2012, the deadline for discovery was December 16, 2012. Further, copies of the assignments of mortgage and Act 6/91 Notices were attached to the motion for summary judgment. Service of the complaint was clearly made on Husband as a counseled answer and new matter was filed on his behalf on October 9, 2012, with no issue being raised as to the propriety of service.
- (6) The issue of subject matter jurisdiction has been addressed within the body of this opinion.
- (7) To the best of the court's recollection, no request was made at the time of argument on the Bank's motion for summary judgment to amend Husband's answer to the complaint based on a recent monetary settlement by the foreclosure review board. In what may be helpful to better understand this claim, paragraph 25 of Husband's petition for reconsideration of summary judgment appears to raise the same issue and attaches a copy of an April 26, 2013, letter from Paying

CONCLUSION

In accordance with the foregoing, the Bank's Motion for Summary Judgment filed on April 24, 2013 was properly granted by our order of June 18, 2013.

BY THE COURT:

P.J.

Agent - Rust Consulting, Inc. advising Husband of his eligibility to receive a \$2,000.00 payment as a result of an enforcement action related to deficient mortgage servicing and foreclosure processes. The extent and nature of the deficiencies are not identified, nor has Husband properly raised or identified to any reasonable degree what effect, if any, such deficiencies would have on this litigation.

- (8) Husband has failed to identify any issues of material fact which would preclude the entry of summary judgment.
- (9) The amount of the judgment entered was not excessive in comparison to the amount claimed in the complaint. The complaint filed on June 19, 2012, sought judgment in the amount of \$46,705.71 as of May 21, 2012. The amount of the judgment actually entered on June 18, 2013, was \$51,120.21. As appears in the affidavit attached to Bank's motion for summary judgment, this latter figure includes additional interest and expenses incurred between May 21, 2012, and the date of entry of judgment.
- (10) Husband has failed to identify, much less preserve for the record, any basis for his claim of *res judicata*. Nevertheless, we note that attached to Husband's petition for reconsideration of summary judgment is a copy of the docket entries for a mortgage foreclosure action by the Bank against the Defendants, Robert Suarez, Jr. and Patricia A. Cunningham. These docket entries indicate that the action was voluntarily discontinued by the Bank by a praecipe filed on November 14, 2011, and ended without prejudice.