IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, N.A., F/K/A NORWEST BANK MINNESOTA, N.A., AS TRUSTEE FOR DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 1999-2, Plaintiff	:	
vs.	:	NO. 13-1664
Maria T. Zumar, Defendant	:	

Brett L. Messinger, Esquire — Counsel for Plaintiff
Brion W. Kelley, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - February 16, 2018

Wells Fargo Bank, N.A., Successor by Merger to Wells Fargo Bank Minnesota, N.A., F/K/A Norwest Bank Minnesota, N.A., as Trustee for Delta Funding Home Equity Loan Asset-Backed Certificates, Series 1992-2 ("Wells Fargo"), the plaintiff in the instant proceedings, has appealed from our order dated December 29, 2017, denying its petition to set aside the sheriff's sale of Defendant Maria T. Zumar's property held on February 14, 2014. The reasons for our December 29, 2017, order were fully set forth in our memorandum opinion of that same date which accompanied the order.

Upon being notified of Wells Fargo's appeal to the Superior

Court, by order dated January 29, 2018, we directed Wells Fargo pursuant to Pa.R.A.P. 1925(b) to file a concise statement of the errors it intended to raise on appeal. Such a statement was timely filed by Wells Fargo on February 14, 2018.

Following our review of Wells Fargo's concise statement, we believe our memorandum opinion of December 29, 2017, properly and fully addressed the issues raised in the proceedings before this court and which were supported by the evidence of record. For this reason, we believe it is unnecessary to provide further explanation for our decision and refer the Superior Court to our memorandum opinion of December 29, 2017, a copy of which has been attached to this opinion for the court's convenience.

BY THE COURT:

P.J.

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Maria T. Zumar, Defendant	:	

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Brion W. Kelley, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - December 29, 2017

Pending before us is the Petition of Wells Fargo Bank, N.A., as Trustee, the plaintiff in these proceedings, to set aside the sheriff's sale of a portion of Defendant's property held on February 14, 2014. The property sold was one of two properties encumbered by Defendant's mortgage which Plaintiff had foreclosed upon, but the only property which Plaintiff identified in its foreclosure complaint as being subject to the foreclosure, and which Plaintiff obtained a default judgment against and listed for sheriff's sale. Whether Plaintiff should now be allowed to set aside the sale with the intent of then foreclosing on both properties is an issue involving not simply Plaintiff's failure to include both properties in its action in foreclosure, but a procedural history of related

litigation to foreclose on the same mortgage which needs to be understood.

FACTUAL AND PROCEDURAL BACKGROUND

By order dated October 7, 2010, and docketed to No. 10-1444 in this court, with Bank One National Association, Trustee ("Bank One") appearing as the plaintiff,[1] the mortgage at issue, one dated April 13, 1999, from the Defendant, Maria T. Zumar, to Delta Funding Corporation ("Delta Funding"), was reformed to include as part of the mortgaged property a one-acre parcel of real estate located in Packer Township, Carbon County, Pennsylvania, in addition to an adjacent 1.52 acre parcel which was already included in the original mortgage.[2] Bank One's complaint which resulted in the reformation

[1] At the time, Bank One was the holder of Defendant's note and mortgage dated April 13, 1999 and, therefore, a predecessor in interest to Plaintiff. Plaintiff's complaint in mortgage foreclosure, docketed to the same number as the instant proceedings and upon which default judgment was taken on December 13, 2013, alleges that Plaintiff is the current legal holder of the mortgage by assignment.

[2] In her answer to Plaintiff's Petition to Set Aside the Sheriff's Sale, Defendant alleges the October 7, 2010 order granting reformation of the mortgage did not have attached Exhibit A, incorporated by reference in the order as providing a complete and accurate legal description of the mortgaged property. (Petition to Set Aside Sheriff's Sale and Answer, Paragraph 13). Contrary to such assertion, Exhibit A does appear and is attached to the filed copy of the October 7, 2010 order docketed to No. 10-1444 in the Prothonotary's Office.

Defendant also argues that the court was without jurisdiction to issue the reformation order because the complaint for reformation was never properly served upon the Defendant, who never appeared in the action or filed a response to the complaint. The sheriff's return for this complaint states that it was served upon the Defendant on July 7, 2010 at 9:00 A.M. by handing a true and correct copy to "Robin R. Flemmings-friend" who was the "person for the time being in charge at [Defendant's] place of residence, 1945 Main Street, Jeddo."

"[I]n the absence of fraud, the return of service of a sheriff, which is full and complete on its face, is conclusive and immune from attack by extrinsic evidence." Hollinger v. Hollinger, 206 A.2d 1, 3 (Pa. 1965). However, "the conclusive nature of a sheriff's return [is limited] only to facts stated in the return of which the sheriff presumptively has personal knowledge, such as when and where the [complaint] was served." *Id.* "[T]he immutability of a return [does] not extend (a) to facts stated in the return of which the sheriff cannot be expected to have personal knowledge and which are based upon information

of the mortgage alleged in substance that both parcels were conveyed to the Defendant by Matthew M. McGowan and Anna Marie McGowan, his wife, by deed dated April 13, 1999, and were intended as collateral for the original purchase money mortgage granted to Delta Funding on the same date, but due to inadvertence and oversight the one-acre parcel had been omitted from the mortgage.

Located on the one-acre parcel is a single-family residential dwelling fronting on Legislative Route 170 for a distance of 205.63 feet. The 1.52 acre parcel is an unimproved flag-shaped tract bounding the one-acre parcel on its eastern and southern sides, with a 16.49 foot frontage on Legislative Route 170.

The 1.52 acre parcel is Lot No.3 of a seven lot subdivision of Joseph Andreuzzi approved by the Packer Township supervisors on January 3, 1989. (Plaintiff Exhibit No.9). The Final Subdivision Plan for this subdivision was recorded on January 4, 1989, in Map Book 2, Page 83 of the Carbon County Recorder of Deeds Office. The general notes for this subdivision plan include Notes 5 and 6, which state the following:

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obtained through hearsay or statements made by third persons or (b) to conclusions based upon facts known to the sheriff only through statements made by others." *Id.* Accordingly, the rule does not preclude an attack on those statements in the return identifying Robin Flemings as the Defendant's friend or asserting that 1945 Main Street, Jeddo, was Defendant's place of residence.

Nevertheless, Defendant has presented no evidence to contradict these statements in the sheriff's return or from which a determination can be made that service was not proper. Further, Defendant has provided us with no legal authority entitling her to collaterally challenge the validity of the reformation order in the instant proceedings, rather than filing a direct challenge in the reformation action via a petition to open or strike the judgment, or in some other manner.

5. The lots shown hereon are subject to all requirements and regulations as set forth in the current Packer Twp. Subdivision Ordinance, except as otherwise noted.
6. These parcels of land shall be conveyed to and become a part of the respective adjoining landowner (see Table below), and may not be conveyed separately or apart therefrom without prior township approval.

Lot No.	To be conveyed to and become a part of adjoining land of:
1	Stephen F. & Claire A. Lorince, H/W
2	James R. & Nancy Lee M. Markovchick, H/W
3	John C. & Maria T. Zumar, H/W
4	Michael J. & Eleanor L. Kadelak, H/W
5	John J. & Rosemary Cherba, H/W
6&7	Peter R. & Ruth E. Yagalla, H/W

(Joseph Andreuzzi - Final Subdivision Plan, Plaintiff Exhibit No.9).[3]

By deed dated January 9, 1989, Joseph A. Andreuzzi, Et ux, Et al. conveyed Lot No.3 of the Joseph Andreuzzi-Final Subdivision Plan to the Defendant and her husband, John C. Zumar.[4] Following the recital for this property, the deed contains the following two paragraphs:

> The parcel of land conveyed herein shall become a part of the respective parcel of the Grantee herein and may not be conveyed separately apart therefrom without compliance with all regulations and ordinances of the Township of Packer.
>
> FURTHER UNDER AND SUBJECT TO all restrictions, covenants and conditions as more fully set forth in the map or plan of "Joseph Andreuzzi Final Subdivision Plan" as recorded in Carbon County Map Book Volume 2, Page 83

[3] The adjoining land of the Zumars referred to in these general notes is the one-acre parcel.

[4] With this conveyance, the Defendant and her husband jointly owned both the one-acre and 1.52 acre parcels which were subsequently conveyed to Matthew M. McGowan and Anna Marie McGowan, his wife, by deed dated June 7, 1994, and recorded in the Carbon County Recorder of Deeds Office in Deed Book Volume 575, Page 309. (Plaintiff Exhibit No.12).

in the Office of the Recorder of Deeds of Carbon County, Pa.

(Plaintiff Exhibit No.10). The existence and effect of the foregoing language appearing in the Joseph Andreuzzi-Final Subdivision Plan and the January 9, 1989 Deed of Conveyance to the Zumars was never disclosed in the reformation proceedings docketed to No. 10-1444.

Notwithstanding the October 7, 2010 order granting Bank One's request to reform the mortgage to include the one-acre parcel, the complaint in mortgage foreclosure filed by the Plaintiff on August 21, 2013, identified the mortgage foreclosed upon as that dated April 13, 1999, and described the mortgaged premises as the 1.52 acre parcel. No mention was made of the reformation to the mortgage.

A default judgment for want of an answer was entered in Plaintiff's favor and against Defendant on December 13, 2013. On the same date a writ of execution for the 1.52 acre parcel was issued. Thereafter, a sheriff's sale of this property occurred on February 14, 2014, with Plaintiff being the successful bidder and purchasing the property for costs. A sheriff's deed dated March 28, 2014, for the conveyance of this property to the Plaintiff was recorded on the same date in the Carbon County Recorder of Deeds Office in Record Book 2101, at Page 802. (Plaintiff Exhibit No.3).[5] The property was subsequently conveyed by Plaintiff to Louis Diaz by deed dated April

[5] A schedule of distribution was also filed on March 28, 2014.

14, 2014, and recorded on April 29, 2014, in the Carbon County Recorder of Deeds Office in Record Book 2106 at Page 238. (Plaintiff Exhibit No.4).

On December 27, 2016, Plaintiff filed the Petition now before us to set aside the sheriff's sale of February 14, 2014. As alleged in this Petition, the failure to foreclose on the mortgaged property as described in the reformed mortgage - the one acre and 1.52 acre parcels - was attributed to clerical oversight. The Petition further alleges that the deed restriction which appears in the 1989 Andreuzzi Deed prohibited the 1.52 acre parcel from being sold separate and apart from the one-acre parcel, thereby depriving the sheriff of the authority to sell the 1.52 acre parcel by itself, and that this constitutes a legal basis for setting aside the sale that survives recording of the Sheriff's Deed-Poll.[6]

DISCUSSION

Preliminarily, the first question we need to address is whether Plaintiff's Petition to Set Aside the Sheriff's Sale was timely filed

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[6] Ironically and sadly, this is not the first time that mortgage foreclosure proceedings against the Defendant have resulted in a sheriff's sale of the 1.52 acre parcel alone. On November 2, 2001, Bank One, Plaintiff's predecessor in interest in the mortgage, filed a complaint in mortgage foreclosure against the Defendant. The mortgage foreclosed upon was the original unreformed April 13, 1999 mortgage given by the Defendant to Delta Funding Corporation. That mortgage, as previously noted, encumbered only the 1.52 acre tract.

A default judgment for Defendant's failure to answer the complaint was taken by Bank One on December 20, 2001. Execution proceedings ended in a sheriff's sale held on December 8, 2006, with Bank One purchasing the property for costs. Thereafter, Bank One filed a petition to set aside the December 8, 2006 Sheriff's Sale. This petition to set aside the sale was granted by order dated April 6, 2010, which vacated as well the judgment entered on December 20, 2001. On April 28, 2010, Bank One discontinued the foreclosure action without prejudice. *See* Docket No. 01-2490.

due to the more than two-year delay occurring between when the Petition was filed and the Sheriff's Deed was delivered for recording. As a general rule, "[a] petition to set aside a sheriff's sale may only be granted when the petition is filed before the sheriff's delivery of the deed." Mortgage Electronic Registration Systems, Inc. v. Ralich, 982 A.2d, 77, 79 (Pa.Super. 2009) (citation and quotation marks omitted), *appeal denied*, 992 A.2d 889 (Pa. 2010); *see also* Pa.R.C.P. 3132 and 3135. However, an exception to this time bar exists in the case of fraud or lack of authority in the sheriff to make the sale. *Id.* at 80 (citing Knox v. Noggle, 196 A. 18 (Pa. 1938) and Workingmen's Sav. And Loan Ass'n of Dellwood Corp. v. Kestner, 652 A.2d 327 (Pa.Super. 1994)).

Plaintiff claims the deed and subdivision restrictions in the chain of title for the 1.52 acre parcel deprived the Sheriff of the authority to sell this property separately from the one-acre parcel. Defendant contends the restriction is an invalid and unenforceable restraint on alienation.

On this issue, the Pennsylvania Superior Court recently stated:

> Restraints on alienation are not automatically void, but are generally disfavored in Pennsylvania law. Lauderbaugh v. Williams, 409 Pa. 351, 186 A.2d 39, 41 (1962). Absolute restraints are against public policy and are void. *Id.* A restraint on alienation that is reasonable and limited is acceptable. *Id.* Whether a restraint is reasonable is a question of law that turns upon the facts and circumstances of the specific case, including any time limit on the restraint. Rice v. Rice, 468 Pa. 1, 359 A.2d 782, 784 (1976).

> Often, the determination of whether a restraint on alienation is reasonable depends upon whether the restraint is limited in time.

Ralston v. Ralston, 55 A.3d 736, 740 (Pa.Super. 2012).

The restrictions at issue are similar, but not identical. Both conditionally prohibit the Defendant's fee simple interest in the 1.52 acre tract from being conveyed separate from the one-acre parcel, but while the deed conditions a separate conveyance on compliance with all regulations and ordinances of the Township, the restriction in the subdivision plan conditions such conveyance on prior approval from the Township. The first is illusory and the second entirely subjective, bereft of any objective standard.

As to the first, either the subdivision complied with the Township's subdivision ordinance at the time subdivision approval was given, or it didn't. If it did, and we have no reason to believe it didn't, the 1.52 acre lot would have conformed to the Township's area and dimensional requirements for a separately owned parcel of real estate at the time of subdivision, and while its use is inherently subject to compliance with all applicable reasonable regulations and ordinances of the Township, its alienability is not.[7]

[7] Effective December 31, 1989, Packer Township adopted a zoning ordinance imposing a two-acre minimum lot size on properties located in the Township's Single-Family Residential District. Both the one-acre and 1.52 acre parcels are located in this District. Not only was this ordinance not in effect when the Joseph Andreuzzi-Final Subdivision Plan was approved on January 3, 1989, the record is bare on whether this ordinance contains any provision which requires two adjacent lots held in common ownership to merge if one or both of the lots is rendered undersized by the passage of the ordinance, or whether the ordinance is still in effect today or has been replaced by a new zoning ordinance. *See* Loughran v. Valley View Developers, Inc., 145 A.3d 815, 823 (Pa.Cmwlth. 2016) ("Absent a merger of

As to the second, without any standard governing when Township approval would or would not be withheld, the restriction is unconscionable and clearly against public policy. The restriction is unlimited in time and absolute: it places the owner of the property at the complete mercy of the Township, which, at least based on the record before us, maintains no ownership interest in the property. Nor is the benefit of this restriction to the Township, if any, apparent from its face. *See also* Grossman v. Hill, 122 A.2d 69 (Pa. 1956) (holding that a deed restriction that a 10 foot-wide strip of property be "used only in conjunction with" an adjacent lot and that the 10 foot-wide strip and adjacent lot "shall constitute a single lot of land" was one which prevented the lot owner, in perpetuity, from conveying away the strip and, as such, fell "clearly and indubitably within the rule forbidding restraints on alienation as being contrary to public policy"), overruling on procedural grounds recognized by Central Delaware County Authority v. Greyhound Corp., 563 A.2d 139, 146 (Pa.Super. 1989).

Accordingly, we agree with Defendant's assertions that the

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lots provision in a municipality's land use ordinance, the merger of lots doctrine is inapplicable."). Moreover, even if such a provision does exist, its application and effect is dependent on the language of the ordinance and the intent of the landowner as evidenced by "an overt, unequivocal physical manifestation. . . to integrate or to keep separate commonly held adjoining lots," factual matters left undeveloped in the record. *Id.* at 821 n.8. Further, this issue is one of zoning law and is distinct from privately imposed restraints on alienation. *See also* National Penn Bank v. Shaffer, 672 A.2d 326, 329 (Pa.Super. 1996) (noting that "[t]he burden of proving circumstances warranting the exercise of the court's equitable powers is on the applicant, and the application to set aside a sheriff's sale may be refused because of the insufficiency of proof to support the material allegations of the application, which are generally required to be established by clear evidence") (citations and quotation marks omitted).

restraint is invalid and unenforceable and did not bar the Sheriff's Sale of the property. Consequently, because Plaintiff's Petition to Set Aside the Sheriff's Sale is untimely, and neither fraud nor want of authority in the Sheriff exists to set aside the Sheriff's Deed, the court is without authority to grant the relief Plaintiff requests. *See* Home Owners' Loan Corp. v. Edwards, 198 A. 123, 124 (Pa. 1938).

Alternatively, even if Plaintiff's Petition was not time barred, Plaintiff's equitable basis for reformation, that the failure to foreclose on both properties in the reformed mortgage was a clerical oversight, is non-availing. In our order dated December 26, 2007 and docketed to No. 01-2490 denying Bank One's Motion to Reform Mortgage, Confirm Judgment, Confirm Sheriff's Sale and for Issuance of a Sheriff's Deed, we explained that even though the property description in the mortgage Bank One had foreclosed upon may have been incomplete, i.e., it did not include the one-acre parcel, Bank One was not without a remedy. Specifically, we stated:

> If in fact a mistake occurred, as [Bank One] contends, and the parties actually intended that both parcels described in the Zumar deed be included in the mortgage, [Bank One] is not without a remedy. In Trachtenberg, the Court quoted with approval the following language from the Indiana Supreme Court's decision in Conyers vs. Mericles, 75 Ind. 443:
>
> > These cases establish the proposition, that when an incorrect description of lands intended to be embraced in a mortgage is carried into the judgment, order of sale, notice and sheriff's deed, such proceedings can not be corrected either

> at the instance of the mortgagee or the purchaser at such sale, but they do not decide that such mistake can not be corrected by reforming the mortgage and foreclosing it as reformed. * * * The mortgage, as reformed, is a different instrument, embraces a different parcel of land, and one against which no foreclosure has been had. The judgment of foreclosure upon the land described did not adjudge that the land in dispute was not mortgaged by such instrument, and omitted therefrom by mistake, and, therefore, 'the question of description' is not res adjudicata, nor does such judgment form any obstacle to the reformation and foreclosure of the mortgage.
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> Trachtenberg v. Glen Alden Coal Co., 47 A.2d 820, 825 (Pa. 1946).

Bank One National Association v. Zumar, 2490 CV. 2001 (Order dated December 26, 2007).

Subsequently, Bank One did in fact commence an action seeking reformation of the mortgage and obtained a court order granting that reformation. *See* order dated October 7, 2010 docketed to No. 10-1444. Notwithstanding this grant, that Plaintiff elected to foreclose on only part of the mortgaged premises - whether by clerical error, ignorance, negligence, or for some other reason - is a decision Plaintiff made, not Defendant, and one which Plaintiff must live with. Having commenced the foreclosure proceedings, obtained a final judgment *in rem*, executed on this judgment, and purchased the property at sheriff's sale, the equities in this case favor Defendant. At some point, and that point has been reached and passed, the power of equity to intervene and act must cease. *See* National Penn Bank v. Shaffer, 672 A.2d 326, 329, 331 (Pa.Super. 1996)

(recognizing that "a petition to set aside a sheriff's sale is based on equitable principles. . . " and noting that courts have refused to grant equitable relief and relieve a party from the consequences of an error due to its own ignorance or carelessness when there existed available means which would have enabled it to avoid mistake if reasonable care had been exercised).

CONCLUSION

Because we find that Plaintiff's Petition to Set Aside the Sheriff's Sale was untimely filed, and there exists no factual basis for a finding of fraud or want of authority in the Sheriff to make such sale, and because we know of no principle of equity which would justify us, under the circumstances here existing - all matters of public record, and for which Plaintiff is largely responsible or should have been aware of, to set aside the Sheriff's Sale, Plaintiff's Petition to Set Aside the Sheriff's Sale held on February 14, 2014, will be denied.

BY THE COURT:

P.J.