IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AMERICAN NATIONAL INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. 02L-05-114-JRJ
G-WILMINGTON ASSOCIATES, L.P.,	)	
Defendant.	)	

Date Submitted: September 4, 2002
Date Decided: October 18, 2002

M E M O R A N D U M O P I N I O N

Upon Plaintiff's Motion for Default Judgment – ***GRANTED.***

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JURDEN, J.

I. Procedural Background

On May 28, 2002, American Nat'l Ins., Co. ("ANIC") filed a complaint asking this Court to issue a Writ of Sci. Fa. Sur. Mortgage and judgment in favor of ANIC to recover the balance due on a mortgage loan made by ANIC to G-Wilmington Associates, L.P. ("GWA"). The complaint contained a demand that GWA must answer by affidavit pursuant to title 10, section 3901 of the Delaware Code.

On July 22, 2002, GWA filed an Answer denying all allegations set forth in ANIC's complaint and setting forth two affirmative defenses: failure to state a claim and equitable estoppel. In addition, GWA filed an Affidavit of Defense signed by Robert A. Rosen, President of G-Wilmington Management Corp.

On July 23, 2000, ANIC moved for entry of default judgment against GWA asserting that GWA had failed to answer by an affidavit of defense with a legally cognizable defense in a *scire facias* action. On July 29, 2002, GWA filed its response. On September 4, 2002, the court heard oral argument on ANIC's motion.

The sole issue before the court is whether equitable estoppel is a valid defense to a *scire facias sur* mortgage action.

II. Facts

On March 2, 1994, GWA and ANIC executed a non-recourse Note and Mortgage (the "March 1994 Note") concerning a commercial property.[1] In the late 90's, the then anchor tenant for the property filed for bankruptcy and rejected its lease for the commercial property, ultimately resulting in GWA's default on the mortgage with ANIC. On or about December

[1] Pl.'s Del. Super. Ct. Compl. ¶ 4; *see also*, Pl.'s Del. Super. Ct. Compl. Ex. B.

1999, GWA entered into negotiations with Ames Department Stores, Inc. ("Ames") to secure Ames as the new anchor tenant.[2] On January 27, 2000, ANIC and GWA executed a letter agreement (the "January 2000 Letter Agreement") "intended to confirm the understanding and agreement of American National and the Borrower [GWA] with respect to the Loan in response to the Borrower's proposal to American National."[3] The January 2000 Letter Agreement served to amend the March 1994 Note. The January 2000 Letter Agreement states in pertinent part:

> [t]he Loan is in default for non-payment of monthly installments. The Borrower desires a final opportunity to rehabilitate the Property by attempting to re-let vacant leasable area. Accordingly, Borrower has requested Noteholder, and Noteholder has agreed, to forbear temporarily from enforcing Noteholder's right to foreclose on the Property under the Loan Documents, to suspend temporarily its exercise of assignment of rents and to reinstate and modify the Loan Documents in certain respects…."[4]

On August 1, 2000, GWA executed and delivered a Reinstatement and Modification Agreement (the "August 2000 Reinstatement Agreement"), incorporating the January 2000 Letter Agreement and amending the Note and Mortgage as stated in the August 2000 Reinstatement Agreement.[5] The August 2000 Reinstatement Agreement was duly recorded.

GWA alleges that during the time period after the execution of the August 2000 Reinstatement Agreement, the parties engaged in discussions concerning the shopping center and the parties' relationship. GWA alleges that because of GWA's excellent record and because GWA independently owns a portion of the shopping center not encumbered by the mortgage, the

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[2] Pl.'s Del. Super. Ct. Compl. Ex. C (Letter from Jeff Gellerman to David Rosen); *see also,* Def.'s Resp. Pl.'s Mot. Default J. § 4.

[3] Pl.'s Del. Super. Ct. Compl. Ex. C. (January 27, 2000 Letter Agreement).

[4] Pl.'s Del. Super. Ct. Compl. Ex. C. (January 27, 2000 Letter Agreement ¶¶ C-D).

[5] Pl.'s Del. Super. Ct. Compl. ¶ 5; *see also,* Pl.'s Del. Super. Ct. Compl. Ex. C.

relationship "between the parties suggested more than a mere borrower/lender relationship and something more akin to a joint venture or partnership."[6] In preparation for the new tenant, Ames, GWA made capital improvements costing over $500,000. GWA contends that the understanding of the parties was that, in the event of default by Ames, ANIC would forbear from foreclosure for a reasonable time, permitting GWA to find another anchor tenant.[7]

On or about February 2002, as a result of a bankruptcy filing by Ames, GWA again defaulted under the terms of the August 2000 Reinstatement Agreement.

III. Discussion

In addition to the right of a mortgagee to foreclose on a mortgage by a bill in equity, Delaware law allows a mortgagee the additional remedy of enforcing the mortgage by writ of *scire facias* in the Superior Court.[8] To understand the remedy of *scire facias sur* mortgage in Delaware, the Court looks to the language of the Pennsylvania *scire facias* act enacted by the Provincial Assembly of Pennsylvania passed in 1705.[9] In Pennsylvania, the act of July 12, 1705 was the inceptive regulation on the subject of writ of *scire facias.*[10] Section 6 provided, "[w]here default or defaults have been or shall be made…by any mortgagor…it shall be lawful…for the

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[6] Rosen Aff. Defense ¶ 3.

[7] *Id.*

[8] DEL. CODE ANN. tit. 10, § 5061 (2002); 2 *Wooley on Delaware Practice* § 1356 (1906).

[9] 1 Sm. L. 57 (Pa. St. 1920, § 8891); 2 *Wooley on Delaware Practice* § 1356.

[10] 1 Sm. L. 57 (Pa. St. 1920, § 8891); 2 *Wooley on Delaware Practice* § 1356.

mortgagee…to sue forth a writ…of *scire facias*…to make known to the mortgagor…that he…my plead satisfaction or payment."[11]

During the administration of Lieut. Gov. Patrick Gordon, which extended from 1726 to 1736, the colonial Legislature of Delaware enacted a statute resembling that of the Pennsylvania act.[12] Section 5 of the Delaware act provided, "if the defendant in such *scire facias* appears, he…may plead satisfaction or payment of part or all the mortgage-money, or any other lawful plea, in avoidance of the deeds, as the case may require."[13] In addition to the defenses of satisfaction and payment, the act of assembly recognized any other lawful plea in avoidance of the deed as a defense in a *scire facias sur* mortgage action, that is, any plea in avoidance of the force of the deed.[14]

In 1852, the language of the Delaware statute changed, clarifying the purpose of the statute and the intent of the Legislature.[15] Section 55 of the Revised Code reads, "[u]pon the breach of the condition of the mortgage…the mortgagee…may…sue out…a writ of *scire facias* upon such mortgage."[16] In addition, a new section 56 specifically addressed the defenses to a *scire facias sur* mortgage. Section 56 of the Revised Code states, "[t]he defendant in a *scire facias* on a mortgage, may plead satisfaction, or payment, of all, or any part of the mortgage

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[11] *Federal Land Bank of Baltimore v. King, et al.*, 143 A. 500, 502-03 (Pa. 1928) (emphasis added).

[12] *Malsberger v. Parsons*, 75 A. 698, 701 (Del. Super. Ct. 1910) (citing *Seals v. Chadwick*, 45 A. 718 (Del. 1900)).

[13] 1 Del. Laws 46, p. 113 (1700-1775).

[14] *Id*. *See also, Deakyne v. Davis*, 5 Del. 354 (Del. Super. Ct. 1851).

[15] *Malsberger*, 75 A. at 702.

[16] Rev. Code, c. 111, §55 (1852).

money, or any other lawful plea in avoidance of the deed, as the case may require."[17] From 1852 to 1953, the code section concerning pleas in a *scire facias* on a mortgage action remained unchanged.[18]

In the Delaware Code of 1953, the Legislature omitted the paragraph relating to pleas permitted in *scire facias sur* mortgage actions.[19] A survey of the history surrounding the deletion reveals that "common law pleading had been abolished in Delaware and pleadings were [to be] covered by rules of this Court."[20] Nothing in the current Delaware statute, title 10, sections 5061-67 of the Delaware Code, or in the relevant case law suggests a departure from the limited defenses allowed in a *scire facias sur* mortgage action,[21] and the Delaware Supreme Court has held that the permitted defenses in an action for writ of *scire facias* are limited.[22] Generally, "only those claims or counterclaims arising under the mortgage may be raised in a *scire facias sur* mortgage foreclosure action."[23] The Delaware Supreme Court, citing the Superior Court's

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[17] *Id.* § 56.

[18] Rev. Code, par. 4859, c. 133 (1935); Rev. Code § 4401 (1915).

[19] *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 896 (Del. Super. Ct. 1973).

[20] *Id.* at 896.

[21] *Id.*

[22] *Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass'n of Norwalk,*520 A.2d 669 (Del. 1986), *aff'g* 1986 WL 9916 (Del. Super. Ct.) (citing *Gordy,*310 A.2d at 895-96 and § 5061).

[23] *Harmon v. Wilmington Trust Co.,* Del. Super., C.A. No. 94L-10-004, Walsh, J. (June 19, 1995) (holding that post-default collections of rents by bank had no relation to mortgagor's pre-default obligations on the same mortgage). *See also, Davis v. 913 North Mkt. St. P'ship*, 1996 WL 769326, at *2, (Del. Super. Ct.) (holding that a claim of set-off arising from an underlying loan transaction of which the mortgage transaction was a part was not sufficient if the attacks were not on the mortgage transaction itself); *Illini Federal Sav. & Loan Ass'n v. Donahue*, 1990 WL

decision in *Gordy v. Preform Bldg. Components, Inc*,[24] held that a defendant in an action for writ of *scire facias* may plead payment or satisfaction, or he may plead "in avoidance" of the mortgage,[25] however, a plea "in avoidance" must relate to the mortgage sued upon, i.e., the plea must relate to the validity or illegality of the mortgage documents.[26] Pleas of avoidance include acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.[27] In essence, a writ of *scire facias sur* mortgage is a rule to show cause that requires the mortgagor to appear and establish why the mortgagee should not be allowed to foreclose.[28] Thus, the foregoing "limitations are consistent with the nature of the *scire facias* action as an expeditious remedy."[29] Where a defendant fails to assert a legally recognized defense in a *scire facias* action, "allegations will be deemed admitted, and default judgment may be entered thereon."[30]

105007 (Del. Super. Ct.) (holding that usury is not a proper defense in a *scire facias sur* mortgage action).

[24] 310 A.2d 893.

[25] *Christiana Falls, L.P.*, 520 A.2d at 669. *See also,* 2 *Wooley on Delaware Practice* § 1371; 59A C.J.S. *Mortgages* § 700 (1998).

[26] *First Fed. Sav. & Loan Ass'n of Norwalk v. Christiana Falls, L.P.,* 1986 WL 9916, at *1. *See also, Davis*, 1996 WL 769326, at *2.

[27] *First Fed. Sav. & Loan Ass'n of Norwalk*, 1986 WL 9916, at *1.

[28] *Peoples Bank & Trust Co. v. Gatta*, 1982 Del. LEXIS 956, at *4 (Del. Super. Ct. 1982).

[29] *First Fed. Sav. & Loan Ass'n of Norwalk,* 1986 WL 9916, at *1 (citing 2 *Wooley on Delaware Practice* § 1358).

[30] DEL. CODE ANN. tit. § 3901(d).

GWA contends that in *Jeffery v. Seventeen Corp.*, the Delaware Supreme Court implicitly recognized equitable estoppel as defense to a *scire facias sur* mortgage action.[31] Before the trial court, in *Jeffery,* the mortgagor in a mortgage foreclosure action argued that the mortgagor's payment of delinquent taxes after the mortgagee's acceleration of the debt and commencement of the foreclosure action barred the lender from invoking the mortgage acceleration clause.[32] In the alternative, the mortgagor argued that the doctrine of equitable estoppel applied to prevent the mortgagee from proceeding with its foreclosure suit where the mortgagor paid all tax delinquencies prior to the expiration of the fifteen day grace period contained in the mortgagee's written notice demanding payment of the entire debt.[33] The trial court held that the mortgagor failed to establish the elements of equitable estoppel.[34] On appeal to the Delaware Supreme Court, in *Jeffery*, the mortgagor abandoned his claim of equitable estoppel and instead argued promissory estoppel.[35] In a footnote, the Court noted,

> [the] Superior Court correctly held that [the mortgagor] failed to establish the elements of equitable estoppel. [The mortgagor] was obviously aware of the acceleration clause and the terms under which it could become operable. [The mortgagor] knowingly failed to take advantage of the 15 day period provided by lender for repayment of the accelerated debt. In paying the back taxes he already owed, [the mortgagor] did not change his position.[36]

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[31] Def.'s Resp. Pl.'s Mot. Entry Default J. ¶ 3; *see also, Jeffery v. Seven Seventeen Corp.*, 461 A.2d 1009, 1011 (Del. 1983).

[32] *Seven Seventeen Corp. v. Jeffery*, Del. Super., No. 81L-MY-10, O'Hara, J. (Nov. 1, 1982).

[33] *Seven Seventeen Corp. v. Jeffery*, Del. Super., No. 81L-MY-10, O'Hara, J. (Nov. 1, 1982).

[34] *Id.*

[35] *Jeffery*, 461 A.2d at 1011.

[36] *Jeffery*, 461 A.2d at 1011 n.1.

Ultimately, the Court held that where the tax payment follows foreclosure, the payment does not bar foreclosure and that the mortgagor's failure to raise promissory estoppel before the trial court precludes raising the claim on appeal.[37]

Not surprisingly, ANIC ignores the *Jeffery* decision and argues that the rule of law announced in *Gordy* controls and therefore the responsive pleadings to a writ of *scire facias* are restricted to the affirmative defenses of payment, satisfaction or avoidance.[38] In *Gordy,* the mortgagor tried to assert a counterclaim based on an indemnity agreement whereby the mortgagee had allegedly agreed to indemnify the mortgagor against certain claims then in litigation in Pennsylvania.[39] Neither the claims nor the indemnity agreement were part of the mortgage transaction on which the mortgage foreclosure action was based.[40] The trial court characterized the counterclaim as "permissive" because it did not arise out of the subject matter of the complaint, and did not allow the mortgagor to assert it.[41] The court concluded that, in addition to satisfaction or payment, allegations "in avoidance" may be asserted but the allegations "must relate to the subject matter of the complaint."[42] Furthermore, the court noted that while the prior statutory provision on defenses in avoidance was omitted from the 1953

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[37] *Jeffery*, 461 A.2d at 1011.

[38] Pl. Mot. Entry Default J. ¶¶ 5-6; *see also, Gordy*, 310 A.2d at 895-96.

[39] *Gordy*, 310 A.2d at 894.

[40] *Id.*

[41] *Id.* at 895-96.

[42] *Id.*

Revised Code of Delaware, there was "nothing in the statute as it now exists" that would suggest a departure "from the recognized case law."[43]

Based on the purpose, history and precedent surrounding the *scire facias sur* mortgage, the Court is not persuaded by GWA's argument, based on *Jeffery,* that Delaware law recognizes equitable estoppel as a defense in a *scire facias sur* mortgage action and concludes that equitable estoppel is not included among the limited defenses. Furthermore, as a matter of public policy "[w]here there is an agreement between the mortgagee and the mortgagor, where by the mortgagee agrees to waive the default and the mortgagor agrees to perform certain conditions, if the agreement is breached by the mortgagor, the mortgagee is not thereby estopped to foreclose the mortgage."[44] In the case at hand, GWA argues that ANIC's behavior and GWA's understanding that ANIC would allow a reasonable period for GWA to cure a second default caused GWA to expend an additional $500,000 to secure Ames as its new tenant. Applying the foregoing authorities to the case *sub judice,* it is clear that GWA's defense, as stated, is not a plea of satisfaction or payment. Nor is the essence of GWA's estoppel defense a plea in avoidance because it does not relate to the validity or illegality of the mortgage documents. GWA's allegations that ANIC agreed to wait a reasonable period of time before moving for default does not constitute a cognizable defense to foreclosure in this case.

Although in *Jeffery*, the Supreme Court noted, in dicta, that the trial court correctly applied the doctrine of equitable estoppel to the specific facts of *Jeffery*, the Court did not explicitly expand the defenses in a *scire facias sur* mortgage action to include equitable estoppel. In fact, the equitable estoppel argument made in *Jeffery* was an alternative argument made by the

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[43] *Id.*

[44] 55 Am. Jur. 2d *Mortgages* § 638 (1996).

mortgagor on the chance that the trial court would not interpret *Clark v. Equitable Life Assurance Society of the United States*[45] to mean that *payment* of delinquent taxes after the commencement of a foreclosure action precluded acceleration of installments for non-payment of taxes. In other words, the mortgagor in *Jeffery* first asserted the affirmative defense of payment, a recognized defense in a *scire facias sur* mortgage action, and then, in the alternative, argued equitable estoppel as a defense because the delinquent taxes had been paid by the mortgagor even if it was after the commencement of the foreclosure action. Here, unlike the mortgagor in *Jeffery*, GWA has made no payments after the default nor does GWA assert that any payments have been made, rather GWA moves directly to the defense of equitable estoppel. In *Christiana Falls, L.P.* decided after *Jeffery*, the Supreme Court, citing to *Gordy*, reaffirmed that the defenses permitted in an action for writ of *scire facias* are limited to payment, satisfaction and defenses in avoidance of the deed. Accordingly, this Court cannot find that GWA's affirmative defense of equitable estoppel alone constitutes a defense to this *scire facias sur* mortgage.

For the foregoing reasons, the Court finds that the Affidavit of Defense does not set forth a legally meritorious defense to the claim. Consequently, the plaintiff's Motion for Default Judgment is **GRANTED**.

Jan R. Jurden, Judge

[45] 281 A.2d 448 (Del. 1971) (holding that payment of delinquent taxes before the commencement of a foreclosure action forestalls acceleration of installments for non-payment of taxes).