

This is a *de novo* appeal pursuant to 10 *Del. C.* § 9571 by plaintiff-below/appellant, 1401 Condominium Association (“Plaintiff”), from a Justice of the Peace Court Order granting defendant-below/appellee Wells Fargo Bank N.A.’s (“Defendant”) motion to dismiss. On December 9, 2015, the Justice of the Peace Court dismissed without prejudice Plaintiff’s claim, after which this appeal was filed. On December 10, 2015, Plaintiff filed its Complaint on Appeal (“Complaint”) and on January 8, 2016, Defendant brought this motion to dismiss pursuant to *Court of Common Pleas Civil Rule* 12(b)(6). A hearing was held

on January 29, 2016, after which supplemental briefing was ordered, and this is the Court's decision.

FACTS

The facts of this matter are not in dispute. In late February of 2013, Ms. Florine Hill ("Ms. Hill") passed away. At that time she owned Unit 1005 ("Unit") in the condominium building at 1401 Pennsylvania Avenue in Wilmington, Delaware. The Unit remained unoccupied after Ms. Hill's passing and Ms. Hill's estate failed to pay the mortgage. On April 4, 2013 Defendant initiated foreclosure proceedings.

On December 30, 2014, Defendant obtained a default judgment against Ms. Hill's estate. Defendant properly noticed Plaintiff of the default judgment. Beginning in January of 2014, Defendant took steps to secure the Unit. These actions included changing the locks, performing periodic inspections, and paying property taxes for years 2013 and 2014.

On May 12, 2015, the New Castle County Sherriff sold the Unit to a third party for \$31,000.00. Plaintiff was properly noticed of the sheriff's sale. Defendant had exclusive possession of the Unit from January 2014 until May 2015. Following the sale, Plaintiff commenced this action in Justice of the Peace Court.

In its Complaint, Plaintiff alleged that Defendant became the owner of the Unit when it took acts precluding all persons from entering the Unit. Plaintiff's position is that Defendant's alleged ownership status brings it within the purview of 1401 Condominium Code of Regulations ("Code of Regulations").

Plaintiff further contends that pursuant to the Code of Regulations, Defendant is “required to pay monthly maintenance fees and assessments.”¹ Plaintiff alleged Defendant “failed to pay [the] past due assessments, special assessments, maintenance fees and costs,” and as such owes the association \$9,063.31.² Therefore, Plaintiff seeks judgment for \$9,063.31, plus additional unpaid condominium fees which accrue to the date of trial, reasonable attorney’s fees, court costs, and pre- and post-judgment interest.³

PARTIES’ CONTENTIONS

On February 12, 2016, Defendant filed its Opening Brief in which Defendant argues that the Common Interest Ownership Act (“CIOA”) explicitly precludes Defendant from attaining ownership status, and Defendant, therefore is not obligated to pay the delinquent assessment fees.

On February 26, 2016, Plaintiff filed its Answering Brief. Plaintiff contends that CIOA is inapplicable because Defendant’s actions with respect to the Unit, demonstrate it had more than a mere security interest in the Unit. Moreover, Plaintiff is not seeking the “regular monthly assessments” but instead “seek[s] the value of its services directly benefitting [Defendant],”⁴ as calculated by the monthly assessment fees. Plaintiff avers that even if CIOA is not applicable, the statute does not bar or limit the relief Plaintiff can seek

¹ Compl. ¶ 6.

² *Id.* at ¶ 5.

³ *Id.*; The Complaint fails to refer to or indirectly address equitable claims. On its face, the Complaint limits the scope of Plaintiff’s action to claims based upon the powers vested in Plaintiff by CIOA and the Code of Regulations, or actions based on Defendant’s alleged ownership of the Unit. Assuming that all well-pleaded facts are true, I find that Plaintiff has failed to plead any equitable claims, the ordinary language of the Complaint leaves no room for interpretation, and the Court cannot conclude otherwise.

⁴ Pl.’s Mot. p.5.

from Defendant because Plaintiff is seeking “equitable remedies for the value conferred” by its services to the Unit and Defendant.⁵

LEGAL STANDARD

Motions to dismiss are analyzed under *Court of Common Pleas Civil Rule* 12(b)(6). In considering a motion to dismiss, the Court must assume that all well-pleaded facts in the complaint are true,⁶ and draw every reasonable factual inference in favor of the non-moving party.⁷ The Court “must determine whether it appears with reasonable certainty that, under any set of facts which could be proven to support the claim, the plaintiffs would be entitled to relief.”⁸

A. CIOA and the Mortgage Documents

The language of the CIOA provides that a security interest means “an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation . . . include[ing] a lien created by a mortgage.”⁹ Additionally, CIOA provides that a “unit owner,” “does not include a person having an interest in a unit solely as security for an obligation.”¹⁰

⁵ *Id.* at p. 6. On March 4, 2016, Defendant filed its Reply Brief. The Reply Brief buttresses Defendant’s previously-raised arguments. The Court, therefore, need not directly address the points raised in the Reply.

⁶ *Battista v. Chrysler Corp.*, 454 A.2d 286, 287 (Del. Super. 1982).

⁷ *Dept. of Labor ex rel. Chasanov v. Brady*, 2010 WL 8706963, at *2 (Del. Com. Pl. Mar. 23, 2010)(citations omitted).

⁸ *Steila v. Steila*, 2009 WL 2581887, at *1 (Del. Com. Pl. Aug. 20, 2009)(quoting *Mortgage Electronic Registration Systems, Inc. v. Haase and Flanagan*, 2006 WL 1454807, at *1 (Del. Super. 2006)(citing *Vanderbilt Income and Growth Associates LLC v. Arvida/JMB Managers, Inc.* 691 A.2d 609, 612 (Del. 1996).

⁹ 25 Del. C. § 81-103(43).

¹⁰ 25 Del. C. § 81-103(49).

Under the mortgage's terms:

If [the] Borrower fails to perform the covenants and agreements contained in this Security Instrument . . . [Defendant] may do and pay for whatever is reasonable or appropriate to protect [Defendant's] interest . . . and rights under this Security Instrument . . . [;]including, protecting and/or assessing the value of the [Unit], and securing and/or repairing the property.¹¹

The Mortgage provides that “securing the property includes . . . entering the [Unit] to make repairs, change locks, replace or board up doors and windows, drain water from pipes . . . [and] have utilities turned on or off.”

B. The Security Interest

Under the Delaware Code, “after default, a secured party may take possession of the collateral.”¹² However, “[t]he existence of a [mere] security interest . . . *without more*, does not subject a secured party to liability in contract, tort or otherwise for the debtor's acts or omissions.”¹³ In determining whether a secured party holds more than a mere security interest in collateral, courts will look specifically to the secured party's actions.¹⁴ In assessing the degree of a secured party's interest in collateral courts will consider a mortgagor's continued use of the collateral; whether a mortgagee has restricted others' access to the collateral, commenced foreclosure proceedings, or promised to pay a mortgagor's

¹¹ Def.'s Mot. Ex. A ¶ 9.

¹² 6 *Del. C.* § 9-609.

¹³ 6 *Del. C.* § 9-402 (emphasis added).

¹⁴ See *Wells Fargo Bank, N.A. v. 1401 Condominium Ass'n*, 2015 WL 1730932, at *7 (Del. Com. Pl. Mar. 24, 2015).

obligation.¹⁵ This analysis must be balanced in light of the principal that “A mortgagee, before foreclosure, has but a chattel interest” in the collateral.¹⁶

DISCUSSION

In the matter before the Court, the primary issue is whether, despite Defendant’s status as holder of a security interest in the Unit, Plaintiff can bring an action against Defendant to pay the unit assessment and fees which are imposed on all similar unit owners. CIOA and the mortgage do not preclude Plaintiff’s action; and Defendant’s actions with respect to the Unit, could reasonably be proven consistent with those of any other unit owner’s obligation to pay assessment fees, and not an individual who holds a mere security interest. At this stage of the proceeding the Defendant has failed to demonstrate that Plaintiff is not entitled to recover under any set of facts which could be proven to support this claim.

Defendant contends that CIOA’s definition of “unit owner” functionally precludes Plaintiff’s action. Under CIOA, a “unit owner” “does not include a person having an interest in a unit *solely* as security for an obligation.” By definition, if Plaintiff can present proof that Defendant’s actions equate to those of a person who possessed more than mere a security interest, Plaintiff may be entitled to recover.

Moreover, Defendant mistakenly relies on the mortgage’s language as delineating the boundaries of Defendant’s interest in the Unit. In its pertinent part, the mortgage states that if the “Borrower fails to perform the covenants and agreements . . . [Defendant] may do

¹⁵ See *Id.*, at *8.

¹⁶ *Cooch v. Gerry*, 3 Del. 280, (Del. Super. 1840).

whatever is reasonable and appropriate” to protect the security interest. The mortgage is an agreement between Ms. Hill, the borrower, and the lender or lender’s assignee, in this case, Defendant. As against Plaintiff, this document does not put Defendant in a position to take whatever actions in securing the Unit it deems appropriate without regard for how these actions affect other unit owners, or Defendant’s status vis-a-vis Plaintiff. The Mortgage, in part, functions as a legal channel, within which Defendant may take swift action to preserve the Unit’s value in the event the borrower defaults. As to Plaintiff, the mortgage does not restrict how a party may assert an action against Defendant in a complaint, or what remedies Plaintiff may seek.

Based upon the record, Defendant’s status with regard to the property is subject to clarification following a factual hearing to determine whether the interest is more than a mere security interest in the Unit, which may create an obligation to pay the assessment. Plaintiff pled that Defendant changed the locks to the Unit thereby precluding all persons from entering the Unit. While not determinative to the outcome of this case, this act alone permits the inference that Defendant, as the sole party in possession or with access to the Unit, possessed interest in the Unit greater than a mere security holder.

CONCLUSION

Accordingly, Defendant’s Motion to Dismiss the Complaint pursuant to *Rule* 12(b)(6) is **DENIED**.

IT IS SO ORDERED.

Alex J. Smalls,
Chief Judge