

conversion promissory note in the amount of \$832,500.00 and, to secure the note, executed and delivered a mortgage on real property located at 38949 Captains Lane, Selbyville, Delaware 19975 (hereinafter the “Property”) to Gateway Funding Diversified Services, LP (hereinafter “Gateway”). Gateway subsequently assigned its interest in the mortgage to MetLife Home Loans, a division of MetLife Bank, N.A., which subsequently assigned its interest in the mortgage to Champion. On January 29, 2013, Dennis G. Carey died, and the property was devised to his wife, Mrs. Carey. The Complaint alleges that Mrs. Carey failed to pay the monthly installments on the mortgage when due, payment was demanded of her, and she was informed of Nationstar’s intention to accelerate the balance due if the arrearages were not paid. According to the Complaint, Mrs. Carey owes the principal sum of the amount remaining on the mortgage with interest from February 20, 2013, together with reasonable attorney fees, late charges, and costs.

Mrs. Carey filed her Answer on February 24, 2014, denying that she had failed to pay the monthly installments on the mortgage when due and denying that she owes Nationstar the principal sum remaining on the mortgage, plus the additional charges. Mrs. Carey raises the following affirmative defenses: (1) failure to state a claim upon which relief may be granted; (2) laches and/or statute of limitations; (3) invalid assignment of rights; (4) no privity of contract; (5) failure of consideration; (6) Statute of Frauds; and (7) waiver.

On May 7, 2014, Nationstar filed its motion for summary judgment, alleging that it had mistakenly omitted to attach as an exhibit to its Complaint the Assignment of Mortgage dated July 13, 2012 and recorded on August 14, 2012, wherein MetLife Loans assigned its interest in the mortgage to Nationstar.¹ In addition, Nationstar claims that the Complaint should have alleged that upon the death of the mortgagor, Dennis G. Carey, the notice of default was issued and payment in full was demanded.² Nationstar contends that the mortgage was properly accelerated, the default has not been cured and, despite the omissions in its Complaint, Nationstar is entitled to summary judgment as a matter of law.

Mrs. Carey opposes Nationstar's motion by arguing that the defects in the Complaint, i.e., the failure to contain the correct acceleration provision, and the failure to attach the July 13, 2012 assignment from MetLife to Champion, cannot be cured by attempting to insert curative language in a motion for summary judgment. Mrs. Carey also argues that Nationstar is in violation of federal law in its attempt to accelerate the note before the surviving spouse dies or sells the property, and that the language in the mortgage permitting such acceleration is invalid, citing *Bennett et al. v. Donovan*, 4 F.Supp.3d 5 (D.D.C. 2013). Finally,

¹ Attached as Ex. A to Motion for Summary Judgment.

² Attached to the Motion for Summary Judgment as Exhibit B is the October 16, 2013 Notice of Default Letter to the Estate of Dennis G. Carey informing the Estate of Nationstar's intent to accelerate the balance due unless the default was cured.

Mrs. Carey argues that the Complaint lacks any supporting documentation to show that she was appointed as personal representative of the Estate of Dennis G. Carey.

In reply, Nationstar argues that the chain of assignments was clearly laid out in its Complaint and the initial omission of an exhibit does not affect the validity of the foreclosure action. Similarly, Nationstar argues that the omission of the correct acceleration language does not invalidate the Complaint because the mortgage attached as an exhibit to the Complaint clearly laid out the acceleration guidelines. Finally, Nationstar points to the petition to act as personal representative of her husband's estate that Mrs. Carey executed and filed with the Sussex County Register of Wills on March 11, 2013, which was attached to the summary judgment motion as proof of Mrs. Carey's capacity as personal representative of the Estate.³

Under Court of Chancery Rule 56, summary judgment will be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.⁴

There is no dispute in this case that the Property was solely owned by decedent, that a reverse mortgage was placed on the Property as security for the loan obtained solely by the decedent in 2009, and that the decedent passed away in 2013. Both the note and the mortgage executed by the decedent state that the

³ Ex. D to Motion for Summary Judgment.

lender is entitled to immediate payment in full upon the death of the borrower, provided that the property is not the principal residence of at least one surviving borrower.⁵ Although Mrs. Carey is a surviving spouse, she is not a surviving borrower.

The federal case cited by Mrs. Carey does not affect the private contract at issue in this case. In *Bennett*, the federal court ruled that a federal statute⁶ allowed the Department of Housing and Urban Development (hereinafter “HUD”) to insure only reverse mortgages that came due after the death of both the homeowner-mortgagor and the spouse of that homeowner, regardless of whether that spouse was also a mortgagor.⁷ As a result, the court concluded that the federal regulation permitting HUD to insure reverse mortgages like the one here was invalid because they state that the loan balance would be due and payable in full if the mortgagor died and the property was not the principle residence of at least one surviving mortgagor.⁸ Following the court’s decision, HUD issued Mortgage Letter 2014-07

⁴ Ch. Ct. R. 56.

⁵ Paragraph 6(A) of the Note provides: “Lender may require immediate payment in full of all outstanding principal and accrued interest if: (1) A Borrower dies and the Property is not the principal residence of at least one surviving Borrower,” Ex. A of Complaint. Paragraph 9(a) of the Mortgage provides: “Due and Payable. Lender may require immediate payment in full of all sums secured by this Security instrument if: (i) A Borrower dies and the Property is not the principal residence of at least one surviving Borrower;” Ex. B of the Complaint.

⁶ 12 U.S.C. § 1715z-20(j).

⁷ *Bennett et al. v. Donovan*, 4 F.Supp.3d 5, 12-15 (D.D.C. 2013).

⁸ *Id.*

and published a Federal Register notice soliciting public comments on this letter which provided that “for loans [initiated after August 4, 2014,], where there is a sole borrower who was married at the time of loan origination (and the spouse was not on the loan), the HECM documents will contain a provision deferring the due and payable status of the loan until the death of the non-borrowing spouse.”⁹

However, the federal court also made clear in a related case that, pursuant to the private contract between the mortgagee and mortgagor, the mortgagee may still choose to foreclose on the non-borrower surviving spouse, despite the fact that as a result of Mortgage Letter 2014-07, HUD will no longer insure contracts that fail to protect a surviving spouse.¹⁰ The loan at issue in this case was issued in 2009. Nothing in the federal case cited by Mrs. Carey or in Mortgage Letter 2014-07 precludes Nationstar from seeking foreclosure against Mrs. Carey, a non-borrower surviving spouse. As a result, I recommend that the Court grant summary judgment as a matter of law in favor of Nationstar.

Sincerely,

/s/ Kim E. Ayvazian
Kim E. Ayvazian
Master in Chancery

⁹ *Plunkett et al. v. Castro*, 2014 WL 4243384, at *3 (D.D.C. Aug. 28, 2014).

¹⁰ *See id.* at *13.