IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DONALD R. HUDSON, SR.,	:	
	:	
Plaintiff,	:	**C.A. No: K14C-05-033 RBY**
	:	
v.	:	
	:	
BANK OF AMERICA, N.A., and QUEEN'S PARK OVAL ASSET HOLDING TRUST,	:	
	:	
Defendants.	:	

Submitted: August 6, 2014
Decided: September 16, 2014

Upon Consideration of Defendant's Motion to Dismiss
DENIED IN PART and GRANTED IN PART

ORDER

Theodore A. Kittila, Esquire, Greenhill Law Group, LLC, Wilmington, Delaware for Plaintiff.

Joseph M. Grieco, Esquire, Reed Smith LLP, Wilmington, Delaware for Defendant Bank of America, N.A.

Daniel T. Conway, Esquire, Atlantic Law Group, LLC, Georgetown, Delaware for Defendant Queen's Park Oval Asset Holding Trust.

Young, J.

SUMMARY

Donald R. Hudson ("Plaintiff") filed a Complaint against Bank Of America, N.A. ("Defendant") alleging five causes of action, arising out of Defendant's failure to accept Plaintiff's purported tender of payment in satisfaction of a mortgage and note securing the mortgage, held by Defendant. By its motion, Defendant seeks to dismiss all of the claims in Plaintiff's Complaint for 1) failure to state a claim for which relief can be granted pursuant to Superior Court Civil Rule 12(b)(6); and 2) failure to join an indispensable party pursuant to Rule 12(b)(7). In addition, Defendant requests that Plaintiff's claim for injunctive relief be brought instead in its previously filed foreclosure action against Defendant, currently dormant before this Court.

With respect to Defendant's motion to dismiss pursuant to 12(b)(6), the crux of the disputes centers upon whether Plaintiff's purported tender was in fact a tender. The Court is satisfied that Plaintiff has plead facts sufficient to support a reasonable interpretation that the alleged tender was indeed a true tender. Defendant's motion to dismiss for failure to state a claim is, thus, **DENIED**.

Both parties have provided insufficient support for their positions concerning Defendant's motion to dismiss pursuant to Rule 12(b)(7). If the parties desire to pursue this complex issue at this early stage, they are to provide thorough briefing regarding it.

Finally, this Court follows settled Delaware case law in dismissing Plaintiff's claim for injunctive relief as it should properly be brought in the pending foreclosure action. The Defendant's motion with respect to Plaintiff's claim for injunctive relief

is, therefore, **GRANTED**.

FACTS AND PROCEDURE

Plaintiff and his former wife Carmen Y. Goldsboro-Hudson (not a party to this action) acquired a residential property located at 121 Thornhill Court, Dover, Delaware ("Thornhill Court Property") on December 3, 1998. This acquisition was financed by a mortgage loan obtained by Plaintiff and his former wife as co-mortgagors. The former couple also executed a deed on the Thornhill Court Property. On August 31, 2004, following Goldsboro-Hudson's legal change of name from "Carmen Y. Hudson" to "Carmen Y. Goldsboro-Hudson," the then-married couple executed a new deed on the property to reflect this life event.

In 2008, the then-couple required refinancing of their residential property. On May 2, 2008, both Plaintiff and Goldsboro-Hudson executed a promissory note ("Original Note") in the amount of $281,155.00 and a mortgage ("the Mortgage") securing the note. The Original Note was made in favor of Taylor, Bean & Whitaker Mortgage Corp. ("Taylor Bean"). The Mortgage lists Mortgage Electronic Registration System, Inc. ("MERS") as the mortgagee, acting as a nominee for Taylor Bean, "its successor and assigns."

Although this is a point of contention between the parties, it appears MERS assigned or at least attempted to assign its beneficial interest under the Mortgage to Defendant, as is evidenced in an Assignment of Mortgage dated September 29, 2011.

Prior to the assignment, in October 2010, Plaintiff and Goldsboro-Hudson divorced. Subsequently, on March 22, 2012, Goldsboro-Hudson by way of quit-claim deed, transferred her interest in the Thornhill Court Property to Plaintiff. Following

this transfer, Goldsboro-Hudson filled for Chapter 7 bankruptcy on March 29, 2012, in the U.S. Bankruptcy Court for the District of Delaware.[1] She was granted a discharge pursuant to 11 U.S.C. § 727 on July 24, 2012.

On December 20, 2013, Defendant Bank of America filed a foreclosure action against Hudson and Goldsboro-Hudson in the Superior Court of Delaware in and for Kent County.[2] Accompanying documents listed the total amount owed as of November 18, 2013 as $286,052.43. At present, the action is dormant.

Although there is some dispute as to the exact date of the correspondence, Plaintiff through his counsel Knight & Mitchell, P.C. ("K&M"), sent a letter entitled "Tender of Payment & Release of Security" ("Tender Letter") to Defendant Bank of America on or about February 28, 2014.[3] Enclosed with the Tender Letter was a copy of a certified cashier's check from Plaintiff, made out to Bank of America in the amount of $292,984.53.[4] The Tender Letter demanded that the Mortgage be released, pursuant to its contractual terms, and that the Original Note be returned to Plaintiff. The parties are in disagreement as to conditionality of the Tender Letter's language, which provides that Bank of America had until March 10, 2014 "to produce the original promissory Note for collection, at which time, in exchange for the original

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[1] *In re Carmen Yvette Goldsboro-Hudson*, Case No. 12-11086 (BLS) (Bankr. D. Del.).

[2] *Bank of America, N.A. v. Donald R. Hudson, Sr. and Carmen Y. Goldsboro-Hudson a/k/a Carmen Y. Hudson*, Case No. K13L-12-033 RBY (Del. Super. Ct.).

[3] As Defendant points out in its Motion to Dismiss, the Tender Letter itself is undated. This date is drawn from the Complaint. Plaintiff further included a Tracking Receipt as Ex. H to his Complaint, evidencing receipt of the letter by Bank of America on March 3, 2011.

[4] Attached as Exhibit G to Plaintiff's Complaint.

Note, all settled proceeds will be presented to the party entitled to enforce or collect payment." It is undisputed that Defendant never responded to Plaintiff's correspondence.

Instead, on March 11, 2014, Defendant notified Plaintiff by letter, that the servicing of the mortgage was transferred to Specialized Loan Servicing, LLC ("SLS"); and that, going forward, any payments should be made to SLS. The letter specifically made clear that Defendant would not be accepting any further payments. The parties disagree as to whether the transfer described in the letter ever occurred. There is further confusion as to the role Queen's Park Oval Asset Holding Trust ("Queen's") plays in this dispute. Apparently, following the transfer to SLS, there was a subsequent transfer of the mortgage to Queen's.[5]

On May 29, 2014, Plaintiff filed a Complaint against Defendant with this Court, alleging five causes of action arising out of Defendant's refusal to accept or act upon the Tender Letter: (1) seeking a declaration that the mortgage is discharged; (2) seeking a declaration as to the discharge of purported debt; (3) seeking declaration as to the lawfulness of foreclosure action and/or requesting injunctive relief to stop the foreclosure action; (4) a claim for breach of contract; and (5) a claim for conversion.

STANDARD OF REVIEW

The Court's standard of review on a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6) is well-settled. The Court accepts all well-pled allegations

[5] Queen's joined Bank of America, N.A.'s motion to dismiss as a defendant on July 23, 2014.

as true.[6] Well-pled means that the complaint puts a party on notice of the claim being brought.[7] If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.[8] The test for sufficiency is a broad one.[9] If any reasonable conception can be formulated to allow Plaintiff's recovery, the motion to dismiss must be denied.[10] Dismissal is warranted only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[11]

The standard of review on a motion to dismiss pursuant to Rule 12(b)(7) and Rule 19 is multi-pronged. Rule 12(b)(7) provides that a Court may dismiss Plaintiff's claim for failing to join a party pursuant to Rule 19.[12] In order to determine whether a plaintiff has failed to join a party pursuant to Rule 19, the Court undertakes a two

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[6] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super. March 31, 2009), citing *Anglo American Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003).

[7] *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *2 (Del. Super. Apr. 24, 2001), citing *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995).

[8] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[9] *Id*.

[10] *Id*.

[11] *Thompson v. Medimmune, Inc.*, 2009 WL 1482237, at *4 (Del. Super. May 19, 2009), citing *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super.).

[12] *Graham v. State Farm Mu. Ins. Co.*, 2006 WL 1600949, at *1 (Del. Super. Jun. 12, 2006).

pronged inquiry.[13] First, the Court inquires whether the party is a necessary party under Rule 19(a). A party is necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.[14]
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> If the party is necessary, it must be joined if feasible to do so. [15] It is not feasible to join a party when the party is not subject to service of process and joining the party would deprive the Court of subject matter jurisdiction. [16] If the party is necessary and joinder is feasible, then the Court shall order that person be made a party.[17] If the person refuses to do so, the person may be made a defendant, or in a prior case, an involuntary plaintiff[18]. The Rule does not

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[13] *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F. 3d 399, 404 (3d. Cir. 1993).

[14] *Roberts v. Delmarva Power & Light Co.,* 2007 WL 2319761 at *2 (Del. Super. Aug. 6, 2007), citing *Fedirko v. G&G Construction, Inc.,* 2007 WL 1784184 at *2 (Del. Super. May 18, 2007).

[15] *Id.*

[16] Super. Ct. Civ. R. 19(a).

[17] *Id.*

[18] *Id.*

provide for dismissal at this stage.[19]

Second, if the party is "necessary" under Rule 19(a), but joinder is not feasible, then the Court must determine[20] whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable."[21] In making this assessment the Court is to consider the following factors:

> 1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. [22]

When presented with a Rule 12(b)(7) motion, the Court places an initial burden on the party raising the defense to show that the person who was not joined is needed for a just adjudication.[23] "However, when an initial appraisal of the facts reveals the possibility that an unjoined party whose joinder is required under Rule 19 exists, the

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[19] *Roberts*, 2007 WL 2319761 at *2 (citing *John Hancock Property & Cas. Co. v. Hanover Ins. Co.*, 859 F.Supp. 165, 168 (E.D. Pa. 1994).

[20] *Janney*, 11 F. 3d at 404.

[21] Super. Ct. Civ. R. 19(b).

[22] *Id*.

[23] *Roberts*, 2007 WL 2319761 at *2.

burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and failure to meet that burden will result in joinder of the party or dismissal of the action."[24]

DISCUSSION

Defendant seeks three things by its motion: 1) to dismiss all the claims in Plaintiff's Complaint pursuant to Rule 12(b)(6) for failure to state a claim; 2) to dismiss the entire Complaint for failure to join an indispensable party pursuant to Rule 12(b)(7); and 3) specific to Plaintiff's request for injunctive relief, a determination by this Court that Plaintiff's request be decided as part of the prior pending foreclosure action filed by Defendant against Plaintiff.

I. Motion to Dismiss Pursuant to Rule 12(b)(6)

With respect to Defendant's motion to dismiss pursuant to Rule 12(b)(6), the crux of the argument is that Plaintiff's February 2014 Tender Letter to Defendant was not, in fact, a tender. Plaintiff, in his Complaint, alleges that the Tender Letter and attached copy of his cashier's check constituted a satisfaction of the outstanding balance due to Defendant; and that, pursuant both to the terms of Mortgage and 6 *Del. C.* § 3-603(b), Plaintiff was discharged of all obligations owed Defendant. Plaintiff points specifically to language in Section 19 of the Mortgage, which reads in relevant part:

> **Satisfaction**. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall cease and become void and of no effect and Lender shall cause

[24] 7 *Federal Practice and Procedure Civ. 3d* § 1609. *See also, Boles v. Greenville Housing Authority*, 486 F.2d 476,478 (6th Cir. 1972).

> the entry of satisfaction to be made upon records of this Security Instrument. (emphasis in original).[25]

Plaintiff's Complaint contends that the Tender Letter was a payment of all the sums secured by the Mortgage; and, as such, Defendant, as the Lender, was obliged to deem the instrument satisfied.

In addition, Plaintiff's Complaint points to 6 *Del. C.* § 3-603(b) for the proposition that Plaintiff's loan obligations were discharged upon Defendant's refusal to accept his Tender Letter. § 3-603(b) states in relevant part:

> If tender payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having the right of recourse with respect to the obligation to which tender relates. [26]

In his Complaint, Plaintiff asserts that the Tender Letter constituted a tender, and that Defendant's refusal of the tender resulted in a discharge as per the statute.

Defendant flatly rejects Plaintiff's characterization of the Tender Letter as a tender. Defendant instead proposes that the letter constituted a tender offer, which it refused. Defendant bases this argument on what it portrays as the conditional language of Plaintiff's Tender Letter. Specifically, Defendant emphasizes the

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[25] *See* Exhibit D to Plaintiff's Complaint.

[26] 6 *Del C.* § 3-603(b).

passage in which Plaintiff states "**in exchange for original Note, all settlement proceeds will be presented**" and that Plaintiff is "**ready and able** to satisfy the above referenced loan." (emphasis in original). According to Defendant's interpretation, the tender would occur only after the note was delivered to Plaintiff. In support of its argument, Defendant further points to the copy of the cashier's check, which as a duplication, was not the original check entitling Defendant to the funds represented. As only an offer of tender, Defendant argues, it was free to reject the Tender Letter without the implication of the contractual mortgage language or § 3-603(b).

With its assertion that the Tender Letter was not in fact a tender, Defendant proceeds to attack each of the Plaintiff's claims. Beginning somewhat out of order, Defendant zeros in on Plaintiff's fourth cause of action for breach of contract. Citing to *VLIW Technology, LLC v. Hewlett-Packard Co.,* Defendant asserts that "in order to survive a motion to dismiss for failure to state a breach of contract claim, the Plaintiff must demonstrate first, the existence of a contract; second the breach of an obligation imposed by the contract; and third, the resultant damages."[27] Defendant appears to recognize the existence of the contract, stating as much by indicating that the contract here is the Mortgage. The focus of Defendant's argument is Plaintiff's failure to show the element of breach. Looking to Section 19 of the Mortgage, Defendant asserts that Plaintiff's Tender Letter and copy of the certified check was not a "payment of all sums" as per the contractual

[27] 840 A.2d 606, 612 (Del. 2003).

language, and, thus, did not require satisfaction of the debt on the part of Defendant. If so, Defendant's failure to satisfy the debt upon receipt of the Tender Letter, therefore, would not be a breach of Section 19. Thus, Plaintiff would have failed to plead a breach of contract claim adequately. Neither would § 3-603(b) of Title 6 of the Delaware Code be implicated, for the same reason that the Tender Letter did not constitute tender.

Reiterating the same line of argument – that the Tender Letter was not proper tender – Defendant asserts that Plaintiff has failed to state a claim for conversion adequately. Citing *Lorenzetti v. Hodges*, Defendant provides that Delaware requires a plaintiff "to prove (a) right to the property in question and (b) that the defendant holds that property in contravention of that right" in order to plead a claim properly for conversion.[28] Defendant disputes that Plaintiff has a right to the property in question, the Original Note. As the Tender Letter, per Defendant's argument, failed as adequate tender and was a mere offer, the Original Note never validly reverted back to Plaintiff. Defendant's continued holding of the Original Note was, then, not in contravention of any rights the Plaintiff had in the property. Without contravention of Plaintiff's rights, Defendant argues that no claim has been stated for conversion.

Grouping Plaintiff's claims for declaratory relief together: 1) seeking declaration of mortgage discharge; 2) seeking declaration of debt discharge; and 3) seeking declaration as to the lawfulness of the foreclosure action, Defendant again seeks dismissal of these claims for failure to adequately plead a cause of action

[28] 2013 WL 592923, at *3 (Del. Feb. 13, 2013).

based upon the theory that the Tender Letter was a mere offer. Defendant asserts that declaratory relief is granted where Plaintiff can meet four elements:

> 1) "the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; 2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; 3) the conflicting interest must be real and adverse; and 4) the issues must be ripe for judicial determination."[29]

Defendant argues that Plaintiff has failed to meet any of these elements, because he cannot show that he has a legal right or interest in the Original Note. Defendant's contention, again, is that the Tender Letter was only an offer; and, thus, the property never reverted back to Plaintiff by way of the Mortgage terms or § 3-603(b) of the Title 6 of the Delaware Code. As such, these three requests for declaratory relief should be dismissed for failure to state a proper claim.

Plaintiff's Response to Defendant's motion begins by reiterating that Defendant has not, to Plaintiff's satisfaction, evidenced its entitlement to payment under the Original Note. Plaintiff stresses that the note was made payable to Taylor Bean, and that Defendant never proved this note was transferred to it. Following this logic, the validity of Defendant's subsequent assignment to SLS and then to Queen's are also put into question.

Setting these concerns aside, and assuming the validity of all said transfers, Defendant disputes Plaintiff's assertion that his Tender Letter was not proper tender, requiring discharge of the debt and return of the Original Note to him.

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[29] *Rollins v. Int'l Hydronic Corp*., 303 A.3d 660, 662063 (Del. 1973).

According to Defendant, the requirement that Plaintiff produce the Original Note was not an additional condition, but rather part of the tender itself. Moreover, Defendant argues that only a copy of the cashier's check was included is not dispositive. Plaintiff likens his inclusion of only a copy of the check, to a set of facts in which two parties are sitting across the table from one another, and the party who has made out the check, holds this check up for the other to view, before passing it across the table. The Court understands the Plaintiff to argue that including a copy is the equivalent of holding the check up for the other party to view, in Plaintiff's scenario. As per Plaintiff, the copy of the check was more than sufficient for Defendant to verify the existence of the funds and to show that the Tender Letter was not a mere offer, but rather a full, complete tender.

Asserting that the Tender Letter was proper tender, Plaintiff stresses that pursuant to both the contractual terms of the Mortgage and 6 *Del. C*. § 3-603(b), Defendant had an obligation to satisfy the mortgage and to return the Original Note to Plaintiff. In failing to do so, Defendant laid the factual groundwork to support Plaintiff's claims for (1) breach of contract; (2) conversion; and (3) the three claims for declaratory relief. Plaintiff's points, in summary, are as follows: (1) the Tender Letter is complete and adequate tender; (2) Defendant breached the terms of the contractual agreement, which required satisfaction of the Mortgage upon payment of all sums; and (3) Defendant converted Plaintiff's property by continuing to hold on to the Original Note when the property rightfully reverted

back to Plaintiff upon presentment of the Tender Letter.[30]

The Court finds that Plaintiff has pled his claims for 1) breach of contract; 2) conversion; and 3) his three requests for declaratory relief, sufficiently to withstand Defendant's motion to dismiss for failure to state a claim. Although there exists a central dissension between the parties – whether the Tender Letter constituted adequate tender – the pleading standard in Delaware requires only what is necessary to put the Defendant on notice of the nature of the Plaintiff's claims.[31] Courts are further instructed to accept all well-pleaded factual allegations as true.[32] Only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief may be granted" should a Court dismiss the complaint.[33] The parties may indeed be in disagreement as to whether the Tender Letter constituted tender, but Plaintiff has pled facts sufficient to sustain the claims in the Complaint.

In Delaware, a breach of contract claim must show "first, the existence of a contract, whether express or implied; second, the breach of an obligation imposed by contract; and third, the resultant damage to the Plaintiff."[34] The parties appear

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[30] Plaintiff does not directly address Defendant's motion to dismiss with respect to the three claims for declaratory relief, although the Court understands Plaintiff to argue similarly that he is entitled to declaratory relief primarily due to the Tender Letter constituting proper tender.

[31] *Savor,* 2001 WL 541484, at *2.

[32] *Loveman*, 2009 WL 847655, at *2.

[33] *Thompson*, 2009 WL 1482237, at *4.

[34] *VLIW Technology*, 840 A.2d at 612.

to be in agreement with regard to the existence of a contract, here the Mortgage. The dispute centers instead upon whether there was a breach of the contract. The parties are further in agreement that Section 19 of the mortgage governs the breach analysis, and assumably, if either party were to act contrary to Section 19, the other would have a valid breach of contract claim. Therefore, the conflict concerns whether Defendant's failure to acknowledge the Tender Letter implicated Section 19.

The Court is satisfied that Defendant has presented facts sufficient to support the element of breach with respect to his breach of contract claim. Under a reasonable interpretation of the Tender Letter, Plaintiff intended to tender $292,984.53 to Defendant in full payment of the outstanding obligation. This is evidenced by both the language of the letter, reflecting Plaintiff's then-present desire and willingness to pay over the sum due, as well as the fact a copy of a cashier's check made out to Defendant was included. If the Tender Letter were indeed a tender, it appears that even Defendant would agree that, by not accepting this tender, it would be in breach of Section 19. That Defendant interprets the Tender Letter to be an offer, due to its finding of a conditional tone, is irrelevant to this Court's analysis of a motion to dismiss for failure to state a claim. Plaintiff's presentation of the facts in his Complaint is sufficient to put the Defendant on notice of the nature of the claims against it. The Court must, therefore, accept these well-pled factual allegations as true.

Much the same analysis applies to Defendant's motion to dismiss the conversion claim pursuant to Rule 12(b)(6). The disagreement between the parties

concerning the Plaintiff's conversion claim rests upon whether Plaintiff had a right to the property, following Defendant's receipt of the Tender Letter. In order to be successful on his conversion claim, Plaintiff would have to show that Defendant improperly withheld the property, in contravention of Plaintiff's right.[35] Again, this determination relies upon whether the Tender Letter was a tender. As stated above, this Court is satisfied that under a reasonable reading of the Complaint, Plaintiff sufficiently pleads the claimed tender.

Similarly, Plaintiff has satisfactorily pled his three claims for declaratory relief.[36] In Delaware, a plaintiff must show the following elements to be entitled to declaratory relief: "1) the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; 2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; 3) the conflicting interest must be real and adverse; and 4) the issues must be ripe for judicial determination."[37] Defendant's only real argument for dismissing these three claims is that the Plaintiff did not tender payment on the underlying note by the Tender Letter. The Court must accept the facts as true. Hence, Defendant's Motion to Dismiss is **DENIED**.

II. Motion to Dismiss for Failure to Join Necessary Party

The Defendant further moves to dismiss the Complaint for failure to join an

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[35] *Lorenzetti*, 2013 WL 592923, at *3.

[36] Seeking 1) declaration sating that the mortgage is discharged; 2) declaration stating that the debt is discharged; and 3) declaration as to the lawfulness of the foreclosure action.

[37] *Rollins Int'l*, 303 A.2d at 662-63.

indispensable party pursuant to Rule 12(b)(7). Defendant contends that Plaintiff's wife Goldsboro-Hudson should have been joined as a party to Plaintiff's action, because she is a necessary party pursuant to Rule 19(a). As a co-signatory of the mortgage and the original note, Goldsboro-Hudson is said to have an interest in the present action, which (because she is a party to the prior foreclosure action) will potentially subject the Defendant to "double, multiple or otherwise inconsistent obligations," as per the language of Rule 19(a).[38] Although claiming that Goldsboro-Hudson is not only a necessary but also an *indispensable* party, Defendant does not go into, or at best hurries over, the Rule 19(b) analysis necessary to make the latter classification.

Plaintiff counters Defendant's assertion that Goldsboro-Hudson is a necessary party as defined by Rule 19(a), by pointing to the quit claim deed transfer underlying the Thornhill Court Property between the ex-spouses following their divorce. In transferring the deed to Plaintiff, Goldsboro-Hudson is portrayed as having cut off any further interest in the property or the litigation surrounding it. The Rule 19(a) requirement that the absent party have an interest, therefore, may not be present.

With respect to the Rule 19(b) analysis, Plaintiff argues that, if this Court were to determine Goldsboro-Hudson a necessary party, the issue of the feasibility of joining her to this action would involve consideration of the effects of her Bankruptcy discharge. Plaintiff further raises the inequity in dismissing this action were joinder not feasible.

The Court finds both parties' handling of the no-doubt complex issues

[38] Super. Ct. Civ. R. 19(a).

presented by this motion to dismiss pursuant to Rule 12(b)(7) and Rule 19, to be in need of further augmentation. As an example, the Court is left with assertions as to the necessity or lack of necessity of joining Goldsboro-Hudson to this action, that are unsupported by case law.

Although complex, the situation presents a clear question: is a co-obligor and co-signatory to a mortgage and note securing the mortgage a necessary and indispensable party such that this party's absence in the action calls for dismissal? Delaware courts have addressed similar issues in the past. Indeed, in *Scott v. Kay*, the Delaware Supreme Court recognized that joint obligors are "conditionally necessary part[ies] and a Court is not barred from proceeding with a case solely because some of the obligors are absent..."[39] With respect to the added wrinkle involving Goldsboro-Hudson's bankruptcy discharge, Delaware courts have again addressed this: "where the debt of one joint obligor had been discharged in bankruptcy, the creditor [is] entitled to proceed against the remaining joint obligors."[40] These discussions at least point to the notion that while a bankrupt joint obligor may be considered a necessary party, that alone does not *de facto* make that absent party an indispensable party.

Jurisdictions outside of Delaware have more directly addressed the specific situation of a bankrupt joint obligor and the effect of this absent party's discharge on

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[39] 227 A.2d 572, 575 (Del. 1967).

[40] *Beal Bank, SSB v, Lucks*, 2001 WL 220252, at *6 (Del. Ch. Feb. 20, 2001).

the Rule 12(b)(7) and 19 analysis.[41] The U.S. District Court for the Northern District of Illinois in *Royal Truck & Trailer, Inc.*,*v. Armadora Maritima Salvadorena, S.A.*, determined that, in the case of two joint obligors, one of whom was bankrupt and absent from the litigation, said party was necessary, but not automatically indispensable.[42] The Court reasoned that the indispensability determination would be made pursuant to the Court's discretion and the enumerated factors laid out in Rule 19(b).[43]

If the parties desire to pursue this issue at this stage of the proceedings, they will need to submit additional briefing with regard to the Defendant's motion to dismiss pursuant to Rule 12(b)(7) and Rule 19. Specifically, the Court is interested in the issue of joint and bankrupt obligors vis-à-vis the necessary and indispensable party analysis.

III. Exclusive Jurisdiction of Foreclosure Court

Defendants argue that Plaintiff's request for injunctive relief prohibiting the foreclosure action should have been properly brought in the foreclosure proceedings, rather than in this case. Defendant's contention is based upon that fact that the previously filed foreclosure action is a *scire facias sur* mortgage foreclosure case, and as such any claims arising out of the original mortgage must be raised in the original

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[41] 10 B.R. 488, 491-492 (N.D. Ill. 1981); *see also Cushman and Wakefield, Inc. v. Backos,* 129 B.R. 35 (E.D. Pa. 1991) (same); *In re Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y. 1983) (same).

[42] *Royal Truck*, 10 B.R at 492-493.

[43] *Id.*

foreclosure proceeding.[44] Specifically, claims for payment or satisfaction are to be brought in the original foreclosure case.[45] Defendant posits that Plaintiff's request for injunctive relief prohibiting the foreclosure action sounds in payment and satisfaction. Defendant's grounds for this argument are that Plaintiff's request for injunctive relief stems from his assertion of having tendered payment by way of the Tender Letter.

Plaintiff responds to Defendant's contention by relying upon the "practical considerations" this Court pondered in a previous case. Although dealing with the reverse analysis – whether a counterclaim not arising out of the original mortgage could be brought in a foreclosure action – this Court noted that following the *scire facias sur* mortgage foreclosure case law, would still allow for the possibility of the parties moving to consolidate the two separate actions.[46] The Court understands the Plaintiff to imply that if it were to rule that his injunctive relief claim should be properly brought in the foreclosure action, the Plaintiff could and perhaps would move to consolidate these two actions.

The Court resolves this issue in a similar fashion to its decision in *Lasalle Nat'l Bank v. Ingram*.[47] The law surrounding *scire facias sur* mortgages appears

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[44] *See Harmon v. Wilmington Trust Co.*, 1995 WL 379214, at *2 (Del. Super. Ct. Jun. 19, 1995).

[45] *See Gordy v. Perform Building Components, Inc.*, 310 A.2d 893, 895-896 (Del. Super. Ct. 1973).

[46] *See Lasalle Nat'l Bank v. Ingram*, 2005 WL 1284049, at *2 (Del. Super. Ct. May 19, 2005) ("if Defendants bring a new cause of action based on their counterclaims...a motion to consolidate could conceivably be granted").

[47] 2005 WL 1284049.

settled: if a claim arises out of the original mortgage then it must be brought in the foreclosure action rather than in a separate case.[48] Added to this is the specification that claims in payment and satisfaction are to be brought in the original foreclosure case.[49] The Court finds that the claim for injunctive relief, which is based on the theory that the foreclosure action is unlawful due to Plaintiff's having paid and satisfied the Mortgage, is a claim that had to have been brought in the previously filed foreclosure case. Moreover, this situation is distinguishable from *Lasalle*, in that the Tender Letter was meant to discharge the *original* mortgage rather than a separate oral agreement. Turning to the "practical considerations," raised by Plaintiff, this Court follows its previous reasoning: "[i]n any event, such practical considerations must be put aside in order to keep in step with the line of settled and consistent cases in the Superior Court and Delaware Supreme Court...holding that all counterclaims and defenses must be related directly to the underlying mortgage transaction."[50]

CONCLUSION

For the foregoing to reasons the Court:

1) **DENIES** Defendant's motion to dismiss the Complaint for failure to state of claim;

2) Requires further briefing with respect to Defendant's motion to dismiss for failure to join an indispensable party; and

3) **GRANTS** Defendant's motion to dismiss Plaintiff's claim for injunctive

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[48] *Harmon*, 1995 WL 379214, at *2.

[49] *Gordy*, 310 A.2d 893.

[50] *Lasalle,* 2005 WL 1284049, at *3.

relief.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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