

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

NATIONSTAR MORTGAGE, LLC :
d/b/a CHAMPION MORTGAGE, : C.A. No: K14L-10-024 RBY
 :
 :
 Plaintiff, :
 :
 _____ :
 v. :
 :
 :
 JOHN MURDOCH CRANE, III, Heir and :
 Personal Representative of the Estate of :
 John Murdoch Crane, Jr., KATHLEEN D. :
 CRANE, Heir, CONSTANCE MARIE :
 CRANE, Heir, and 1971 WINDSWEPT :
 DRIVE TRUST, :
 :
 :
 Defendants. :

Submitted: January 5, 2015

Decided: January 29, 2015

*Upon Consideration of Defendant 1971 Windswept Drive Trust's
Motion to Dismiss*

DENIED

ORDER

Daniel T. Conway, Esquire, Atlantic Law Group, LLC, Georgetown, Delaware for
Plaintiff.

John Murdoch Crane, III, *pro se*.

Kathleen D. Crane, *pro se*.

Constance Marie Crane, *pro se*.

Theodore A. Kittila, Esquire, Greenhill Law Group, LLC, Wilmington, Delaware
for Defendant 1971 Windswept Drive Trust.

Young, J.

SUMMARY

____Nationstar Mortgage, LLC (“Plaintiff”) seeks to foreclose on real property (“Property”) currently held by 1971 Windswept Drive Trust (“Defendant”). Following an assignment of the Mortgage, Defendant became the mortgagee. This action was initially filed in the Court of Chancery.

However, upon discovering that it had a remedy at law, Plaintiff transferred the suit to the Superior Court. Defendant moves to dismiss the action, pursuant to Superior Court Civil Rule 12(b)(6), arguing that Plaintiff’s claim fails due to the doctrine of judicial estoppel. As per Defendant, in the Chancery Court matter, Plaintiff maintained that the Mortgage was not filed under seal. In the present action, Plaintiff avers that the Mortgage is under seal. Defendant contends that Plaintiff should be estopped from so arguing.

The Court **DENIES** Defendant’s Motion as, although these positions are inconsistent, neither the Chancery Court, nor this Court, relied upon the prior contrary position in making a ruling. Thus, the doctrine of judicial estoppel is not applicable.

FACTS AND PROCEDURE

On April 24, 2009, John Murdoch Crane, Jr. (“Crane, Jr.”), executed a Home Equity Conversion Mortgage (the “Mortgage”) on the Property. Crane, Jr. passed away on June 20, 2012, leaving the Property to his heirs John Murdoch Crane, III, Kathleen D. Crane, and Constance Marie Crane (“Heir Defendants”). The Property was then deeded to Defendant.

Upon the death of Crane, Jr., Plaintiff,, who acquired the Mortgage by assignment from the original mortgagee, issued a Notice of Default, demanding payment in full. On January 24, 2014, Plaintiff filed a mortgage foreclosure action in

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the Delaware Court of Chancery, seeking an equitable remedy. The suit was filed against both Defendant and the Heir Defendants. After purportedly discovering that the Mortgage was filed under seal, Plaintiff transferred the case to the Delaware Superior Court, filing the Complaint in this action on October 8, 2014.

DISCUSSION¹

Defendant seeks to dismiss Plaintiff's *scire facias sur mortgage* Complaint, following the transfer of this litigation from the Delaware Court of Chancery. Framed under Superior Court Civil Rule 12(b)(6), Defendant claims Plaintiff has failed to state a claim for which relief can be granted. Support for Defendant's argument, however, rests upon an argument of judicial estoppel.

In its initial form, Plaintiff's action was one in equity, filed in the Court of Chancery. In that Court, Plaintiff maintained that the Mortgage was not filed under seal. In such situations, an equitable remedy is the only one available in actions for mortgage foreclosure.² Subsequently, Plaintiff allegedly discovered that the Mortgage was, in fact, filed under seal, and thus, a remedy at law was available. Hence, the present lawsuit. Defendant contends that Plaintiff should be judicially estopped from now arguing that the Mortgage was filed under seal, when he previously purported that it was not. If estopped from so arguing, it follows that the Mortgage would be determined not to have been filed under seal; in which event Plaintiff's suit would fail

¹ The Heir Defendants have not filed a response to Defendant's Motion to Dismiss.

² *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d, 734, 735 (Del. 1983) (“[i]f the mortgage is not sealed...it is enforceable only in equity”).

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to state a proper claim in *this* Court, pursuant to 25 Del. C. § 2101.³

Plaintiff misreads the judicial estoppel standard. Although it is accurate that the doctrine of judicial estoppel serves to prevent “a party...from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding,”⁴ there is a second part to this analysis. Not only must the posited positions be contrary to one another; but, further, the Court hearing the inconsistent argument must have been “successfully induced to adopt [the position] in a judicial ruling.”⁵ The rationale for this second level of inquiry stems from the realization that “[a]bsent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations.”⁶

Delaware courts have readily and consistently applied this additional inquiry, when considering judicial estoppel arguments. Where finding that the prior contradictory position had not resulted in a successful decision for a party, Delaware

³ See also *Handler Construction, Inc. v. Corestates Bank, N.A.*, 633 A.2d 356, 363 (Del. 1993) (“absence of a seal on the...mortgage is a technical defect that precludes the enforcement of this document as a mortgage at law in the Superior Court”).

⁴ *Capaldi v. Richards*, 2006 WL 4782245 at *2 (Del. Ch. Dec. 8, 2006) (internal quotations omitted).

⁵ *Wave Holdings, LLC v. Highland Capital Mgmt. L.P.*, 2011 WL 5314507, at *10 (Del. Super. Ct. Oct. 31, 2011).

⁶ *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001) (internal quotations omitted).

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courts have rejected judicial estoppel challenges.⁷ In *Lillis v. AT&T Corp.*, the Court of Chancery considered an estoppel argument in the framework of a motion to amend the pleadings.⁸ Not only did the Court determine that estoppel was inapplicable, as the purportedly offending position never factored into any ruling of the Court's, but the Court permitted amendment of the Answer to reflect the changed position, given Delaware's recognition that motions to amend pleadings should be granted liberally.⁹

The Court views the current situation as analogous to an amendment of the pleadings. Plaintiff first filed its Complaint, alleging that the Mortgage was not filed under seal. The Plaintiff now argues that the Mortgage was under seal. This is similar to the changed position in *Lillis*' Answer: amended pleadings are to be granted liberally.¹⁰ Neither the previous position in *Lillis*, nor the prior assertion in this case, induced the respective courts to rule in any party's favor. As such, following the judicial estoppel analysis adopted by Delaware courts, there is no reason for this Court to preclude the Plaintiff from arguing now that the Mortgage was filed under seal.

The Mortgage, if, as alleged, is under seal, than the Plaintiff's foreclosure

⁷ See e.g., *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) (“[t]he doctrine is not appropriate in all situations; parties may raise many issues throughout a lengthy litigation such as this, and only those arguments that persuade the court can form the basis for judicial estoppel”); *Lillis v. AT&T Corp.*, 896 A.2d 871, 877 n. 10 (Del. Ch. 2005) (“[m]oreover, AT&T is not barred changing its position under the doctrine of judicial estoppel because this court did not rely on AT&T's argument in a decision”).

⁸ 896 A.2d 871.

⁹ *Id.*, at 877.

¹⁰ *Id.*

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action is properly before this Court. Without the support of judicial estoppel, Defendant has no grounds to move for the dismissal of the action for failure to state of claim.

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Defendant's Motion to Dismiss.

IT IS SO ORDERED.

/s/ Robert B. Young

J.

RBV/lmc

oc: Prothonotary

cc: Counsel

John Murdoch Crane, III

Kathleen D. Crane

Constance Marie Crane

Opinion Distribution

File