SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

May 19, 2006

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RE: Mortgage Electronic Registration Systems, Inc., v. Haase and Flanagan
C.A. No. 05L-06-113 ESB

Date Submitted: February 6, 2006

Dear Counsel and Ms. Flanagan:

This is my decision on the Motions to Dismiss the complaint in this mortgage foreclosure action filed by defendants Frederick T. Haase, Jr. ("Haase") and Donna M. Flanagan ("Flanagan").

STATEMENT OF THE CASE

Haase executed and delivered to the Delaware Trust Company a mortgage (the "Mortgage") on the property (the "Property") known as 210 North Cass Street, Middletown, New Castle County, Delaware on May 6, 1992. Haase conveyed the Property to himself and Flanagan on February 4, 1997. Delaware Trust Company merged into CoreStates, Bank, N.A. on August 30, 1996. CoreStates merged into First Union National Bank on May 16, 1998. First

Union then changed its name to Wachovia Bank. Wachovia Bank assigned the Mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") on March 19, 2003. MERS began this action against Haase and Flanagan by filing with the New Castle County Prothonotary the following on June 23, 2005: (a) a Superior Court Civil Case Information Statement ("CIS"); (b) a complaint signed by Kristi J. Doughty, Esquire ("Doughty"); and (c) a Praecipe signed by Doughty. Haase and Flanagan filed their Motions to Dismiss with the Court on February 6, 2006. Haase raised the following arguments in his motion: (1) Insufficiency of process; (2) Lack of subject matter jurisdiction; (3) Lack of personal jurisdiction; (4) Failure to state a claim for which relief may be granted; and (5) Defective assignment of the Mortgage. Flanagan argues in her motion that she should not have been named as a defendant because she did not sign the Mortgage. She also argues that MERS has not established that it has an interest in the Mortgage.

STANDARD OF REVIEW

On a motion to dismiss, the trial 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."[1] This analysis is limited to the facts alleged in the complaint, which are taken as true and interpreted in a light most favorable to the non-moving party.[2]

DISCUSSION

I. Insufficiency of Process

Haase argues that service of process was insufficient because it is unclear whether a writ of summons or *scire facias sur* mortgage was issued by the Prothonotary and served by the

[1] *Vanderbilt Income & Growth Assoc., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996).

[2] *Id.*

sheriff. This Court has acknowledged that technical discrepancies between the official forms and those employed in practice should not result in summary disposition.[3] "The Forms attached to the Rules will be considered to satisfy the requirements for practice and procedure,"[4] but the Delaware Supreme Court has also stated that "the Rules prevail over the forms."[5] Where a writ adheres to the Rules, it need not necessarily adhere to the forms."[6]

Doughty asked the Prothonotary to issue a writ of *scire facias sur* mortgage and Haase was personally served with a writ and a *scire facias sur* mortgage complaint on July 29, 2005. The writ was not identified by name and for some unknown reason the Prothonotary docketed it as a summons. However, the writ complies with Form 1(p) of the forms attached to the Superior Court Civil Rules and contains all the language necessary for a *scire facias sur* mortgage action. Moreover, the writ does not contain any language indicating that MERS was taking action against Haase individually. The CIS lists the case as a mortgage foreclosure action. The complaint states, on its face, that the action is an *"In Rem*" proceeding. The caption of the complaint also states that this is a "*Scire Facias Sur* Mortgage" action. The inclusion of such language dispels any claim by Haase that he was not apprised of the nature of the current proceeding. The writ served upon Haase substantially complies with the requirements of service of process. Thus, there is no reason for me to dismiss the complaint for improper service of process.

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[3] *Equitable Trust Co. v. O'Neill*, 420 A.2d 1196, 1200 (Del. Super. Ct. 1980).

[4] *Gordy v. Preform Building Components, Inc.*, 310 A.2d 893, 897 (Del. Super. Ct. 1973), *citing Mackey v. O'Neil*, 47 Del. 483, 93 A.2d 526 (1952).

[5] *Pauly Petroleum, Inc. v. Continental Oil Company*, 235 A.2d 284, 292 (Del. 1967).

[6] *Cf. Id.* (Stating Form does not dictate interpretation given to the Rules).

II. Subject Matter Jurisdiction

Haase argues that there is no subject matter jurisdiction because service of process was defective. Since I concluded that service of process was not defective, there is no merit to this argument.

III. Personal Jurisdiction

Haase argues that there is no jurisdiction over him or the Property because service of process was defective. Since I concluded that service of process was not defective, there is no merit to this argument.

IV. Failure to State a Claim

Haase argues that MERS has failed to establish in either the caption or complaint how it acquired an interest in the Mortgage and that it is the proper plaintiff in this action. MERS has provided an arguably incomplete record of how it acquired an interest in the Mortgage. It appears, based on the allegations in the complaint and the response filed by MERS to Haase's motion to dismiss, that Wachovia Bank, formerly known as First Union National Bank and the successor in interest of the Mortgage by merger to Delaware Trust Company, assigned the Mortgage to MERS. While MERS does state that Wachovia Bank is the successor in interest by merger to Delaware Trust Company, which is technically correct, it failed to recite the mergers between (1) Delaware Trust Company and CoreStates Bank, N.A., and (2) CoreStates Bank, N.A. and First Union National Bank. However, instead of dismissing the complaint, I will allow MERS to amend it within 14 calendar days of the date of this decision so that the complete history of the mergers is set forth therein.[7]

[7]The Mortgage passed by operation of law to the surviving entity. 8 Del.C. §259.

V. The Assignment of the Mortgage

Haase argues that the assignment from Wachovia Bank to MERS is defective for a number of reasons. One, Haase argues that the assignment is defective because there was no recital in the caption of the complaint of how the Mortgage went from Delaware Trust Company to MERS. I addressed this argument before and concluded that it is largely without merit. Haase, as part of this argument, also points out that there is no recital of the merger between Delaware Trust Company and Meridian Bank. This argument is, according to MERS, factually incorrect because Delaware Trust Company never merged with Meridian Bank. Instead, both Delaware Trust Company and Meridian Bank merged into CoreStates Bank. CoreStates Bank then merged into First Union National Bank, which later changed its name to Wachovia Bank. Wachovia Bank then assigned the Mortgage to MERS. I am satisfied, based on the information before me, that MERS has, for the purpose of resolving Haase's motion to dismiss, established that it is the holder of the Mortgage.

Two, Haase argues that the assignment is defective because it is not under seal. The requirements of a valid assignment are set forth in 25 Del.C. §2109.[8] There is no requirement that an assignment be made under seal. Moreover, this argument was raised and rejected by the Superior Court in *P & B Properties I, L.L.C. v. Owens*.[9] In this case the Court stated:

> In the Code of 1852, an assignment of a mortgage under seal was covered by the predecessor to *6* Del.C §2702, which required that the assignment be under seal. However, by *18 Del. Laws, ch.* 213, assignments of mortgages were removed from this provision, and

[8]25 Del.C. §2109, provides: (a) An assignment of a mortgage or any sealed instrument attested by one credible witness shall be valid and effectual to convey all the right and interests of the assignor. (b) All assignments of mortgages or any sealed instruments heretofore made in the presence of one witness and all satisfactions made by assignees in such assignments are made good and valid.

[9]1996 WL 111128 (Del. Super.).

> the predecessor to 25 Del.C. §2109 was created. 25 Del.C. § 2109 requires only on creditable person witness the assignment.

Three, Haase argues that the assignment was not properly witnessed. 25 Del.C. §2109 states that "[a]n assignment of a mortgage or any sealed instrument attested to by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor." The assignment from Wachovia Bank to MERS, excluding the notary's signature, has two signatures. The first signature belongs to Carla Teneyck, a vice-president of Wachovia Bank. The second signature belongs to Ruana Ransom, a corporate secretary of Wachovia Bank. Without any indication that the signature of the corporate secretary was necessary to validate the assignment as a corporate act, Ransom's signature acts as that of a credible witness. Teneyck's signature validates the assignment as a corporate act.

Four, Haase argues that the assignment was defective because the assignment was not properly attested. Delaware General Corporation Law does not, in any instance, require attestation of a business document as a requisite to the validity of that document as a corporate act.[10] It specifies attestation as one means of affirming the authenticity of a document only in the case of organic corporate instruments, which are required to be filed with the Secretary of State."[11] The assignment was not required to be filed with the Secretary of State. Therefore, it was not required to be "attested" to constitute a valid corporate act. The assignment from Wachovia Bank to MERS was not defective. It was properly witnessed, notarized, and not required to be under seal.

Flanagan's argument that she should have not been named as a defendant because she did not sign the Mortgage is contrary to applicable law. 10 Del.C. §506(b) states in part that in

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[10] *Stewart Capital Corporation v. Andrus*, 468 F.Supp. 1261, 1264 (S.D.N.Y. 1979).

[11] *Id.*

addition to the mortgagor any "record owners acquiring title subject to the mortgage (terre-tenants) which is being foreclosed upon," are necessary parties in that mortgage foreclosure action. Flanagan, by virtue of having acquired an interest is the Property by the deed from Haase, is a record owner of the Property subject to the Mortgage and is thus a necessary party who has been properly brought into the present proceeding. Moreover, the complaint makes it clear that the proceedings against Flanagan are *in rem* in nature and not *in personam*. MERS even states in its response to Flanagan's motion that it is not seeking a personal judgment against Flanagan, but merely attempting to foreclose upon the Mortgage. Flanagan's argument that MERS has not established how it acquired an interest in the Mortgage has been dealt with before and resolved against her.

CONCLUSION

The Motions to Dismiss filed by Haase and Flanagan are denied for the foregoing reasons.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley