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

US BANK NATIONAL ASSOCIATION,	:
as Trustee for Citigroup Mortgage Loan	:
Trust, Inc., Mortgage Pass-Through	: C.A. No: K11L-12-072 (RBY)
Certificates, Series 2006-WF2 assignee of	:
Wells Fargo Bank, N.A.,	•
:	:
Plaintiff,	:
	:
V.	:
	:
REGINALD A. GILBERT,	:
	:
Defendant.	:

Submitted: December 6, 2013 Decided: January 15, 2014

Upon Consideration of Plaintiff's Motion for Summary Judgment DENIED

ORDER

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

Dean A. Campbell, Esquire, The Law Office of Dean A. Campbell, LLC, Georgetown, Delaware for Defendant.

Young, J.

January 15, 2014

SUMMARY

US Bank National Association ("Plaintiff") moves for an order granting summary judgment against Reginald A. Gilbert ("Defendant") in an action to recover the principal sum of the amount due and owing under Defendant's mortgage loan, after Plaintiff accelerated the balance. There are genuine issues of material fact in the instant action that preclude an order granting summary judgment. These issues are whether: 1) Plaintiff is the holder of the promissory note associated with Defendant's mortgage loan; 2) whether Plaintiff's supporting affidavit is valid; and 3) whether the assignment transferring interest in Defendant's mortgage loan to Plaintiff was proper. Accordingly, Plaintiff's Motion for Summary Judgment is **DENIED**.

FACTS AND PROCEDURAL POSTURE

On January 13, 2006, Defendant executed a mortgage loan (the "Mortgage") with Wells Fargo Bank, N.A. ("Wells Fargo"). Wells Fargo allegedly assigned its entire interest in the Mortgage (the "Assignment") to US Bank National Association, as Trustee for Citigroup Mortgage Loan Trust, Inc. Defendant allegedly failed to pay the monthly installments of the Mortgage when due. Hence, Plaintiff demanded payment from Defendant on September 4, 2011 (the "Demand Letter"). Defendant was informed of Plaintiff's intention to accelerate the balance in a letter on November 21, 2011 (the "Fair Debt Letter"). Defendant, therefore, is alleged to owe Plaintiff the principal sum of the amount remaining on the Mortgage with interest from December 1, 2010, together with reasonable counsel fees, late charges and costs.

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

On December 21, 2011, Plaintiff filed its complaint (the "Complaint") against the Defendant seeking foreclosure of Plaintiff's interest in the property located at 278 Evelyndale Drive, Dover, Delaware 19904-1825 (the "Property"), under the Mortgage referenced in the Complaint. Prior to the filing of the Complaint, Wells Fargo allegedly assigned the Mortgage to Plaintiff. The Assignment of the Mortgage was dated September 2, 2011, and recorded on September 8, 2011. As of the date of the filing of Plaintiff's Motion for Summary Judgment, Plaintiff asserts, the arrearages have not been paid, and the resulting default has not been otherwise cured.

Defendant was personally served with a copy of Plaintiff's Complaint on January 12, 2012. Defendant entered his appearance on April 18, 2012. On April 30, 2012, Defendant filed an Answer to Plaintiff's Complaint. In Defendant's Answer to Plaintiff's Complaint, Defendant admitted the execution and delivery of the Mortgage as well as the recordation of the Mortgage. Defendant denied that a copy of the Assignment was attached to the Complaint within Exhibit A. Defendant admitted that a copy of the Fair Debt Collections Practices Act disclosure notice was attached to the Complaint as Exhibit B for identification purposes only. Defendant denied that Plaintiff has followed applicable standards of conduct pursuant to the Fair Debt Collections Practices Act. In addition, Defendant denied that Plaintiff was entitled to accelerate the mortgage.

Further, Defendant raised the following two affirmative defenses in his Answer: 1) Plaintiff lacks standing, because Plaintiff has not proven a sufficient chain of assignments to have the authority to enforce a foreclosure on the

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

Defendant; and 2) Plaintiff has denied the Defendant the required opportunity to avoid foreclosure through early intervention upon delinquency pursuant to the FHA servicing requirements and standards, promulgated by HUD, pursuant to the National Housing Act, 12 U.S.C. Section 1710(a). On November 14, 2013, Plaintiff filed the instant Motion for Summary Judgment. On December 13, 2013, Defendant filed a Response to Plaintiff's Motion for Summary Judgment.

STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 56, summary judgment is appropriate when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. In ruling on a Motion for Summary Judgment, the Court must consider the facts in the light most favorable to the non-moving party. The moving party bears the burden of showing that no genuine issue of material fact exists. If, in a properly supported motion for summary judgment, the moving party shows that there is no genuine issue of material fact, then the burden shifts to the non-moving party to prove that there is a material issue of fact in dispute. In order to carry its burden, the non-movant must produce specific facts, which would sustain a verdict in its favor. The non-movant cannot create a genuine issue

Schagrin v. Wilmingn Medical Center, Del. Super., 304 A.2d 61 (1973).

² Moore v. Sizemore, Del. Super., 405 A.2d 679 (1979).

³ *Id.* at 681.

⁴ Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986).

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

for trial through bare assertions or conclusory allegations.⁵ In weighing a motion for summary judgment under this rule, the Court must examine the record, including pleadings, depositions, admissions, affidavits, answers to interrogatories, and any other product of discovery.⁶

DISCUSSION

First, Plaintiff argues that Defendant's Answer to Plaintiff's Complaint was untimely filed. Defendant was personally served a copy of Plaintiff's Complaint on January 6, 2012. Defendant did file his answer on April 30, 2012, though that filing was well outside the twenty days required under Rule 12(a). Pursuant to Superior Court Civil Rule 12(a), "A defendant shall serve an answer within 20 days after service of process, complaint and affidavit, if any, upon that defendant..." Superior Court Civil Rule 6(b)(2) states that "the Court for cause shown may at any time in its discretion...upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect..." Defendant presented no motion for enlargement of the twenty days, and did not present evidence of any excusable neglect regarding why such an infraction should be overlooked.

Second, Plaintiff contends that the Mortgage was properly accelerated. Section 22 of the Mortgage details the acceleration guidelines in the event of

⁵ Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

G.R. Sponaugle & Sons v. Mcknight Construction Co., Del. Super. Ct., 304 A.2d 339 (1973); Oliver B. Cannon & Sons v. Door Oliver, Inc., Del. Super. Ct., 312 A.2d 322 (1973).

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

default.⁷ Plaintiff alleges that the Demand Letter, satisfies all of the requirements in this section; which would entitle Plaintiff to accelerate the Mortgage.

Third, Plaintiff asserts that Defendant's allegation in the Answer, that Plaintiff failed to engage in any loss mitigation efforts, is without merit. As early as January 2011, documents were being exchanged between the parties in an attempt to modify the loan, as a result of Defendant being unemployed. On January 7, 2011, Defendant had been pre-qualified for the Home Affordable Unemployment Program. An entry dated January 20, 2011 listed the payment plan for the Home Affordable Unemployment Program, detailing six monthly payments of \$443.30, beginning on March 1, 2011, and concluding on August 1, 2011. According to entries dated June 6, 2011, and July 6, 2011, Defendant called Plaintiff to make payments in the amounts of \$443.30 and \$450.00. On September 9, 2011, Defendant advised Plaintiff that he gained employment. In response,

7

Lender shall give notice Borrower prior acceleration following Borrower's breach of any covenant or agreement in this Security Instrument...The notice shall specify: a) the default; b) the action required cure the default; c) a date, not less than 30 days from the date the notice is given the Borrower, by which the default must be cured; and d) that failure cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right reinstate after acceleration and the right assert in the foreclosure proceeding the nonexistence of a default or any other defense of Borrower acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security instrument by judicial proceeding.

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

Plaintiff advised Defendant to send in paystubs, along with other loss mitigation documents.

As a result of Defendant's failure to respond, an entry on October 18, 2011, details the loan workout option as being denied. The Defendant was not eligible for a loss mitigation program due to his failure to apply, failure to provide required information, and failure to complete the requirements of the loss mitigation program. Additionally, because the Complaint was filed on December 21, 2011, this case is subject to Administrative Directive 2011-2, which requires Defendant to opt into mediation.

Fourth, Plaintiff asserts that Defendant is limited to raising only satisfaction, payment, or avoidance of the deed as defenses to this action. A *scire facias* action is one used in connection with proceedings founded upon a matter of record, such as, in this instance, upon a mortgage, and is strictly an *in rem* action.⁸ The defenses and counterclaims which may be pled in such an action are limited by well settled case law in Delaware. Defenses to a *scire facias sur* mortgage action are limited to satisfaction, payment, or avoidance of the deed.⁹ Defendant has failed to raise any arguments related to satisfaction, payment, or avoidance.

In Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Defendant argues that: 1) Plaintiff has failed to allege that it is the holder of the note, or otherwise, entitled to enforce it; 2) Plaintiff's affidavit is invalid; and

² Woolley on Delaware Practice, p. 889, Section 1309, p. 932, Section 1386.

See Gordy v. Preform Building Components, Inc., 310 A.2d 893 (Del. Super. Ct. 1973); Christiana Falls, L.P. v. First Federal Savings and Loan Association of Norwalk, 1986 Del. LEXIS 1357 (Del. 1986); LaSelle National Bank v. Ingram, 2005 Del. Super. LEXIS 185 (Del. Super. Ct. 2005); Wilmingn Trust Co. V. The Bethany Grp Ltd. Partnership et al., 1993 Del. Super. LEXIS 216 (Del. Super. Ct. 1993).

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

3) there is a question regarding whether the assignment of the Mortgage's interest to Plaintiff was proper.

First, Plaintiff has failed to provide any affirmative evidence that it is the holder of the note. Plaintiff also failed to provide a copy of the promissory note. Therefore, there is an issue of whether Plaintiff is the holder of the note; and whether Plaintiff has standing to pursue the instant foreclosure.

Second, Defendant asserts that Plaintiff's affidavit is invalid. Supporting and opposing affidavits shall be made on personal knowledge; shall set forth such facts as would be admissible in evidence; and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached there or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or affidavits.

Defendant claims that Plaintiff's affidavit was made by two attorneys without personal knowledge of the amounts due and owing. Furthermore, affiants are required to attach the documents upon which their testimony relies. Typically, an affidavit as to the amounts due is supported by a payment history. A payment history will reveal servicing abuses that may have artificially inflated the debt precipitating the foreclosure or any attempt to cure it. Plaintiff has failed to establish that its affidavit is based on competent evidence; it is, therefore, potentially hearsay and inadmissible in a court of law. Thus, Plaintiff has failed to

Rochester v. Katalan, 320 A.2d 704 (Del. 1974) (citing Rule 56).

¹¹ *Id*.

¹² *Id*.

C.A. No.: K11L-12-072 (RBY)

January 15, 2014

meet its burden of proof regarding the amounts paid; thereby creating a genuine issue of material fact.

Lastly, Defendant argues that there is a question regarding whether the assignment is proper. The recorded "Corporate Assignment" of the Mortgage is dated September 6, 2011 by a Vice President of Loan Documentation for Well's Fargo. Despite the assignment dated September 2, 2011 by Wells Fargo, on September 4, 2011, Wells Fargo Home Mortgage sent a Default Notice to Defendant. In subsequent notices from Plaintiff's counsel, Atlantic Law Group, dated November 21, 2011, the law firm represented that it had been retained by Wells Fargo Home Mortgage, who is not a party to this action. This inconsistency in the timeline has created another genuine issue of material fact. In light of this inconsistency, Defendant should have the opportunity to investigate this assignment to determine whether Plaintiff has standing in this action.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc

oc: Prothonotary

cc: Counsel

Opinion Distribution

File