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NATURE AND STAGE OF THE PROCEEDINGS

This is an appeal filed on September 13, 2012 by the Plaintiff below (now Appellant) seeking review of an Order of the Superior Court for New Castle County dated August 23, 2012 granting Defendant's Motion to Vacate Sheriff's Sale, Vacate Confirmation and Set Aside Sheriff's Sale in an *In Rem Scire Facias Sur* mortgage action.

Appellant's Opening Brief was initially filed on November 30, 2012 and corrected on December 10, 2012. Appellee's Answering Brief was filed on January 4, 2013. This is Appellant's Reply Brief.

COUNTER STATEMENT OF FACTS

Appellant objects to the inclusion of statements regarding the terms and conditions of the 1999 mortgage and the 2004 mortgage and comparisons of the terms and rates of each. Appellant further objects to statements alluding to ‘predatory lending’ of ‘onerous’ terms as these statements are conclusory statements made by the Appellee and not issues properly presented to the court below for adjudication. Said information is irrelevant to the determination of whether or not the trial court properly set aside sheriff sale based upon incompetency and/or lack of notice.

The manner in which service was obtained is relevant to this action. Plaintiff below filed a complaint and praecipe requesting service upon the defendant at the last address known to the Plaintiff, 205 East Ayre Street, Wilmington, Delaware 19804. (A-6, A-9). When service was not successful, Plaintiff filed an alias praecipe requesting service at the address of the property in dispute 1610 N. Union Street, Wilmington, Delaware 19801. The sheriff attempted service 1610 N. Union Street on February 16, 2010. (A-11). On February 17, 2010, the sheriff notes an

address of 123 W. Champlain Ave., Bellemoor 19804. (A-11) On February 18, 2010, the sheriff notes he will attempt to serve at the new address and on February 19, 2010 the sheriff notes that the defendant no longer lives at the new address per the current occupants. (A-11). After attempting service at the 205 East Ayre Avenue, 1610 N. Union Street and 123 Champlain Ave., the sheriff ultimately posted that property and sent certified mailings to the property to effectuate service pursuant to Superior Court Civil Rule 4(f)(4). (A-10).

Appellant relies upon the statement of facts contained within its Opening Brief.

ARGUMENT

I. APPELLEE ERRS IN ASSERTING THAT THE HEARING BELOW ESTABLISHED THAT MS. GOLDFEDER WAS INCOMPETENT AS THERE WAS NOT AN ADJUDICATION ON THE MERITS NOR AN ACTUAL FINDING OF INCOMPETENCY. AS SUCH, THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE SHERIFF SALE DUE TO INCOMPETENCY.

Appellee in its first argument to the Court, states that the Court below set aside the sale due to the incompetency of the defendant and the limited prejudice this caused the plaintiff. (Tr. 9). However, in doing so the court has abused its discretion.

Appellee argues that the Motion for Appointment of Guardian Ad Litem “established that Ms. Goldfeder was not only then currently incompetent to address matters relating to the Sheriff’s Sale, but it also alleged that Ms. Goldfeder had been incompetent due to her dementia since 2000.” (See Appellee’s Answering Brief, Page 11). In fact, during the hearing for the Guardian Ad Litem, the court heard NO testimony from any witness regarding competency. The granting of the appointment of a Guardian was

based solely upon the pleadings, argument of counsel and a lack of opposition by Plaintiff. Likewise at the Motion to Set Aside Sale, the Court heard NO testimony from any witness on the competency of Ms. Goldfeder. Applying the well settled standard for reviewing abuse of discretion found in Appellant's opening brief, it is clear the lower Court has exceeded the bounds of reason so as to produce an injustice to the Plaintiff. To set aside a sheriff sale eight months following the sale, based upon an allegation of incompetency with no testimony or medical evidence before the court, is an abuse of discretion.

II. THE APPELLEE ERRS IN STATING THAT THE SUPERIOR COURT IMPLICITLY CONCLUDED THAT THE DEFENDANT WAS REASONABLY DILIGENT AND THE RECORD PROVIDED BY THE APPELLANT PROPERLY INCLUDED THE COMPLETE SIX PAGE DOCUMENT FILED BY THE APPELLEE WITH THE DEPARTMENT OF JUSTICE

1. The Appellee Errs in Stating that the Superior Court Implicitly Concluded that the Defendant was Reasonably Diligent

In its Answering Brief, Appellee states that the Superior Court, simply by virtue of the fact that the Court conducted a hearing on the Motion to Vacate the Sale and did indeed vacate the sale, “implicitly concluded that the Defendant was reasonably diligent under the circumstances.” (Appellee Answering Brief-14). Furthermore, Appellee concludes, “...the Superior Court evidently accepted as reasonable the defendant’s explanation for the passage of time between January 24, 2012 and July 5, 2012.” (Appellee Answering Brief-17). Neither of these conclusions are supported by the transcript. (Tr. 1-8) The Superior Court made no findings, actual, implicit or otherwise, regarding the delay of the Defendant in filing its Motion. In fact, Appellant argues that the trial Court

abused its discretion in granting the Motion to Vacate sale as the Court failed to address the unreasonableness of the delay and instead based its ruling on alleged incompetency of the Defendant (Tr. 7-8) despite that fact that the Court conducted no hearing and heard no testimony on the issue of the Defendant's competency. Furthermore, even if the Court had conducted a hearing on competency and found the Defendant incompetent, the alleged incompetency would not provide a sufficient basis for setting aside the sale absent a finding that the six (6) month delay in time from actual notice of the sale to filing any document with the court was reasonable.

2. The Record Provided by the Appellant Properly Included the Complete Six Page Document Filed By the Appellee With The Department of Justice

In reviewing a case on appeal, the Supreme Court of Delaware has adopted the rule that only the issues properly brought below may also be addressed on appeal. Supreme Court Rule 8 states:

Only questions fairly presented to the trial court may be presented for review provided, however, that when the interests of justice so

require, the Court may consider and determine any question not so presented.

However, it is a well-established principle of law that when one party seeks to introduce only part of a writing, the other party may require the additional parts under the rule of completeness found in the Delaware Rules of Evidence 106.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In the instant case, Defendant attached two pages of the complaint that the Defendant filed with the Department of Justice as an exhibit to the Guardian's Motion to Vacate Sheriff Sale. The Motion was predicated on an alleged lack of notice to the Defendant under Superior Court Rule 69(g). (B-55 through B-58). Defendant's purpose in attaching the two (2) page DOJ document was to explain the delay in filing the Motion to Vacate. (B-57). Defendant's guardian claimed that after doing some research, he

filed a complaint with the DOJ due to concerns over robo-signing and predatory lending. (B-57). However, Defendant's guardian fails to attach the additional four (4) pages of the document which would verify his statements. Appellant would assert that these pages were intentionally omitted as the complaint filed does not make any mention of predatory lending concerns and in fact, states that the mortgage said to be the subject of this predatory lending claim, does not even exist. (A-41).

In the interest of justice, this Court can properly view Appellant's appendix A-39 through A-43. Appellee cannot be permitted to claim delay due the filing of a complaint regarding predatory lending, and admit only that part of that complaint which shows the date of filing into the record. The substance of the complaint is equally important the issue of delay and the rule of completeness warrants the consideration of the additional pages on appeal.

III. APPELLEE ERRS IN ASSERTING THAT PLAINTIFF FAILED TO COMPLY WITH RULE 69(g) OR THAT THIS COURT SHOULD AFFIRM THE LOWER COURT BASED UPON THE ASSERTED LACK OF NOTICE

Appellee asserts that Superior Court Rule 69(g) requires that the notices regarding the sale of property pursuant to a foreclosure proceeding be sent to necessary parties in separate certified mailings. While the Appellant agrees that may be necessary in many, if not most, cases, a strict reading of the rule reveals no such language. In addition, Appellant asserts that the specific allegation of failure to comply in this particular case is unfounded.

Appellee argues that Plaintiff failed to comply with Superior Court Rule 69(g) due to the fact that the Plaintiff included the language “and/or occupant/tenant” on the envelope addressed to Mr. Goldfeder. In support of this argument, Appellee draws the Court’s attention to a court docket entry dated April 19, 2010 which states, “No longer lives here per current occupants.” (A-4) Appellee alleges this demonstrates that the Plaintiff knew that Ms. Goldfeder did not reside at the property

located at 1610 N. Union Street and prevented the forwarding of the envelope to her true address. Appellee's reliance on the court docket entry is misguided as the actual sheriff's return does not state that there are "occupants" residing at 1610 N. Union Street. (A-11).

A review of the actual sheriff's return reveals that the occupants to which the docket entry is referring reside at 123 Champlain Avenue. The sheriff first attempted service at the subject property address on February 16, 2010. There is a note that the property is "possible vacant." On February 17, 2010, the sheriff writes of the possible alternate address located at 123 Champlain Avenue. On February 18, 2010, the sheriff makes a note to "try new add(ress)" and "emailed attorney for \$30.00." On February 19, 2010, the sheriff attempts the alternative address and writes, "no longer here per current occupants." (A-11) As such, there was never any indication that there were tenants residing at the 1610 N. Union Street property.

Even if tenants had been residing at the 1610 N. Union Street property, Appellee's reliance on a sheriff's return from April 2010 to assert there was a tenant in the property in November 2011 is not

reasonable. Nor does Appellee provide any proof that there was indeed a tenant in the property in November 2011 which prevented the forwarding of the envelope addressed to Ms. Goldfeder. Plaintiff's mailing to Nancy Goldfeder and/or Occupant/tenant at the property address, when that was the last known address for the Defendant, was appropriate and compliant with Superior Court Rule 69(g).

Appellee further asserts that the Plaintiff should have sent the notice to two (2) addresses in addition to the property address of 1610 N. Union Street. The first address, 205 East Ayre Street, was not an appropriate address for notice and this was known to the Plaintiff at the time. In 2010, Plaintiff had previously voluntarily stayed a scheduled sheriff sale due to Ms. Goldfeder having filed a complaint with the Department of Justice alleging fraud and theft of her home by and individual residing at 205 East Ayre Street. (A-48). Incidentally, this is the same address where her physician, and now guardian-ad-litem, Emil Mikhail resides. (B-08) (B- 02). Second, Appellee states Plaintiff should have sent notice to 710 N. West Street, Apartment A, Wilmington Delaware 19801. Appellee asserts Plaintiff should have sent notice to

this address in November 2011 because the Plaintiff knew of this address in January 2012, two (2) months after the notice was sent. This argument is not even logical.

Appellee relies on Household Bank, F.S.B. v. Daniels & Clark, 2005 WL 1953035 (Del. Super. Ct. 2005), alleging that the Plaintiff did not act with reasonable diligence. In Household Bank v. Daniels & Clark, Plaintiff sent notice of the sheriff sale to the property address of the Defendant. Defendant argues that the Plaintiff did not meet the standard of reasonable diligence required in ascertaining the address of the Plaintiff. Defendant further stated that this burden was not met for three reasons: first, the simple fact that the Plaintiff's notice of foreclosure action was sent to the property by certified mail and not returned was insufficient to show it was received; second, the tax records for the city in which the property was located indicated that the tax bills were being sent to the Defendant at a Pennsylvania address; and third, the Defendant had notified the Plaintiff of her address in Pennsylvania approximately two years prior to the sale. This case is wholly distinguishable from the matter before the Court today.

Plaintiff in the current matter made many attempts to ascertain the address of the Defendant. Beginning with initial service of the complaint, Plaintiff attempted service at the 205 East Ayre Street. (A-9). When that was unsuccessful, Plaintiff attempted service at the property address. (A-11). When the sheriff informed the Plaintiff that the Defendant was not at that address and might be at 123 Champlain Avenue, Plaintiff sent another \$30.00 to the sheriff and tried that address. When that was unsuccessful, Plaintiff had the property posted and mailed in accordance with Superior Court Civil Rule 69(g). (A-10). During the next two (2) years, Plaintiff knew of no other address for the Defendant. In fact, on or about July 13, 2010, Plaintiff canceled a scheduled sheriff sale at the request of the Department of Justice to allow time for an investigation based on a complaint filed by the Defendant on July 9, 2010. (A-4 and A-48). Despite Defendant having filed the complaint and clearly being aware of the impending sale, Defendant never provided an alternative address for future notice. In addition, unlike the Plaintiff in Household v. Daniels & Clark, when the time arrived for the new sale in November 2011, Plaintiff checked the

tax record for the county and confirmed that Ms. Goldfeder's tax statements were indeed being sent to the property address at 1610 N. Union Street. (Tr. 7) Having no other address for the Defendant, Plaintiff sent notice to the property address in compliance with the Superior Court Rules.

Under the totality of the above circumstances, Plaintiff met its burden of due and reasonable diligence and Appellee's argument the judgment of the lower court should be affirmed based on a lack of notice, despite the fact that the lower court did not rule on this issue, is erroneous and should fail.

CONCLUSION

It is well settled in Delaware law that confirmation of a sheriff sale acts as a bar to any subsequent attacks on the sale. Over the years, case law has carved out two exceptions to this rule; lack of notice and excusable of delay. The trial Court below did not find that either of these two exceptions existed in the instant case but rather, determined that the alleged incompetency of the Defendant provided a basis upon which the Court could set aside the sale. In doing so, the Court abused its discretion. As such, the ruling of the lower Court should be reversed, confirmation should be affirmed and the Appellant's deed reinstated.

Respectfully Submitted,
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