IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

NEW CASTLE COUNTY

CACH, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No.: CPU4-09-009022**
	)	
EASTERN SAVINGS BANK, FSB,	)	
	)	
Defendant.	)	
	)	

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MEMORANDUM OPINION ON
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DEFENDANT'S MOTION TO DISMISS

Date Submitted: May 21, 2010
Date Decided, June 11, 2010

I. Procedural Posture.

On Friday, May 21, 2010 a hearing was held on Plaintiff's Motion for Summary Judgment on Defendant's Motion to Dismiss. Following oral argument, the Court reserved decision. This is the Court's final opinion and order on both Motions.

II. The Facts.

On December 7, 2006, judgment was entered in favor of CACH, LLC (hereinafter "Plaintiff") against Aaron Johnson, Jr. (hereinafter "Johnson").[1] On December 21, 2006, this judgment was transferred to Superior Court and recorded. At this time, Johnson was the legal

[1] *CACH, LLC v. Johnson*, C.A. No. 2006-08-238 (Del. Com. Pl. Dec. 7, 2006).

owner of record of 19 Sanford Drive, Newark, Delaware, 19713 (hereinafter "19 Sanford Drive").

On December 19, 2006, Johnson executed a deed conveying 19 Sanford Drive to himself and his wife, Angela Johnson. Mr. and Mrs. Johnson then executed a mortgage on the property with Eastern Savings Bank (hereinafter "Defendant"). The deed and mortgage were recorded on December 29, 2006.

On August 26, 2008, Defendant filed a foreclosure action against Mr. and Mrs. Johnson. Pursuant to this action, on April 14, 2009, 19 Sanford Drive was sold at foreclosure for $133,000.00. Sale was confirmed on May 8, 2009. On June 3, 2009, the proceeds of the sale, less sheriff's costs were sent to Defendant. Despite its December 21, 2006 judgment lien against Johnson, Plaintiff did not receive any proceeds of the June 3, 2009 sale of 19 Sanford Drive.

III. The Cross-Motions.

a) Defendant's "Supplemental Brief".

On November, 30, 2009, Plaintiff filed its complaint in this action. On December 24, 2009, Defendant filed its answer. On March 4, 2010, Defendant filed a Motion to Dismiss. On March 5, 2010, Plaintiff filed a reply brief to Defendant's Motion to Dismiss. On March 10, 2010 Plaintiff also filed the instant Motion for Summary Judgment. On March 11, 2010, Counsel for Plaintiff filed a "Proposed Briefing Schedule," that was signed by counsel for both parties. The schedule required Defendant's answering brief be filed no later than April 12, 2010; and that Plaintiff's reply brief be filed no later than April 26, 2010.

On April 12, 2010, Defendant filed a response to Plaintiff's motion for summary judgment. Subsequently, on April 16, 2010, Plaintiff filed a brief in response to Defendants April 12, 2010 brief. On May 6, 2010 Defendant filed a "Supplemental Brief," responding to

Plaintiff's April 12, 2010 brief. On May 12, 2010, Counsel for Plaintiff, Patrick Scanlon, sent the Court a letter challenging Defendant's May 6, 2010 brief as outside of the briefing schedule and raising issues and facts not raised in previous briefs.

The Court agrees with Mr. Scanlon that the brief is untimely and should be disregarded. "There is no inherent right to summary judgment in Delaware."[2] The Court may disregard briefs filed outside of the briefing schedule.[3] If a party chooses not to raise an argument at the summary judgment stage, the argument or issue is not waived.[4] The party may raise the issue or argument at the end of trial via a Motion for Directed Verdict, or in closing.[5] These are tactical decisions to be made by counsel.[6] Defendant's May 6, 2010 "Supplemental Brief" was filed outside of the briefing schedule stipulated to by the parties on March 11, 2010. Therefore, the Court will not consider Defendant's May 6, 2010 brief in its decision.

b) <u>Standard of Review</u>.

The issue of standard of review must also be resolved. On March 4, 2010, Defendant filed a Motion to Dismiss, and on March 5, 2010, Plaintiff filed a response. On March 10, 2010, Plaintiff filed a Motion for Summary Judgment, and the stipulated briefing schedule was filed on March 11, 2010. Plaintiff replied to the Motion for Summary Judgment on April 12, 2010, and Defendant responded to this brief in its April 16, 2010 brief.

It is within the Court's discretion to *sua sponte* convert a motion to dismiss into a motion for summary judgment under certain circumstances.[7] The materials must require conversion, the parties must receive adequate notice of the conversion, and if adequate notice is not given, then

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[2] *Cross v. Hair*, 258 A.2d 277, 278 (Del. 1969).
[3] *Monsanto Co. v. Aetna Casualty and Surety Co.*, 1994 WL 161967 (Del. Super. Apr. 11, 1994).
[4] *Monsanto*, 1994 WL 161967; *Cross*, 258 A.2d at 278.
[5] *Id.*
[6] *Id.*
[7] *Appriva Shareholder Litigation Co. v. EV3, Inc*., 937 A.2d 1275, 1286 (Del. 2007); *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008).

the conversion must cause only harmless error.[8] Court of Common Pleas Civil Rule 12(b) controls the analysis and provides:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[9]

In the instant motion to dismiss, there are no averments or additional evidence beyond that presented in the pleadings. However, in the subsequent briefings on Plaintiff's Motion for Summary Judgment, new factual and legal information and argument is included. All legal and factual arguments made in Defendant's Motion to Dismiss are also argued in the Motion for Summary Judgment. Therefore, conversion is appropriate.

Proper notice of conversion was given. "Adequate notice allows parties an opportunity to submit evidentiary materials to support or oppose summary judgment and protects opposing parties from what, in effect, is 'summary judgment by ambush.'"[10] "The parties must have a reasonable opportunity to present all facts pertinent to the motion."[11] When a court exercises its conversion power, it should do so "with great caution and attention to the parties procedural rights."[12]

In the action before the court, there was no "summary judgment by ambush." The parties briefed the motion to dismiss, then when Plaintiff filed its motion for summary judgment, argued issues identical to those argued in the motion to dismiss. The motion was briefed according to a

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[8] *Appriva*, 937 A.2d at 1286.
[9] *CCP Civ. R.* 12(b).
[10] *Appriva*, 937 A.2d at 1286; *Geco Corp. v. H.D. Smith Wholesale Drug Co.*, 2006 WL 3359652, at *2 (D.N.J. Nov 17, 2006) (*citing In re Bayside Prison Litig.*, 190 F.Supp.2d 755, 760 (D.N.J. 2002)).
[11] *Appriva*, 937 A.2d at 1287 (*citing Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986)).
[12] *Appriva*, 937 A.2d at 1288 (*citing* 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 136, at 149 (3d ed. 2004)).

briefing schedule stipulated to by both parties. *Therefore*, both parties had adequate notice because they both had a full and reasonable opportunity to present all the facts pertinent to the motions.

Court of Common Pleas Civil Rule 56(c) governs motions for summary judgment and provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[13]

In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-moving party.[14] "From those accepted facts the court will draw all rational inferences in favor of the non-moving party."[15]

IV. The Law.

Ten *Del. C.* § 4985 controls the order of lien discharge at foreclosure sale and provides, *inter alia*, "Real estate sold by virtue of execution process shall be discharged from all liens…against the defendant…whose property such real estate is, except such liens as have been created by mortgage or mortgages prior to any general liens…the sale shall discharge to the extent to which the proceeds thereof may be legally applicable to a judgment or judgments obtained from the debt, to secure the payment of which the mortgage or mortgages respectively, appear to have been given."[16] The Court interprets this statute to mean that foreclosing liens are to be paid first, irrespective of the order of liens on a piece of property.

[13] *CCP Civ. R.* 56(c).
[14] *Mason v. USAA*, 697 A.2d 388, 392 (Del. 1997).
[15] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).
[16] 10 *Del. C.* § 4985.

In *Cedar Inn, Inc. v. King's Inn, Inc.*, the Superior Court explored the meaning of 10 *Del. C.* § 4985. This case stands for the principle that regardless of the order of the liens on a parcel of land, the foreclosing lien-holder is entitled to first payment from the proceeds at foreclosure sale of the property.[17] The court also noted that if any other lien-holders doubt the status of a sale or the order of liens on a parcel of lands, the burden is on these lien-holders to make the inquiry, not the foreclosing lien-holder.[18]

After foreclosure sale, the non-foreclosing liens remain attached to the sold property. 10 *Del. C.* § 5066 provides, "The person to whom any lands and tenements shall be sold…shall hold the same…as they were sold or delivered for, discharged from all equity or redemption, and all other encumbrances made and suffered by the mortgagor, the mortgagor's heirs, or assigns, and such sale shall be available in law."[19] *Therefore*, when an inferior lien-holder forecloses on a parcel of land, any superior lien holder continues to hold a lien on the property, and has no remedy with the inferior foreclosing lien-holder.

V. Analysis.

a) Plaintiff's Contentions.

Plaintiff contends that 10 *Del. C.* § 4985 stands for the principle that real estate sold at foreclosure sale is sold free of all liens, and therefore Plaintiff should have been paid out of the proceeds from the foreclosure sale. Plaintiff cites only *Woolley on Delaware Practice* (hereinafter "*Woolley*") in support of its argument. *Woolley* states:

> "If liens upon land sold by the sheriff under execution process…are in the order of (a) a general lien, as a judgment, recognizance or mechanic's lien, (b) mortgage lien and (c) general lien, the statute provides the application of proceeds to and discharge of the land 'from all liens…except such liens as have

[17] *Cedar Inn, Inc. v. King's Inn, Inc.*, 265 A.2d 781, 785 (Del. Super. 1970).
[18] *Id.* at 786.
[19] 10 *Del. C.* § 5066.

> been created by mortgage or mortgages prior to any general liens.'"[20]

Plaintiff argues that under this rule, regardless of which party foreclosed on the property, the first lien holder, Plaintiff, should have been paid first out of the proceeds.

The Court finds *Woolley* helpful but not controlling. Plaintiff does not cite any case law, nor is the Court aware of any supporting the proposition set forth in *Woolley*. The Court is bound by 10 *Del. C.* § 4985, 10 *Del. C.* § 5066, and *Cedar Inn, Inc. v. King's Inn, Inc.*, not *Woolley*.

Plaintiff argues in the alternative that Defendant was unjustly enriched when it took proceeds of the foreclosure sale that should have been distributed to Plaintiff. To prove a claim of unjust enrichment, the Plaintiff must prove the following: (1) Plaintiff conferred a benefit upon Defendant; (2) Defendant knowingly accepted and unjustly retained the benefit; (3) Defendant was unjustly enriched by the benefit; and (4) It is unconscionable or unjust to permit Defendant to be so enriched at Plaintiffs expense.[21] Plaintiff argues that Defendant took money that belonged to the Plaintiff, refused to return it, and as such was unjustly enriched.

b) <u>Defendant's Contentions</u>.

Defendants argument, simply put, is that there is no legal authority supporting the proposition that the first lien be paid off prior to the foreclosing party. Defendant interprets 10 *Del. C.* § 4985 to stand for the proposition that at foreclosure sale, the foreclosing party is paid first. The Defendant interprets *Cedar Inn, Inc. v. King's Inn, Inc.* similarly to stand for the principle that foreclosing liens are paid first. Defendant urges the Court to consider that if all subsequent lien foreclosures are required to satisfy previous liens before their own, then it would be impractical for subsequent liens to bring foreclosure actions, because the benefits arising from

[20] 2 Victor B. Woolley, *Woolley on Delaware Practice,* § 1139 (1906).
[21] *Petroplast Petrofisa Plasticos S.A. v. Ameron Intern. Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009) (*citing Peterson v. Cellco Partnership*, 80 Cal. Rptr.3d 316, 323 (Cal. Ct. App. 2008)).

their litigation would benefit third party superior liens. Defendant contends that Plaintiff's appropriate remedy is to bring foreclosure action or otherwise attempt to collect on the lien against the current owner of the property.[22]

Defendant argues that it was not unjustly enriched. First, there was no "unjust retention" of a benefit because the foreclosure sale was valid. Second, Plaintiff was not harmed because under 10 *Del. C.* § 5066, it retains a lien on 19 Sanford Drive, which it can attempt to collect on at any time.

The Court agrees with Defendant. In this case, the order of the liens is undisputed.[23] Plaintiff's lien is first, and Defendant's lien is second. Defendant foreclosed on 19 Sanford Drive first. *Therefore*, Defendant's foreclosure was valid, and Defendant was not required to distribute any of the proceeds to the Plaintiff. Plaintiff is not without remedy. Pursuant to 10 *Del. C.* § 5066, Plaintiff's lien remains affixed to 19 Sanford Drive, despite the change in ownership.

The Court finds Plaintiff's unjust enrichment claim not convincing. The Plaintiff must prove the following elements of the claim by a preponderance of the evidence: (1) Plaintiff conferred a benefit upon Defendant; (2) Defendant knowingly accepted and unjustly retained the benefit; (3) Defendant was unjustly enriched by the benefit; and (4) It is unconscionable or unjust to permit Defendant to be so enriched at Plaintiffs expense.[24] Plaintiff fails to prove that Defendant unjustly retained any benefit or was unjustly enriched. As discussed *supra*, Defendant foreclosed on the property pursuant to a valid foreclosure action. As the foreclosing lien-holder,

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[22] 10 *Del. C.* § 5066 provides that unpaid liens run with real property to subsequent purchasers.

[23] On March 11, 2010 the briefing schedule for the instant motion was set. Defendant's Answering Brief was due on April 12, 2010; Plaintiff's Reply Brief was due on April 26, 2010. Both Defendants Answering Brief and Plaintiff's Reply Brief were timely filed. On May 6, 2010, Defendant filed a Supplemental Brief challenging the order of the liens in this case. Counsel for Plaintiff filed a responsive letter with the Court on May 12, 2010. It its letter, Plaintiff argues that the Court should disregard Defendant's Supplemental Brief on grounds that it is not timely, presents arguments not discussed in any other briefs, and Defendant provides no explanation for the late filing. As discussed *supra*, the Court agrees with Counsel for Plaintiff and disregards Defendant's Supplemental Brief in its analysis.

[24] *Petroplast Petrofisa Plasticos S.A. v. Ameron Intern. Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009) (*citing Peterson v. Cellco Partnership*, 80 Cal. Rptr.3d 316, 323 (Cal. Ct. App. 2008)).

Defendant was entitled to be paid out of the proceeds of the sale first, irrespective of the order of the liens. Therefore, Defendant was not unjustly enriched because it was entitled to the proceeds of its own foreclosure sale.

VI. Opinion and Order.

For the reasons contained herein the Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendant's Motion to Dismiss. Each party shall bear their own costs.

IT IS SO ORDERED this 11th day of June, 2010.

John K. Welch, Judge.

cc: Mr. Jose Beltran, CCP Civil Case Manager