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ASTORIA BANK V. JOSEPH P. NEIDERER AND
TERRI L. NEIDERER



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ASTORIA BANK V. JOSEPH P. NEIDERER AND
TERRI L. NEIDERER

1. Under the Pennsylvania Rules of Civil Procedure a court may enter summary judgment when the pleadings, depositions, answers to interrogatories, omissions, affidavits, and other materials demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

2. The burden of demonstrating the lack of any genuine issue of material fact falls upon the moving party, and, in ruling on the motion, the court must consider the record in the light most favorable to the non-moving party.

3. However, where a motion for summary judgment has been supported with depositions, answers to interrogatories, or affidavits the non-moving party may not rest on the mere allegations or denials in its pleadings.

4. In an action for mortgage foreclosure, the precise amount due is essential because upon sale of the real estate after judgment is entered the sheriff must distribute the proceeds among the parties in interest. Without knowing the precise claim of the mortgagee the distribution could not be properly achieved.

5. General denials by the mortgagor of the amount owing can, under certain circumstances, be deemed an admission. This is because averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication.

6. However, there may be circumstances where the mortgagor is unable to ascertain the amount owed due to a variety of factors. See *U.S. Bank, N.A. v. Puatenis*, supra., where the interest rate was adjustable.

7. In paragraph 8 of the Answer to the Complaint, Defendants deny they are in default commencing in June 1, 2014, and, in a separate sentence, specifically aver that they paid the mortgage in June 2014 and made or attempted to make payments thereafter which were refused by Plaintiff. This averment goes to the very nature of a mortgage foreclosure action - whether the mortgage is in default and if and when payments were made - and evidentiary support for this averment in the pleading stages is not required in Pennsylvania in order to successfully raise a genuine issue of material fact.

IN THE COURT OF COMMON PLEAS OF ADAMS
COUNTY, PENNSYLVANIA, CIVIL 2015-S-22,
ASTORIA BANK V. JOSEPH P. NEIDERER AND
TERRI L. NEIDERER.

Andrew L. Markowitz, Esq., Attorney for Plaintiff

Joseph E. Erb, Esq., Attorney for Defendant

Kuhn, J., December 23, 2015

MEMORANDUM OPINION

Before the Court for disposition is a Motion for Summary Judgment filed by Plaintiff. For reasons set forth herein, the Motion is denied.

Astoria Bank (“Plaintiff”) initiated this action by filing a Complaint in Mortgage Foreclosure on January 8, 2015, against Joseph P. Neiderer and Terri L. Neiderer (“Defendants”). Therein, Plaintiff avers that Defendants own 185 Bollinger Road, Littlestown, Pennsylvania 17340 (“Property”). On July 31, 1998, Defendants executed and delivered a Mortgage on the Property to Plaintiff’s predecessor.¹ The Mortgage was secured by an Adjustable Rate Note (“Note”). Plaintiff avers that Defendants are in default because monthly payments of principal and interest from June 1, 2014 to the present remain unpaid with a balance due and owing, as of the date of filing, of \$105,231.39. Defendants filed an Answer to Plaintiff’s Complaint wherein they admit they are the owners and mortgagors of the Property but deny that they did not make the June 1, 2014 payment and aver payments were made or attempted to be made after that date but were refused by Plaintiff.

Plaintiff subsequently filed a Motion for Summary Judgment on May 2, 2015, with an affidavit signed by Tracy A. Duck, the Assistant Secretary of Astoria Bank.² Defendant’s filed an Answer in Opposition on June 29, 2015, wherein they deny their note and mortgage are in default from June 2014 through present. Attached to the Answer is an Affidavit in Support of Defendants’ Answer wherein they aver they made the June 2014 mortgage payment as well as made or attempted to make further payments, all of which Plaintiff allegedly refused to accept. Defendants further aver they are in a position to cure any alleged default, however Plaintiff allegedly has refused to accept any attempts to do so.

Under the Pennsylvania Rules of Civil Procedure a court may enter summary judgment when the pleadings, depositions, answers to interrogatories, omissions, affidavits, and other materials demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R. Civ. P.

¹ The Mortgage was delivered to The Long Island Savings Bank, FSB, who merged with and into Astoria Federal Savings and Loan Association who then changed its name to Astoria Bank.

² Motion for Summary Judgment, Exhibit H.

1035.2; *Strine v. Commonwealth*, 894 A.2d 733, 737 (Pa. 2006); *Roche v. Ugly Duckling Car Sales, Inc.*, 879 A.2d 785, 789 (Pa. Super. 2005) (quotations and citations omitted). The burden of demonstrating the lack of any genuine issue of material fact falls upon the moving party, and, in ruling on the motion, the court must consider the record in the light most favorable to the non-moving party. *Id.* Summary judgment is only appropriate in those cases which are free and clear from doubt. *McConnaughey v. Bldg. Components, Inc.*, 637 A.2d 1331, 1333 (Pa. Super. 1994).

However, where a motion for summary judgment has been supported with depositions, answers to interrogatories, or affidavits the non-moving party may not rest on the mere allegations or denials in its pleadings. *Accu-Weather, Inc. v. Prospect Commc'ns Inc.*, 644 A.2d 1251, 1254 (Pa. Super 1994). Rather, the non-moving party must, by affidavit or in some other way provided for within the Rules of Civil Procedure, set forth specific facts showing that a genuine issue of material fact exists. *Id.*

The holder of a mortgage has the right upon default to bring a foreclosure action or to sue on the bond accompanying the mortgage. *Cunningham v. McWilliams*, 714 A.2d 1054, 1056-7 (Pa. Super. 1998). The former is strictly an in rem proceeding, the purpose of which is to effect a judicial sale of the mortgaged property. *Rearick v. Elderton State Bank*, 97 A.3d 374, 383 (Pa. Super. 2014). In a proceeding on the note or bond, the matter is in personam and the object is to obtain a judgment against the obligor of the note. *Levitt v. Patrick*, 973 A.2d 581, 591 (Pa. Super. 2009).

In an action for mortgage foreclosure, the entry of summary judgment is proper if the mortgagor admits the mortgage is in default, that he has failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount. *Bank of America, N.A. v. Gibson*, 102 A.2d 462, 464, (Pa. Super. 2014). Judgment is entered on the amount due. The precise amount due is essential because upon sale of the real estate after judgment is entered the sheriff must distribute the proceeds among the parties in interest. Without knowing the precise

claim of the mortgagee the distribution could not be properly achieved. *U.S. Bank, N.A. v. Pautenis*, 118 A.3d 386, 394 (Pa. Super. 2015). General denials by the mortgagor of the amount owing can, under certain circumstances, be deemed an admission. This is because averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. Pa. R.C.P. 1029(b). For example, a mortgagor's general denial as to the amount owed in a pleading in mortgage foreclosure can be considered an admission because the mortgagor and the lender are the only entities that would have sufficient information upon which to base a specific denial regarding those averments. *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 692 (Pa. Super. 1995); *New York Guardian Mortg. Corp. v. Dietzel* 524 A.2d 951, 952 (Pa. Super. 1987). See *Cunningham v. Williams, supra.*, where the interest rate was fixed and the ability to calculate the amount owing is a simple calculation. However, there may be circumstances where the mortgagor is unable to ascertain the amount owed due to a variety of factors. See *U.S. Bank, N.A. v. Pautenis, supra.*, where the interest rate was adjustable.

In reviewing the Motion for Summary Judgment, the Court must examine all pleadings to determine whether a genuine issue of material fact exists. Plaintiff's Complaint avers: 1) that by virtue of a merger it is the proper plaintiff to enforce Defendants' Mortgage, 2) the Mortgage fell into default in June 2014 for lack of payment and it remains in default as of the date of filing, and 3) the amount due and owing on the Mortgage is \$105,231.39. Defendants deny that Plaintiff is the proper plaintiff and further deny that the Mortgage entered default in June 2014. Additionally, they aver they paid the mortgage in June 2014 and made or attempted to make payments thereafter which Plaintiff allegedly refused to accept.

It is well-known that Pennsylvania is a fact-pleading state. Plaintiff argues that Defendants do not allege any specific facts in defense of foreclosure but only deny in the most general and conclusory terms their default under the mortgage. Furthermore, Plaintiff argues that Defendants have not presented any specific evidence to show payments were made in an attempt to cure their alleged default under the

mortgage. In furtherance of its argument, Plaintiff cites Pa. R.C.P. 1035.3 which requires that an adverse party identify “one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion” when filing a response to the motion for summary judgment.

In paragraph 8 of the Answer to the Complaint, Defendant’s deny they are in default commencing in June 1, 2014, and, in a separate sentence, specifically aver that they paid the mortgage in June 2014 and made or attempted to make payments thereafter which were refused by Plaintiff. This averment goes to the very nature of a mortgage foreclosure action – whether the mortgage is in default and if and when payments were made – and evidentiary support for this averment in the pleading stages is not required in Pennsylvania in order to successfully raise a genuine issue of material fact.³ Therefore, an analysis regarding compliance of the Response with Pa. R.C.P. 1035.3 is not required when the Complaint and Answer create a genuine issue as to material fact causing the Motion to be denied.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 23rd day of December, 2015, Plaintiff’s Motion for Summary Judgment, filed May 22, 2015, is denied for the reasons set forth in the attached Memorandum Opinion.

³ It would have been prudent for Defendants to have provided some evidentiary support for their averment, i.e. check stubs, bank statements, correspondence to or from Plaintiff indicating attempts to make or refusal to accept payments. However, at this point the issue is too close to grant Plaintiff’s Motion. Further discovery may flush out whether Defendants have supporting information, and, if not, subject them to defending another pre-trial motion.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary of or administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF NEAL EITEL, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executrix: Victoria Eitel, 21 Frederick Street, Taneytown, MD 21787

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF PAUL K. HOOVER, SR., DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executrix: Jane E. Hoover, 1236 Russell Tavern Road, Gettysburg, PA 17325

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF MARGARET A. SITES a/k/a MARGARET ANN SITES, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executor: Terry L. Monn, 509 Bollinger Road, Littlestown, PA 17340

Attorney: Robert L. McQuaide, Esq., Suite 204, 18 Carlisle Street, Gettysburg, PA 17325

ESTATE OF JEFFREY A. TOPPER a/k/a JEFFREY ANDREW TOPPER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Courtney K. Zinn, 1020 Dicks Dam Road, New Oxford, PA 17350

Attorney: Ann C. Shultis, Esq., Shultis Law, LLC, 1147 Eichelberger Street, Suite F, Hanover, PA 17331

ESTATE OF WILLIAM PATRICK WALLACE, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Personal Representative: George N. Norton, 148 N. Allwood Drive, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF JAMES R. BUSBY a/k/a JAMES BUSBY a/k/a JAMES R. BUSBEY a/k/a JAMES BUSBEY, DEC'D

Late of Hamilton Township, Adams County, Pennsylvania

Casey Busbey, 435 Boy Scout Road, New Oxford, PA 17350

Attorney: Crabbs & Crabbs, 202 Broadway, Hanover, PA 17331

ESTATE OF JOHN J. McCORMACK, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Cecilia M. Billingsley, 42 North Schoolhouse Road, Thomasville, PA 17364

Attorney: David K. James, III, Esq., 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF THOMAS EDWARD METZ a/k/a THOMAS E. METZ, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Personal Representatives: Carol Metzler, 113 S. Market St., Elizabethtown, PA 17022; Ronald Metz, 10214 Baltusrol Ct., Oakton, VA 22124; Cynthia Berger, 6 Robin Road, Pittsburgh, PA 15217

Attorney: Phillips & Phillips, 101 West Middle Street, Gettysburg, PA 17325

ESTATE OF DONALD E. NICKOL, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrator-Executor: Joan G. Nickol, c/o Alexis K. Sipe, Esq., 50 East Market Street, Hellam, PA 17406

Attorney: Alexis K. Sipe, Esq., 50 East Market Street, Hellam, PA 17406

ESTATE OF JUDITH A. SHIPMAN a/k/a JUDITH ANN SHIPMAN, DEC'D

Late of Latimore Township, Adams County, Pennsylvania

Executrix: Jane K. Falk, c/o Charles E. Shields, III, Esq., 6 Clouser Rd., Mechanicsburg, PA 17055

Attorney: Charles E. Shields, III, Esq., 6 Clouser Rd., Mechanicsburg, PA 17055

THIRD PUBLICATION

ESTATE OF MICHAEL R. BROWN, DEC'D

Late of the Borough of New Oxford, Adams County, Pennsylvania

Administratrix: Linda M. Brown, 314 Hollywood Avenue, New Oxford, PA 17350

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF MICHAEL PATRICK CASEY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administratrix: Martha S. Wolf, c/o Barbara Jo Entwistle, Esq., Entwistle & Roberts, 37 West Middle Street, Gettysburg, PA 17325

Attorney: Barbara Jo Entwistle, Esq., Entwistle & Roberts, 37 West Middle Street, Gettysburg, PA 17325

ESTATE OF LARRY E. MOOSE, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Linda K. Blettner, 239 Meade Avenue, Hanover, PA 17331

Attorney: Ann C. Shultis, Esq., Shultis Law, LLC, 1147 Eichelberger Street, Suite F, Hanover, PA 17331

ESTATE OF EVELYN L. SMYERS, DEC'D

Late of the Borough of East Berlin, Adams County, Pennsylvania

Executor: Max Emig, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, P.O. Box 606, East Berlin, PA 17316

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, P.O. Box 606, East Berlin, PA 17316

ESTATE OF CARRIE A. SPONSELLER, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executor: Dale V. Sponseller, 20 Cottage Lane, New Oxford, PA 17350

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331