

Adams County Legal Journal

Vol. 52

July 9, 2010

No. 8, pp. 49-56

IN THIS ISSUE

SUNTRUST VS. O'LEARY

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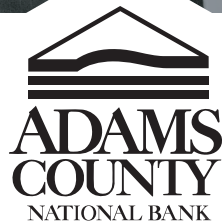
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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published weekly by Adams County Bar Association, John W. Phillips, Esq., Editor and Business Manager.

Subscribers should send subscriptions directly to the business office. Postmaster: Send address changes to Adams County Legal Journal, 117 BALTIMORE ST RM 305 GETTYSBURG PA 17325-2313.

Business Office – 117 BALTIMORE ST RM 305 GETTYSBURG PA 17325-2313. Telephone: (717) 334-1553

Periodicals postage paid at Gettysburg, PA 17325.

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ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of 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 BETTY L. JENKINS a/k/a BETTY LOUISE JENKINS, DEC'D

Late of Mount Joy Township, Adams County, Pennsylvania

Barbara Rae Deeds, 318 Stultz Road, Fairfield, PA 17320; Sharon Kay Cooke, 290 Schwartz Road, Gettysburg, PA 17325

Attorney: Henry O. Heiser, III, Esq., 104 Baltimore Street, Gettysburg, PA 17325

ESTATE OF DANIEL H. JENKINS, DEC'D

Late of Mount Joy Township, Adams County, Pennsylvania

Barbara Rae Deeds, 318 Stultz Road, Fairfield, PA 17320; Sharon Kay Cooke, 290 Schwartz Road, Gettysburg, PA 17325

Attorney: Henry O. Heiser, III, Esq., 104 Baltimore Street, Gettysburg, PA 17325

ESTATE OF GENE LAZARCHIK, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executor: Daniel G. O'Dell, 286 Ridge Avenue, Gettysburg, PA 17325

Attorney: Scott W. Morrison, Esq., 6 West Main Street, P.O. Box 232, New Bloomfield, PA 17068

SECOND PUBLICATION

ESTATE OF ROBERT A. BRODBECK, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executor: Robert A. Brodbeck, 482 Providence Drive, McSherrystown, PA 17344

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

ESTATE OF JAMES ROBERT HAHN, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Patsy Brown, 1970 Taneytown Rd., Gettysburg, PA 17325

Attorney: Barbara Jo Entwistle, Esq., Entwistle & Roberts, 66 West Middle Street, Gettysburg, PA 17325

ESTATE OF ANNA S. KLUNK a/k/a ANNA L. KLUNK, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executors: Stephen J. Klunk, 50 Shady Lane, Hanover, PA 17331; Gary F. Klunk, 227 Vincent Drive, McSherrystown, PA 17344

Attorney: David C. Smith, Esq., 754 Edgegrove Rd., Hanover, PA 17331

ESTATE OF HOWARD O. MYERS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Louise E. Myers, c/o Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, PA 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle St., Hanover, PA 17331

ESTATE OF ROSELLA T. PLUNKERT a/k/a ROSELLA M. PLUNKERT, DEC'D

Late of Union Township, Adams County, Pennsylvania

Executrix: Bobbye Kay Dillman, 700 Littlestown Road, Littlestown, PA 17340

Attorney: Clayton R. Wilcox, Esq., P.O. Box 176, Littlestown, PA 17340

ESTATE OF IRENE C. SHRADER, DEC'D

Late of Hamilton Township, Adams County, Pennsylvania

Executors: Bruce E. Shrader, 3916 York Road, New Oxford, PA 17350; Deborah A. Bell, 237 Hanover Street, New Oxford, PA 17350

Attorney: David C. Smith, Esq., 754 Edgegrove Rd., Hanover, PA 17331

ESTATE OF MARY I. WETZEL, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executrix: Jane M. Wetzel, 996 Old Route 30, Orrtanna, PA 17353

Attorney: Phillips & Phillips, 101 W. Middle St., Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ROBERT M. KENNEDY, JR., DEC'D

Late of Tyrone Township, Adams County, Pennsylvania

Co-Executors: Michael K. Kennedy, 1025 Waynesboro Pike, Fairfield, PA 17320; Eileen M. Stough, 345 Bermudian Creek Road, East Berlin, PA 17316

Attorney: John R. White, Esq., Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JOHN E. MATTHEWS, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Executors: Janet L. Thomas, 60 E. King Street, Littlestown, PA 17340; David N. Matthews, 1858 Fish & Game Road, Littlestown, PA 17340

Attorney: Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325

ESTATE OF HELEN A. WIRTH, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Co-Executors: Herbert F. Wirth, Jr., 1789 Mummasburg Rd., Gettysburg, PA 17325; William F. Wirth, 30 Park Ave., Gettysburg, PA 17325

Attorney: Chester G. Schultz, Esq., 145 Baltimore Street, Gettysburg, PA 17325

SUNTRUST VS. O'LEARY

1. The non-moving party bears a clear duty to respond to a motion for summary judgment. The non-moving party may not rest upon the averments contained in his pleadings; instead, it is required to show, by depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial. If the non-moving party does not respond, the court may grant summary judgment on that basis.

2. Because Defendant knew specifically of her own mortgage, a general denial and demand for proof is insufficient to establish a genuine issue of fact.

3. Because the mortgagor is the only party, apart from the mortgagee, who would have sufficient knowledge upon which to base a specific denial as to the amount due on the mortgage, a general denial with respect to this amount constitutes an admission.

4. In Pennsylvania, a mortgagee is entitled on a foreclosure to recover costs, including reasonable attorney's fees, which is determined by the circumstances of the particular case.

5. It is well-established that an action in mortgage foreclosure is strictly in rem and thus may not include an in personam action to enforce personal liability.

6. Entry of summary judgment is appropriate where a defendant admits in his/her answer he/she is behind in mortgage payments. This is so even if the mortgagor has not admitted the total amount of the indebtedness in the pleadings.

In the Court of Common Pleas of Adams County, Pennsylvania,
Civil, No. 09-S-311, SUNTRUST MORTGAGE, INC. VS. KATH-
LEEN O'LEARY.

Joseph P. Schalk, Esq., for Plaintiff

Matthew R. Battersby, for Defendant

Kuhn, P.J., December 9, 2009

OPINION PURSUANT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiff's Motion for Summary Judgment. For the reasons set forth in this Opinion, said Motion is granted.

This case involves a dispute regarding the alleged default of Defendant, Kathleen A. O'Leary, on mortgage payments to Plaintiff, Suntrust Mortgage. The factual background has been gathered from the pleadings, affidavit, exhibits, and motion.

FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 2007, Defendant executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. for the principal sum of \$415,000.00 on real estate located at 119 E. Main Street, Fairfield, Adams County, Pennsylvania. The mortgage was recorded in the Adams County Recorder of Deeds Office in Book 4781, at page 95. (Plaintiff's Motion Ex. A). By Assignment of Mortgage

recorded October 15, 2008, the Mortgage was assigned to Plaintiff. The Assignment is recorded in Assignment of Mortgage Book No. 5303, at page 744. (Plaintiff's Motion Ex. A2).

Plaintiff filed a Complaint in Mortgage Foreclosure on March 3, 2009, in which it alleges that Defendant is in default on the mortgage as a result of failing to pay the monthly installment due May 1, 2008, and all subsequent installments thereafter. Defendant filed an Answer on April 14, 2009.¹

Defendant admitted Paragraph 1 which identified Plaintiff.

Defendant admitted Paragraph 2 which identified her as the mortgagor and owner of the subject property.

Paragraph 3 identified the mortgage dated March 26, 2007, and that Plaintiff was the assignee of the mortgage executed to Mortgage Electronic Registration Systems, Inc. Paragraph 4 identified the subject property. Defendant admitted these averments.

In Paragraph 5 Plaintiff averred the default. Defendant admitted that the mortgage may be in default but denied that she was properly served with written notice of default.

In Paragraph 6 Plaintiff set forth the amount owed. Defendant answered,

Denied. Since Defendant was not given any prior notification of the charges outlined in Plaintiff's paragraph #6 Defendant has no knowledge of what is due and owed and as such, demands strict proof of same at trial.

In Paragraph 7 Plaintiff explained the calculation of attorney's fees. Defendant denied that this was the appropriate calculation and

¹Defendant's Answer contained a Counterclaim in which she alleged she was not properly served with notice of default. By way of background, Plaintiff filed its first Complaint in Mortgage Foreclosure on October 3, 2008. That Complaint was withdrawn when Plaintiff was informed that Defendant held a timely face-to-face meeting with a Pennsylvania Housing Finance Agency (PHFA) representative and an application for assistance was made on September 30, 2008. On November 6, 2008, Defendant was denied PHFA assistance and the PHFA file was closed on December 12, 2008. This Complaint followed. Additional notices pursuant to Act 6 of 1974 and Act 91 of 1983 were not served on Defendant prior to filing the second complaint. By Order dated July 8, 2009, the undersigned denied Defendant's Counterclaim finding that the notices served with the initial Complaint were sufficient to put Defendant on notice of the default and it was not necessary to re-serve these notices upon filing of the second Complaint.

stated “Defendant has no idea what Plaintiff’s counsel is attempting to do and must state their total fees in the action herein.”

In Paragraph 8 Plaintiff averred it was seeking to foreclose on the property and was not seeking a judgment of personal liability, but reserved the right to do so by separate action. Defendant denied this paragraph, alleging Plaintiff must join all appropriate causes of action.

In Paragraph 9 Plaintiff averred its compliance with statutory notice requirements and Defendant’s failure to request a face-to-face meeting. Defendant denied, stating she had not received any of the required notices after withdraw of Plaintiff’s previous Complaint.

In Paragraph 10 Plaintiff averred that this action does not come under Act 6 of 1974 because the original mortgage amount exceeds \$50,000. Defendant admitted this averment, however, demanded strict proof of service of the Act 6 Notice.

In Paragraph 11 Plaintiff alleges that Defendant’s application for assistance under Act 91 of 1983 has been rejected by the Pennsylvania Housing Finance Agency. Defendant admitted this occurred after filing of the first Complaint but denies it as to the second Complaint.

On September 21, 2009, Plaintiff filed a Motion for Summary Judgment, supporting brief, a copy of the mortgage agreement, note, and assignment of mortgage, and the affidavit of Annette Holman-Foreman, the Vice President of Suntrust Mortgage Corporation. Ms. Holman-Foreman attests to Defendant being in default and the amount owed on the mortgage. Ms. Holman-Foreman also asserts that Notice of Intent to Foreclose has been sent to Defendant. This notice has been attached to Plaintiff’s Summary Judgment Motion as “Exhibit F.”

Plaintiff asserts that Defendant has defaulted and Plaintiff is entitled to judgment as a matter of law. Defendant failed to file a responsive brief within 30 days in accordance with Pennsylvania Rule of Civil Procedure 1035.3, and an extension has not been requested.

DISCUSSION

Summary judgment is granted whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *Wolloch v. Aiken*, 815 A.2d 594, 595 (Pa.

2002), *Harber Philadelphia Center City Office Ltd. v. LPCI Ltd. P'ship, LCCO*, 764 A.2d 1100, 1103 (Pa. Super. 2000). The purpose of Rule 1035.2 is to eliminate cases prior to trial where a party cannot make out a claim or defense after discovery has been completed. *Wolloch*, 815 A.2d at 596. The party moving for summary judgment has the burden of proving that there is no genuine issue of material fact. *Citicorp Mortgage, Inc. v. Morrisville Hampton Vill. Realty Ltd. P'ship*, 662 A.2d 1120, 1122 (Pa. Super. 1995). This Court must resolve all doubts against Plaintiff, as the moving party, and examine the record in a light most favorable to Defendant, as the non-moving party. *Id.*

Pursuant to Rule 1035.3, the non-moving party bears a clear duty to respond to a motion for summary judgment. Pa.R.C.P. 1035.3(a)(1)-(2); *Harber Philadelphia Center City Office Ltd.*, 764 A.2d at 1104. The non-moving party may not rest upon the averments contained in its pleadings; instead, it is required to show, by depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial. *Buckno v. Penn Linen & Unif. Serv., Inc.*, 631 A.2d 674, 676 (Pa. Super. 1993). If the non-moving party does not respond, the court may grant summary judgment on that basis. Pa.R.C.P. 1035(d); *Harber Philadelphia Center City Office Ltd.*, 764 A.2d at 1105 (emphasis added). Accordingly, although Defendant did not file a response to the present Motion, this Court must still analyze Plaintiff's averments to determine if it has established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.

Plaintiff asserts that Defendant's Answer did not raise any legal or factual issues providing a basis to deny Plaintiff's Motion for Summary Judgment. Plaintiff argues in its brief that Defendant, through the averments in her answer, effectively admitted every allegation of Plaintiff's Complaint, therefore there is no genuine issue of material fact. Plaintiff contends that Defendant's averments do not constitute denials as she fails to support any of the denials with specificity. Particularly, Plaintiff asserts that Defendant's averments do not comport with Pa.R.C.P. 1029. Rule 1029(b) provides:

Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand

for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

Pa. R.C.P. 1029(b). Subsection (c) allows for a general denial when a party states that after reasonable investigation it is unable to form a belief as to the truth of the averment. Subsection (e) allows general denials when seeking monetary relief in personal injury actions.

We begin with Defendant's response to Plaintiff's allegations in Paragraphs 1-4 of the Complaint. In Paragraphs 1 & 2 Plaintiff admits the identity of the parties and that she is the owner of the subject property. Plaintiff also admits Paragraphs 3 and 4 which establish the existence of the mortgage delivered by Defendant to Mortgage Electronic Registration Systems, the assignment of that mortgage to Plaintiff, and the description of the subject property.

Next this Court addresses whether there exists an issue of fact as to Paragraphs 5 and 6 of the Complaint. Paragraph 5 alleges that the mortgage is in default due to Defendant's failure to make the required payment on May 1, 2008, and all subsequent payments thereafter. Paragraph 6 lays out the amounts due on the mortgage. Plaintiff asserts that because Defendant knew specifically of her own mortgage account, a general denial and demand for proof is insufficient to establish a genuine issue of fact. I concur. Defendant admitted in her Answer that the mortgage may be in default. Her only denial concerned whether or not she was served notice of default.² Defendant's denials constitute general denials. In *First Wisconsin Trust Company v. Strausser*, 653 A.2d 688 (Pa. Super. 1995) the court held that because the mortgagor is the only party, apart from the mortgagee, who would have sufficient knowledge upon which to base a specific denial as to the amount due on the mortgage, a general denial with respect to this amount constitutes an admission. *Id.* at 692. In the instant case, Paragraphs 5 and 6 of the Complaint aver facts which specifically concern Defendant's own knowledge and information. Defendant presumptively has personal knowledge as to whether she paid the monthly installments on her mortgage and the amount due on the mortgages; therefore, she has sufficient knowledge upon which to base specific denials. Thus, Defendant's general denials in Paragraphs 5 and 6 concerning the principal amount and interest due are deemed admissions.

²This argument has already been rejected by the Court (see FN 1 above).

Even if this Court were not to find that Defendant's denials are deemed admissions, Plaintiff has established through supporting exhibits that Defendant is in default on her mortgage. Plaintiff has provided a detailed payment history indicating that Defendant has not paid since May 1, 2008 (Plaintiff's Motion Ex. G), and has submitted the affidavit of Ms. Holman-Foreman who attested to the amount due on the mortgage and Defendant's default. Further, Plaintiff has included a copy of the Act 91 notice sent to Defendant informing her she was in default and warning her of the consequences. Perhaps most importantly, Defendant has failed to challenge any of these assertions with a response to the summary judgment motion. Thus, Plaintiff has established that there is no genuine issue of material fact on whether Defendant has defaulted on the mortgage.

With regard to the remainder of Paragraph 6 and all of Paragraph 7 relating to attorney's fees, Plaintiff claims that the amount requested in attorney's fees is five percent of the principle amount due on the loan and therefore reasonable. Defendant asserts that Plaintiff is entitled to reasonable attorney fees and has "no idea what Plaintiff's counsel is attempting to do and must state their total fees in the action herein." As similarly stated before, opponents of a motion for summary judgment cannot merely rely upon their pleadings to assert genuine issues as to the reasonableness of attorney's fees assessed against them, and failure to present facts through counter-affidavits, depositions, admissions, or answers to interrogatories is not sufficient to contest the motion. *Washington Federal Savings & Loan Assoc. v. Stein*, 515 A.2d 980, 983 (Pa. Super. 1986) (court upheld grant for summary judgment, which included an attorney's commission of 5% of the balance due on the loan). Accordingly, without having submitted anything in response to Plaintiff's present Motion, Defendant fails to raise any genuine issues as to Plaintiff's proposed attorney fees. Nonetheless, we find these fees reasonable.

In Pennsylvania, a mortgagee is entitled on a foreclosure to recover costs, including reasonable attorney's fees, which is determined by the circumstances of the particular case. *Citicorp Mortgage, Inc. v. Morrisville Hampton Village Reality Ltd. Partnership*, 662 A.2d 1120, 1123 (Pa. Super. 1995). Defendant received a Notice pursuant to Act 91 of 1983 which provides that if the mortgage is foreclosed on, she will be liable for attorney's fees. Additionally, Paragraph 9

of the mortgage itself provides that if the “[b]orrower fails to perform the covenants and agreements contained in this Security Instrument...Lender’s actions may include...paying reasonable attorneys’ fees.” Defendant was clearly put on notice that she would be subject to paying reasonable attorney’s fees. Given that Pennsylvania courts recognize a five percent commission to be a reasonable rate for attorney’s fees in such cases, I find the proposed attorney’s fees of \$3,300.00 to be reasonable.

In Paragraph 8, Plaintiff asserts that it is not seeking a judgment of personal liability against Defendants, rather is proceeding in rem. A foreclosure action shall not include an action to enforce personal liability. *Newtown Village P’ship v. Kimmel*, 621 A.2d 1036, 1037 (Pa. Super. 1993). “It is well-established that an action in mortgage foreclosure is strictly in rem and thus may not include an in personam action to enforce personal liability.” *Id.* However, in a mortgage foreclosure action, the plaintiff is required to include a demand for judgment for the amount due. **Pa. R.C.P. 1147**. Plaintiff has appropriately demanded judgment from this Court for the amount due on the mortgage. No genuine issue of material fact exists on this averment because Plaintiff is proceeding in an appropriate manner.

The remaining averments in the Complaint assert that Notice of Intention to Foreclose and Notice of Homeowner’s Emergency Assistance have been sent to Defendant and the temporary stay has expired. Defendant asserts she did not receive these notices. As mentioned above, this issue was previously addressed by the Court Order of July 8, 2009. The discussion beginning with “The Act 6 notice” on page 8 of that Order through the conclusion of the Order on page 9 is incorporated herein.

On a final note, Plaintiff is also entitled to judgment as a matter of law. In Pennsylvania, upon a mortgagor’s default on the mortgage, a mortgagee can legally proceed to enforce the terms of the mortgage by initiating foreclosure proceedings, that is, file a complaint for mortgage foreclosure. *Cunningham v. McWilliams*, 714 A.2d 1054, 1056-57 (Pa. Super. 1998) (citing *Elmwood Fed. Sav. Bank v. Parker*, 666 A.2d 721, 724 n.6 (Pa. Super. 1995)). In an action for mortgage foreclosure, the entry of summary judgment is proper if the mortgagor admits that 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. *Cunningham*, 714 A.2d at 1057 (citing *Landau v. Western Pennsylvania Nat'l Bank*, 282 A.2d 335, 340 (Pa. 1971)). Our Superior Court has concluded that entry of summary judgment is appropriate where a defendant admits in his/her answer he/she is behind in mortgage payments. *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 694 (Pa. Super. 1995); *New York Guardian Mortgage Corp. v. Dietzel*, 524 A.2d 951, 952 (Pa. Super. 1987). This is so even if the mortgagor has not admitted the total amount of the indebtedness in the pleadings. *Cunningham*, 714 A.2d at 1057.

In the instant case, Defendant defaulted on mortgage payments, thereby allowing Plaintiff to lawfully institute foreclosure proceedings. Since Defendant has effectively admitted to defaulting on her mortgage, Plaintiff is therefore entitled to judgment as a matter of law.

Accordingly, the attached Order is entered.

ORDER

AND NOW, this 9th day of December, 2009, for the reasons set forth in the attached Opinion, Plaintiff's Motion for Summary Judgment is granted.