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V. CHERYELONA NARESH MIRCHANDANI AND
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DEUTSCHE BANK NATIONAL TRUST COMPANY AS
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1. 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). A general denial or a demand of proof, except as provided by subdivision (c) and (e) of this rule shall have the effect of an admission.
2. Lack of service upon a defendant is an issue personal to that party and an issue that must be raised by that party, not a separate party.
3. Whether the holder of the original note is also the owner of the entity entitled to receive the benefit of payment of the note is irrelevant to that inquiry. The holder has the right to enforce the negotiable instrument even if he is not the owner or is in wrongful possession of it.
4. The amount of the judgment is important so the sheriff can distribute the proceeds of the sale among the various parties in interest. Without knowing the precise claim of the mortgagee, that distribution could not be properly achieved.

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY,
PENNSYLVANIA, CIVIL 2014-S-1055, DEUTSCHE BANK
NATIONAL TRUST COMPANY AS TRUSTEES, IN TRUST
FOR REGISTERED HOLDERS OF FIRST FRANKLIN
MORTGAGE LOAN TRUST 2005-FF4, ASSET-BACKED
CERTIFICATES, SERIES 2005-FFH4 V. CHERYELONA
NARESH MIRCHANDANI AND NARESH G. MIRCHANDANI

Patrick J. Wesner, Esq., Attorney for Plaintiff
Cherylona Naresh Mirchandani, Pro se
Naresh G. Mirchandani, Pro se

Kuhn, J., October 2, 2015

MEMORANDUM OPINION

Before the Court for disposition is Plaintiff's Motion For Summary Judgment. For reasons set forth herein, the Motion is granted in part.

BACKGROUND

On August 27, 2014, Plaintiff filed a Complaint In Mortgage Foreclosure. Therein, Plaintiff averred that on August 2, 2005, Defendants, Cheryelona Naresh Mirchandani and Naresh G. Mirchandani, executed a Note with First Franklin, a Division of National City Bank of Indiana (hereinafter "the Lender"), and on November 21, 2011, executed a Loan Modification Agreement with the Lender. To secure the obligation under the Note, Defendants executed a Mortgage, also dated August 2, 2005, covering real estate at 4209 York Road, New Oxford, Adams County. The Mortgage was recorded on August 23, 2005. Plaintiff averred that the Lender assigned the Mortgage to it on February 19, 2009, and the Assignment was recorded on March 6, 2009. Defendants allegedly defaulted by failing to make payment on the monthly obligation due October 1, 2012, and for every month thereafter. Plaintiff alleges that the Act 91 Notice was sent to Defendants on March 19, 2013. Consequently, Plaintiff requests an in rem judgment against Defendants.

Defendants were purportedly served with the Complaint on August 29, 2014, by the Sheriff of Adams County. On October 6, 2014, Defendant Naresh G. Mirchandani, acting pro se, filed his Answers To Complaint wherein he set forth two categories of response. The first was a "General Denial" where, in a single paragraph, he stated that

Defendants admits (sic) all matters known to be of public record with the exception of any assignment or other transaction of the subject note and mortgage subsequent to Defendant's/Defendants' execution thereof. Further, Defendants otherwise deny, in part for lack of knowledge, each and every other allegation contained in the Plaintiff's Complaint. In response to any averment in Plaintiff's Complaint concerning compliance with conditions precedent, including: the acceleration of the remaining balance on the note and/or compliance with applicable federal law, including the U. S. Code, Code of Federal Regulations and directives of Federal officials, Defendants specifically Deny the same with particularly in the following defenses.

The second category was entitled "Defenses" and set forth 17

paragraphs of defenses in very general terms.¹ On October 17, 2014, Plaintiff filed a Reply to Defendants' pleading. In turn, Defendant, Naresh G. Mirchandani, filed a Reply to Plaintiff's Reply. A series of pro se motions followed.²

On May 13, 2015, Plaintiff filed its Motion For Summary Judgment. Therein, it basically repeated the allegations in the Complaint and attached supporting documentation. By subsequent Order, Defendants were directed to follow the procedure set forth in Pennsylvania Rule of Civil Procedure 1035 and the corresponding Local Rule, and to file a response to the Motion together with a brief. On June 22, 2015, Defendant, Naresh G. Mirchandani, filed a Response but, to date, has not filed a brief.

LEGAL STANDARD

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

¹ Specifically, he alleged that Plaintiff a) failed to state a claim (Para. 1); b) lacks standing and/or capacity to sue (Para. 2); c) is not the real party in interest (Para. 3); d) failed to join necessary parties (Para. 4) and e) failed to satisfy conditions precedent to instituting this action (Para. 10). He also alleged that a) the claims are barred because of failure to mitigate damages (Para. 5 and 7); b) the assignment was made without his knowledge (Para. 6); c) the claim is barred because of unlawful/unreasonable application of payments and assessment of fees, charges and expenses (Para. 8), the doctrine of estoppel and waiver (Para. 14), the doctrine of accord/satisfaction/ratification (Para. 15), and the doctrine of res judicata (Para. 16). Defendant also requests an accounting of the amount owed (Para. 9) and the right to raise additional defenses upon completion of discovery (Para. 17).

² On November 17, 2014, Defendants filed a Motion To Dismiss For Plaintiff's Failure To Respond To Defendant's Qualified Written Request In A Timely Manner, which the Court denied on December 19, 2014. On December 8, 2014, Defendants filed a Motion For Default Judgment For Plaintiff's Failure To Respond In A Timely Manner, which the Court denied on December 17, 2014. On December 12, 2014, Defendants filed a Motion To Dismiss which the Court denied on December 18, 2014.

Summary judgment is only appropriate in those cases which are free and clear from doubt. **McConnaughey v. Building 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 Communications 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.* Furthermore, 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). A general denial or a demand of proof, except as provided by subdivision (c) and (e) of this rule shall have the effect of an admission. *Id.*

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.3d 462, 464 (Pa. Super. 2014). A defendant's statements that he or she is without sufficient information to admit or deny plaintiff's statements regarding the principal and interest owed on a mortgage shall be deemed as admissions of those facts since, apart from the plaintiff, the defendant would be the only party who would have sufficient knowledge on which to base a specific denial. **New York Guardian Mortgage Corp. v. Dietzel**, 524 A.2d 951, 952 (Pa. Super. 1987).

A 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 the instant action Plaintiff is seeking an in rem judgment.

DISCUSSION

Defendant Naresh G. Mirchandani's Response did not deny any of the specific averments set forth in Plaintiff's Motion For Summary Judgment. Instead, he simply avers that Plaintiff has not responded to his "defenses" 4, 6, 9, 14, 15 and 16 set forth in the Answer to the Complaint filed October 6, 2014. Before addressing each of these issues, it should be noted that Plaintiff, in fact, did answer those averments on October 17, 2014.

In its Motion, Plaintiff repeated the averments set forth in the Complaint regarding the parties, the background, the default, compliance with Act 91 and, the amount due and owing. Other than the general denial averred in the Answer filed October 6, 2014, Defendants have not otherwise responded to those express averments. Defendants clearly know whether they entered into the Note, Mortgage and Loan Modification, whether and to what extent they made payment on the obligation when due, whether they received the Act 91 notice, and whether proper assignments of the Mortgage is a matter of public record. Under the circumstances, such denials are deemed admissions, Pa. R. C. P. 1029, which expose Defendants to entry of judgment.

As to the various defenses raised by Defendants, they have not produced any affidavits, admissions, records, or other evidence supporting these claims. Therefore, they do not suggest any material question of fact that would preclude the entry of summary judgment.

In "defense # 4", Defendant Naresh G. Mirchandani claims that his co-defendant was not served with the Complaint and "does not reside at the subject address." Clearly, Cheryelona Naresh Mirchandani is a party to the Note, Mortgage and Loan Modification and was joined as a party defendant in this action. Service of the Complaint was made upon her by an Adams County deputy sheriff on August 29, 2014, at the subject property, by handing a copy to Joshua Mirchandani, "Son, adult-in-charge of the residence at the time of service."³ Original service of a complaint in mortgage foreclosure in Pennsylvania may be made by the sheriff. Pa. R. C. P. 400(a). Service may be made upon a party by handing a copy thereof, at the residence of the defendant, to an adult member of the family with whom he resides or an adult person in charge of the residence.

³ See Sheriff's Affidavit of Service.

Pa. R. C. P. 402(a)(2). Lack of service upon a defendant is an issue personal to that party and an issue that must be raised by that party, not a separate party. Nevertheless, here, Defendant Naresh G. Mirchandani was served by the same process on the same day. He has never alleged that Joshua Mirchandani was not a family member or an adult in charge of the residence or that the Complaint was not given to him. Naresh G. Mirchandani has offered no evidence supporting that Cheryelona Naresh Mirchandani resides elsewhere. Most interesting, in the Answer filed on October 6, 2014, he purported to be speaking for both himself and Cheryelona when he repeatedly referred to “Defendants”.

In “defense #6”, Naresh claims that Plaintiff must produce the original note; otherwise, it has no right to proceed with this action. He misunderstands the status of the litigation at this juncture. In fact, Plaintiff has produced a copy of the Note⁴ purportedly signed by both defendants and endorsed in blank by the Lender. The Affidavit of Matthew Metters attached to the Motion avers that Plaintiff has possession of the original Note. Defendants have not expressly denied that the Note is a true and correct copy of the same or that their signatures appear thereon. There is no indication in the record that Defendants pursued discovery to verify that Plaintiff has the original Note.

Generally, the note accompanying a purchase money mortgage is considered a negotiable instrument under §3104 of Pennsylvania’s Uniform Commercial Code (UCC), 13 Pa. C.S.A. §3104. **J. P. Morgan Chase Bank, N. A. v. Murray**, 63 A.3d 1258, 1266 (Pa. Super. 2013). The holder of the negotiable instrument is the person in possession of it if the instrument is payable to the bearer or is payable to the person in possession of it. **PHH Mortgage Corp. v. Powell**, 100 A.3d 611, 620 (Pa. Super. 2014); 13 Pa. C.S.A. §1201(b) (21)(i). Under the UCC, the holder of a negotiable instrument is the person entitled to enforce it. 13 Pa. C.S.A. §3301(1). Thus, where standing is being raised, the inquiry becomes whether the plaintiff has possession (i.e., is the holder) of the original note. Whether the holder of the original note is also the owner of or the entity entitled to receive the benefit of payment of the note is irrelevant to that inquiry. *Id.* at 621-2. The holder has the right to enforce the negotiable instrument even if he is not the owner or is in wrongful posses-

⁴ See Exhibit C attached to the Motion For Summary Judgment.

sion of it. 13 Pa. C.S.A. §3301. For purposes of a motion for summary judgment, the evidence produced by Plaintiff and otherwise unchallenged by Defendants is sufficient to demonstrate that it has the right to pursue the relief requested.

In “defense #9”, Defendants dispute the amount Plaintiff claims is owed on the account. Plaintiff has alleged the principal balance, the accrued interest, the escrow advances for taxes and insurance, accumulated late charges and, the “recoverable balance” for a total of \$323,892.25. Attached to the Motion⁵ is a Payment History dating to prior to the alleged default. As noted above, Defendants have only generally denied the amount owed and have offered no evidence disputing this amount even though they should have a record of payment made. We agree that proof of the amount of indebtedness is an essential element of a claim in mortgage foreclosure because the sole purpose of the judgment obtained in such an action is to effect a judicial sale of the mortgaged property. Therefore, the amount of the judgment is important so the sheriff can distribute the proceeds of the sale among the various parties in interest. Without knowing the precise claim of the mortgagee, that distribution could not be properly achieved. *U. S. Bank, N. A. v. Pautenis*, 118 A.3d 386, 394 (Pa. Super. 2015). However, a mortgagor’s general denial as to the amount owed in a pleading in mortgage foreclosure is 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 of the averments. *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 692 (Pa. Super. 1995). The instant situation is not one where the borrower has claimed that even with payment information he is unable to ascertain the amount owing.

In “defense” 14, 15 and 16, Defendants respectively raise the defenses of estoppel/waiver, accord and satisfaction, and res judicata/claim preclusion. These are affirmative defenses that must be supported in some respect by Defendants in order to become relevant to the discussion. Defendants have offered no evidence or argument in support of these defenses so the Court is left to speculate how these defenses present an issue of material fact.

The only issue upon which there appears, to the Court, to be any question of material fact relates to the amount of the judgment to be

⁵ Exhibit H.

entered. The Payment History exhibit attached to the Motion For Summary Judgment is extremely difficult to read. In the Complaint and the Motion For Summary Judgment, Plaintiff reports the principal balance owing as \$293,345.44. However, the Payment History appears to report a principal balance of \$294,406.07 after the last payment in 2012. Accrued, but unpaid, interest is to be calculated at 2% per annum from September 1, 2012, but would depend upon the principal balance. Escrow Advances for taxes and insurance are reported at \$13,528.07, but the Payment History is too difficult to read in order to ascertain when and what amounts were advanced for those purposes after the escrow account last had a positive balance. Accumulated Late Charges are reported to be \$202.65 but are not itemized as to the amount or when charged. Finally, there is a category entitled "Recoverable Balance". The Court is unable to ascertain what this reported balance of \$2,345.00 represents nor the authority to charge Defendants for the same. Plaintiff may be entitled to a judgment in rem but the amount of the judgment requires further clarification.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 2 day of October, 2015, for the reasons stated in the attached Memorandum Opinion, the Motion For Summary Judgment filed by Plaintiff on May 13, 2015, is granted. An in rem judgment in mortgage foreclosure is hereby entered in favor of Plaintiff and against Defendants as to real estate located at 4209 York Road, New Oxford, Adams County, Pennsylvania.

The amount of the judgment will be determined by the Court after Plaintiff submits a motion clarifying in detail the amounts owed as discussed in the attached Opinion.

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 GILBERT L. ARVIN, DEC'D**

Late of Hamilton Township, Adams County, Pennsylvania

Administrator-Executor: Ricky L. Henry, c/o Donald B. Swope, Esq., 50 East Market Street, Hellam, PA 17406

Attorney: Donald B. Swope, Esq., 50 East Market Street, Hellam, PA 17406

ESTATE OF HARRY W. FLETCHER, DEC'D

Late of Reading Township, Adams County, Pennsylvania

Executrix: Sandra L. Fletcher, 2280 Germany Road, East Berlin, PA 17316

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF RONALD L. HARBAUGH, DEC'D

Late of Hamiltonban Township, Adams County, Pennsylvania

Co-Administrators: Ronald L. Harbaugh, 24 Main Street, Fairfield, PA 17320; Lisa M. Cathell, 1571 Deer Creek Road, New Freedom, PA 17349

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

ESTATE OF EDWARD J. HETRICK, JR., DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executrices: Dianne L. Croft, 2880 Black Rock Road, Hanover, Pennsylvania 17331; Helen L. Ports, 2870 Black Rock Road, Hanover, Pennsylvania 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

ESTATE OF ROBERT H. KELLEY, SR., DEC'D

Late of Germany Township, Adams County, Pennsylvania

Attorney: Thomas E. Miller, Esq., Law Office of Thomas E. Miller, ESQUIRE LLC, 249 York Street, Hanover, PA 17331

ESTATE OF DOROTHY E. KIESSLING, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Joanne L. Schmick, 406 Mt. Allen Drive, Mechanicsburg, Pa. 17055

ESTATE OF MAE E. LEGORE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executors: Michael F. Robinson, 210 700 Road, New Oxford, Pennsylvania 17350; Carolyn R. Geiger, 1800 Heritage Avenue, Lancaster, Pennsylvania 17603

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

ESTATE OF HERBERT CHARLES MCINTOSH, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Personal Representative: Cornelia R. McIntosh, 1525 Naudain Street, Harrisburg, PA 17104

Attorney: Brian F. Levine, Esq., 22 E. Grant Street, New Castle, PA 16101

ESTATE OF ROBERT L. PAINTER, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Co-Executors: Paul R. Painter, 3000 Spout Run Parkway, Apt. A609, Arlington, VA 22201; Penny P. Hudson, 84 Jessica Drive, Gettysburg, PA 17325

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

ESTATE OF JAY L. SIXEAS, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: James W. Sixeas, c/o R. Thomas Murphy & Associates, P.C., 237 East Queen Street, Chambersburg, PA 17201

Attorney: R. Thomas Murphy, Esq., R. Thomas Murphy & Associates, P.C., 237 East Queen Street, Chambersburg, PA 17201

ESTATE OF LORRAINE MAE ZINN, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executrix: Colleen Faye Zinn, 2400 Tweed Trail, Hillsborough, NC 27278

SECOND PUBLICATION**ESTATE OF DONALD J. FRYE a/k/a DONALD JOHN FRYE, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Personal Representative: Donna Marie McGough, 225 Springs Avenue, Gettysburg, PA 17325

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

ESTATE OF STEPHEN R. NELSON A/K/A STEPHEN RAYMOND NELSON, DEC'D

Late of New Oxford, Adams County, Pennsylvania

Executrix: Wendy L. Waltermeyer, 69 Galaxy Drive, Hanover, PA 17331

Attorney: Clayton A. Lingg, Esq., Mooney and Associates, 34 West King Street, Shippensburg, PA 17257

ESTATE OF MARY BETTY SEIPLE, DEC'D

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

Executor: Diane Dupert, c/o Sharon E. Myers, Esq., CGA Law Firm, PO Box 606, East Berlin, PA 17316

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

ESTATE OF RUTH A. WOLF, DEC'D

Late of Menallen Township, Adams County, Pennsylvania

Executors: Randall C. Wolf, 463 Upper Temple Road, Biglerville, PA 17307; Kenneth C. Wolf, 550 Upper Temple Road, Biglerville, PA 17307

Attorney: Robert E. Campbell, Esq., Campbell & White, P.C., 112 Baltimore Street, Suite 1, Gettysburg, PA 17325-2311

THIRD PUBLICATION**ESTATE OF RAYMOND HOAK, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Administrator: Richard L. Hoak, Jr., c/o Bruce C. Bankenstein, Esq., Manifold & Bankenstein, 48 South Duke Street, York, PA 17401-1454

Attorney: Bruce C. Bankenstein, Esq., Manifold & Bankenstein, 48 South Duke Street, York, PA, 17401-1454

Continued on pg. 4

THIRD PUBLICATION CONTINUED

ESTATE OF MEGHAN T. McKINNEY

Late of Menallen Township, Pennsylvania

Administrators: Douglas G. McKinney,
Box 501, Biglerville, PA 17307-0501;
Kimberly A. Killen, 739 Bendersville
Wenksville Road, Aspers, PA 17304

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ESTATE OF S. KENNETH OGG, a/k/a
STANLEY KENNETH OGG, DEC'D

Late of Germany Township, Adams
County, Pennsylvania

Executrix: Helen M. Ogg, 6220
Baltimore Pike, Littlestown, PA 17340

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

ESTATE OF REGINA M. ROSENTERER,
DEC'D

Late of Oxford Township, Adams
County, Pennsylvania

Co-Executors: Virginia J. Dixon, 41 Pin
Oak Lane, Gettysburg, PA 17325;
Linda R. Shinnars, 40 Christopher
Lee Drive, New Oxford, PA 17350

Attorney: Puhl, Eastman & Thrasher,
220 Baltimore Street, Gettysburg, PA
17325

ESTATE OF AGNES L. SMITH, DEC'D

Late of Cumberland Township, Adams
County, Pennsylvania

Executrix: Gloria J. Miller, 1240
Westminster Ave., Hanover, PA 17331

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

ESTATE OF ADA A. WOLF, DEC'D

Late of Straban Township, Adams
County, Pennsylvania

Co-Executrices: Christine W. Poole,
Darlene W. Shrader and Shelby W.
Barrett, c/o Genevieve E. Barr, Esq.,
11 Carlisle Street, Suite 301 Hanover,
PA 17331

Attorney: Genevieve E. Barr, Esq., 11
Carlisle Street, Suite 301 Hanover, PA
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