

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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|-------------------------|---|--------------------------|
| WELLS FARGO BANK, N.A., |) | |
| |) | |
| Plaintiff, |) | |
| |) | C.A. No. N16L-08-105 FWW |
| v. |) | |
| |) | |
| RUSSELL K. HINKLE, |) | |
| |) | |
| Defendant. |) | |

Submitted: July 18, 2017
Decided: August 1, 2017

Upon Plaintiff's Motion for Summary Judgment:
GRANTED.

ORDER

Russell K. Hinkle, *pro se*, 312 Matthes Avenue, Wilmington, Delaware 19804;
Defendant.

Lisa Keil Cartwright, Esquire, Atlantic Law Group, LLC, 913 North Market Street,
Suite 1011, Wilmington, Delaware 19801; Attorney for Plaintiff Wells Fargo Bank,
N.A.

WHARTON, J.

This 1st day of August 2017, upon consideration of Plaintiff Wells Fargo Bank, N.A.'s ("Plaintiff") Motion for Summary Judgment, Defendant Russell K. Hinkle's ("Defendant") Response, argument on June 27, 2017, and Plaintiff's Supplement to the Motion, it appears to the Court that:

1. On May 7, 2009, Defendant executed and delivered a mortgage securing a promissory note to Mortgage America, Inc. for real property located in Wilmington, Delaware. Mortgage America, Inc., for valuable consideration, duly assigned its entire interest in the mortgage to Plaintiff.
2. Defendant defaulted on the loan by failing to pay the monthly installments of the mortgage. The mortgage permits Plaintiff to accelerate the sum secured by the mortgage and foreclose on the property for the collection of the debt owed. Defendant was given proper notice and the opportunity to cure the default, but Defendant failed to do so.
3. On August 19, 2016, Plaintiff filed a *scire facias sur* mortgage action against Defendant.
4. The parties participated in mandatory mediation on December 21, 2016. Mediation was unsuccessful because the parties failed to come to an agreement. Specifically, the mediation report states that the "borrower does not wish to participate in the program and wishes to pursue his own legal action."¹

¹ D.I. 7.

5. On March 27, 2017, Plaintiff filed a Motion for Summary Judgment (“Motion”). Plaintiff argues Defendant has failed to plead one of the limited allowable defenses to a *scire facias sur* mortgage action.² Moreover, Plaintiff argues Defendant has failed to raise any genuine issues of material fact.³

6. On April 10, 2017, Defendant filed his response to Plaintiff’s Motion. Defendant argues Plaintiff “has failed to produce [the] Original Wet Signature note signed by me on the day of my purchase of 312 Mattes Avenue. Wells Fargo does not hold the original documents. Therefore Wells Fargo does not have legal standing to foreclose on my home 312 Matthes Avenue.”⁴ Additionally, Defendant argues Plaintiff never informed him that it was going to securitize his loan.⁵ Defendant states that “it is [his] understanding that in order to securitize a loan that loan must first be paid off.”⁶

7. The Court scheduled oral argument on June 27, 2017. Plaintiff’s counsel appeared before the Court, but Defendant did not. The Court ordered Plaintiff’s counsel to file a supplement to the Motion to include the promissory note in light of

² Pl.’s Mot. Summ. J., D.I. 9, at ¶ 12.

³ *Id.*

⁴ Def.’s Response Mot. Summ. J., D.I. 12.

⁵ *Id.*

⁶ *Id.*

the Delaware Supreme Court's recent decision in *Shrewsbury v. Bank of N.Y. Mellon*.⁷

8. On June 27, 2017, Plaintiff supplemented the Motion by providing the promissory note. By letter dated June 27, 2017, the Court notified Defendant that he was able to respond to Plaintiff's supplementation of the Motion. However, Defendant never responded.

9. Superior Court Civil Rule 56(c) provides that summary judgment is appropriate when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist "but not to decide such issues."⁸ The moving party bears the initial burden of demonstrating that the undisputed facts support its claims or defenses.⁹ If the moving party meets its burden, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact to be resolved by the ultimate fact-finder.¹⁰

10. In a mortgage foreclosure action, "a mortgagor must establish why the mortgaged property should not be seized and sold to pay the mortgagor's

⁷ 160 A.3d 471 (Del. 2017).

⁸ *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

⁹ *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

¹⁰ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

indebtedness.”¹¹ A mortgagor’s defenses in such a proceeding “are limited to defenses to the mortgagor’s obligations under the mortgage.”¹² In other words, “a defense that does not relate to the mortgage is not properly raised in a mortgage foreclosure action.”¹³ As such, “Defendant’s available defenses are ‘limited to payment, satisfaction, absence of seal, or a plea in avoidance of the deed.’”¹⁴

11. The Court finds Defendant has failed to plead any allowable defenses that are supported by evidence. Further, Defendant has failed to raise any genuine issues of material fact. As to Defendant’s argument regarding the securitization of his loan, the Court finds Defendant has failed to provide any evidence to substantiate this potential defense. Plaintiff has established that it holds the promissory note, and Defendant has no control over what the original note holder does with it. Defendant has therefore failed to meet his burden for the purpose of this Motion.

¹¹ *McCafferty v. Wells Fargo Bank, N.A.*, 105 A.3d 989, at *2 (Del. 2014) (TABLE) (citing 10 Del. C. § 3901).

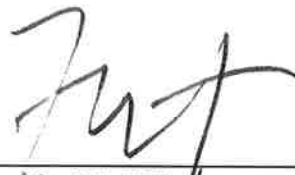
¹² *Id.* (citing *Brooks v. BAC Home Loans Servicing*, 53 A.3d 301 (Del. 2012) (TABLE)).

¹³ *Id.* (citing *Harmon v. Wilmington Trust Co.*, 663 A.2d 487 (Del. 1995) (TABLE)).

¹⁴ *Bayview Loan Servicing, LLC v. Edwards*, 2017 WL 1019729, at *3 (quoting *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 895 (Del. Super. 1973)). *See also Gordy*, 310 A.2d at 895–96 (“Examples of matters which could be asserted under a plea in confession and avoidance are: act of God, assignment of cause of action, conditional liability, discharge, duress, exception or proviso of statute, forfeiture, fraud, illegality of transaction, justification, nonperformance of condition precedent, ratification, unjust enrichment and waiver.”).

THEREFORE, Plaintiff's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.



Ferris W. Wharton, J.

FWW

SUPERIOR COURT OF THE STATE OF DELAWARE
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