IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

HSBC MORTGAGE CORPORATION	:	
(USA),	:	
	:	C.A. No: K09L-11-016 RBY
Plaintiff,	:	
	:	
V.	:	
	:	
KENNETH BENDFELDT and	:	
BETTINA ROLOFF,	:	
	:	
Defendants.	:	

Submitted: January 28, 2014 Decided: February 4, 2014

Upon Consideration of Plaintiff's Motion to Affirm Default and Proceed to Sheriff Sale GRANTED

ORDER

Daniel T. Conway, Esquire, and Thomas D.H. Barnett, Esquire Atlantic Law Group, LLC, Georgetown, Delaware for Plaintiff.

Douglas A. Shachtman, Esquire, The Shachtman Law Firm, Wilmington, Delaware for Defendants.

Young, J.

February 4, 2014

SUMMARY

HSBC Mortgage Corporation (USA) ("Plaintiff" or "HSBC Mortgage Corporation") moves this Court for an entry of an order affirming default judgment against Kenneth Bendfeldt and Bettina Roloff ("Defendants"), permitting the Sheriff to sell the subject property in accordance with Plaintiff's foreclosure action. The Court must decide: 1) whether Plaintiff is the real party in interest in order to foreclose on the subject property, and 2) whether Defendants have standing to challenge the validity of the Note or the Mortgage assignment to Plaintiff. First, Plaintiff is the real party in interest, because the Mortgage and the Note in this case both clearly list HSBC Mortgage Corporation as the lender, with the Note also having been signed by Plaintiff. Second, the Court does not address Defendants' challenge to Plaintiff's standing based on the Note, because scire facias sur mortgage actions are based upon the mortgage, not the Note. Finally, Defendants lack standing to challenge the assignment of the Mortgage to Plaintiff, because Defendants are not parties or third-party beneficiaries to the assignment according to Delaware contract law. Defendants merely benefitted from the assignment indirectly once Defendants purchased the loan from Plaintiff. Therefore, Plaintiff's Motion is **GRANTED**.

FACTS AND PROCEDURAL POSTURE

Defendants executed and delivered a valid mortgage to HSBC Mortgage Corporation on May 3, 2007 (the "Mortgage"). On April 1, 2009, Defendants defaulted on the Mortgage. After a Demand Letter was sent to Defendants on June 3, 2009, the Defendants failed to cure the default as required by the Demand Letter. Pursuant to Section 22 of the Mortgage, the mortgage was accelerated. On November

February 4, 2014

6, 2009, Plaintiff filed its Complaint (the "Complaint") against Defendants in this *in* rem scire facias sur mortgage action. Plaintiff sought foreclosure of Plaintiff's interest in the property known as 5513 Whiteleysburg Road, Harrington, Delaware 19952 (the "Property") under the mortgage referenced in the Complaint. On January 25, 2010, Defendants received service of the Complaint.

The Plaintiff received no answer or other responsive pleading to the Complaint which was sent to Defendants on November 6, 2009. Plaintiff obtained a default judgment against the Defendants on March 22, 2010. On May 3, 2010, Plaintiff filed a *Writ of Levari Facias*, which was entered into the record and sent to the Kent County Sheriff to execute upon the judgment exposing the Property to the public sale. On June 30, 2010, one day before the scheduled Sheriff's Sale, Defendants entered appearance. On August 24, 2010, Plaintiff filed a second *Writ of Levari Facias*. Plaintiff stayed the Sheriff's Sale to permit negotiations to attempt to resolve the underlying arrear ages. On the same day, counsel faxed Defendants' settlement proposal to Plaintiff, and continued to follow up with Plaintiff. On October 11, 2010, counsel for Plaintiff directed Defendants to Plaintiff's Loss Mitigation Department. Having received no further communication or instruction, counsel for Plaintiff proceeded in an effort to exercise its rights under the Mortgage. On November 19, 2010, this Court stayed the Sheriff's Sale, which was scheduled to occur on December 20, 2010 upon the Motion of Defendants.

Thereafter, Defendants served Discovery Requests upon the Plaintiff on December 9, 2010, and, on January 7, 2011, the Court entered a stipulation (the "Stipulation") staying the Sheriff's Sale. The Stipulation did not vacate the default

C.A. No.: K09L-11-016 RBY

February 4, 2014

judgment. Plaintiff's response to discovery was sent to counsel on February 8, 2011. On July 29, 2011, Defendants, through counsel, served upon Plaintiff their supplemental interrogatory, and, on November 2, 2011, Plaintiff responded.

Prior to the filing of the instant case, on April 15, 2009, Defendants spoke with a representative of Plaintiff, inquiring about which type of work out programs they qualified for. Defendants were asked to provide a work out package in order for Plaintiff to review their financial situation. Defendants failed to provide this package. On May 13, 2009, Defendants called Plaintiff to make a payment, and were advised that they were pre-qualified for Home Affordable Modification Program (HAMP), whereupon Defendants advised they would call Plaintiff back in two weeks. Defendants failed to do so. Instead, on July 2, 2009, Plaintiff mailed the HAMP documents with approval for the trial payments. After receiving no further communication from Defendants, Plaintiff mailed Defendants a HAMP failure letter.

On April 23, 2013, Plaintiff filed a Motion to Affirm Default Judgment and Proceed to Sheriff Sale. Defendant filed a response to the motion. Then, a hearing was held before this Court on December 6, 2013, where the Court ordered additional briefing from the parties.

STANDARD OF REVIEW

Superior Court Civil Rule 55© provides that upon a motion, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

C.A. No.: K09L-11-016 RBY

February 4, 2014

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment that the Court may set aside a default judgment in accordance with Rule 60(b).

DISCUSSION

First, Plaintiff argues that it is the real party in interest to bring the instant foreclosure action, because the Mortgage and the Note both explicitly list HSBC Mortgage Corporation as the lender. Superior Court Rule of Civil Procedure 17 requires that the party filing suit is the one who has the legal right to pursue the claim. The Mortgage and the Note in this case both clearly list HSBC Mortgage Corporation as the lender. The Plaintiff has the Note in its possession. Further, the Note is signed by Plaintiff. Therefore, on the assignment's face, the Plaintiff is the real party in interest.

In response, Defendants contend that Plaintiff lacks standing to bring this foreclosure action on the basis that Plaintiff does not own the Note, rendering the purported assignment to the Plaintiff invalid. However, the Court will not address Defendants' challenge to Plaintiff's standing based on the Note, because *scire facias sur* mortgage actions are based upon the mortgage, not the Note. Generally, "only those claims or counterclaims arising under the mortgage may be raised in a

February 4, 2014

scire facias sur mortgage foreclosure action." An action on the Note is an *in* personam litigation, which is distinct from the *in rem* action at hand. Pleading any defenses which do not arise from the initial mortgage transaction would "infuse an *in personam* litigation and judgment based upon a different transaction into an action which is essentially an *in rem* action."

Second, Plaintiff contends that Defendants lack standing to challenge the validity of the assignment. In *CitiMortgage, Inc. v. Bishop* (herein *Bishop*), 2013 WL 1143670, at *4 (Del. Super. Ct. March 4, 2013), the Court held that, "a mortgage-debtor lacks standing to challenge the validity of the assignment." This holding is also cited in *Branch Banking & Trust Co. v. Eid* (herein *Branch Banking*)³, which followed *Bishop*.

Defendants (overlooking that *Bishop* and *Branch Banking* now are Delaware authorities) argue that neither *Bishop* nor *Branch Banking* cites any Delaware authority in support of reaching this holding. To the contrary, *Bishop* states that under Delaware contract law, a nonparty to a contract generally has no rights relating to it unless he or she is a third-party beneficiary to the contract. In order to qualify as a third-party beneficiary, a party must be an intended beneficiary. Even though a third-party happens to benefit from the performance of

¹ LaSalle National Bank v. Ingram, 2005 WL 1284049, at *1 (Del. Super. Ct. May 19, 2005), citing Harmon v. Wilmington Trust Co., 1995 WL 379214, at *2 (Del. Super.).

² Gordy v. Preform Building Components, Inc., 310 A.2d 893, 896 (Del. Super. Ct. 1973).

³ 2013 WL 3353846, at *4 (Del. Super. Ct. June 13, 2013).

C.A. No.: K09L-11-016 RBY

February 4, 2014

the contract indirectly, the third person has no rights under the contract.⁴ This contract law principle is consistent with *Bishop's* statement that a debtor is not a party to a mortgage assignment, is not a third-party beneficiary to the assignment, and cannot show legal harm as a result of the assignment.⁵

While *Bishop's* holding rests on several federal decisions⁶, where the mortgagor was in the position of a plaintiff, or a party raising an affirmative claim to a remedy; nonetheless, the assignment in this action, treated like any other contract under Delaware law, does not recognize Defendants as a parties to the assignment. Defendants merely benefitted from the assignment coincidentally once Defendants purchased the loan from the Plaintiff, the assignee. Therefore, Defendants, as mortgage-debtors, do not have standing to challenge the validity of the instant Mortgage assignment.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Affirm Default and Proceed to Sheriff Sale is **GRANTED**.

⁴ 2013 WL 1143670, at *5.

⁵ *Id*.

⁶ In re: Romie David Bishop, and Shirley Ann Bishop, Case No. 11-12338 (BLS) and Bishops v. Argent Mortgage Company, LLC, Adv. Pro. No. 11-53412 (BLS), at 3. See also Blake v. Bank of America, 845 F.Supp.2d 1206 (D. Alabama 2012); In re Walker, 466 B.R. 271, 285 (Bankr.E.D.Pa.2012); In re Washington, 469 B.R. 587, 591 (Bankr.W.D.Pa.2012); Metcalf v. Deutsche Bank Nat. Trust Co., 2012 WL 2399369, at *5 (D. N.D. Tex. June 26, 2012); In re Edwards, 2011 WL 6754073, at *4 (Bankr.E.D. Wisconsin Dec. 23, 2011); See Juarez v. U.S. Bank Nat. Ass'n, 2011 WL 533046, at *4 (D.Mass. Nov. 4, 2011).

C.A. No.: K09L-11-016 RBY

February 4, 2014

IT IS SO ORDERED.

/s/ Robert B. Young

J.

RBY/lmc

oc: Prothonotary

cc: Counsel

Opinion Distribution

File