

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

WELLS FARGO BANK, NA	)	
	)	
Plaintiff,	)	C.A. No. 11L-07-079 CLS
	)	
v.	)	
	)	
JOANN NICKEL,	)	
	)	
Defendant.	)	
	)	

Date Submitted: November 14, 2011  
Date Decided: November 18, 2011

On Plaintiff's Motion for Summary Judgment.  
**GRANTED.**

**ORDER**

Lisa R. Hatfield, Esq., Morris, Hardwick & Schneider, LLC, 284 East Main Street, Newark, Delaware 19711; Lisa Keil Cartwright, Esq., Atlantic Law Group, LLC., 913 N. Market Street, Wilmington, DE 19801.  
*Attorney for Plaintiff.*

Jane W. Evans, Esq., 100 West 10<sup>th</sup> Street, Suite 203, Wilmington, Delaware 19801.  
*Attorney for Defendant.*

**Scott, J.**

## Introduction

Before the Court is Plaintiff's, Wells Fargo Bank ("Plaintiff"), Motion for Summary Judgment pursuant to Superior Court Civil Rule 56. Defendant responded in opposition to this motion. The Court reviewed the parties' submissions and for the reasons discussed below, Summary Judgment is **GRANTED**.

## Facts

This is a mortgage foreclosure action arising from Defendant's, Joann Nickel, ("Defendant") Mortgage with the Plaintiff. The Defendant delivered and executed a Mortgage on a residential property in Middletown, Delaware. A mortgage agreement was executed and delivered on May 23, 2008.

On July 12, 2011, Plaintiff filed a *scire facis sur* Mortgage Complaint seeking judgment against the property and judicial sale for non-payment of the Mortgage. Defendant was personally served on August 2, 2011. Counsel entered her appearance for Defendant on September 12, 2011. On September 22, 2011, Plaintiff filed a Motion for Judgment. Defendant filed an answer to the complaint on October 5, 2011 and Defendant responded in opposition to the Motion for Judgment on October 25, 2011. The Defendant, in her Answer, admitted to signing a mortgage and admitting to failing to pay monthly payments of the mortgage when due. However, the

Defendant is “unable to determine with any accuracy the amount of the principle sum remaining as of July 13, 2001[,] and is unable to determine when interest began to accrue on any past due payments.”<sup>1</sup>

A hearing was held before this Court on November 1, 2011, and parties submitted briefing on the insufficiency of Defendant’s Answer.

### **Standard of Review**

The Court may grant summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to summary judgment as a matter of law.”<sup>2</sup> The moving party bears the initial burden of showing that no material issues of fact are present.<sup>3</sup> Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.<sup>4</sup> In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.<sup>5</sup> “Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the

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<sup>1</sup> Def. Answ., ¶ 4.

<sup>2</sup> Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>4</sup> *Id.* at 681.

<sup>5</sup> *Burkhart*, 602 A.2d at 59.

circumstances.”<sup>6</sup>

### Discussion

Pursuant to Superior Court Civil Rule 56, summary judgment is appropriate in this case. Plaintiff, as the moving party, is required to show that there are no genuine issues of material fact.<sup>7</sup> In the *scire facias sur* Mortgage Complaint, Plaintiff alleges Defendant is in default of her Mortgage, in the amount of \$215,596.26 with interest, late charges, counsel fees, costs and all other sums due or which become due under the Mortgage.

First, “[a] lender may accelerate a mortgage for a default in payments on principal, interest or taxes if provided for in the mortgage contract. The purpose of an acceleration clause is solely to protect the lender.”<sup>8</sup> Defendant submits that she received notice of Plaintiff’s intention to accelerate the Mortgage.

Second, Defendant, in her Answer, failed to assert a legally recognized defense in a *scire facias sur* mortgage action. Pursuant to Superior Court Civil Rule 8, Defendant must answer the complaint with legal defenses.

In a *scire facias sur* mortgage foreclosure action, the Delaware

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<sup>6</sup> *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at \*1 (Del. Super. Apr. 26, 2006).

<sup>7</sup> Super. Ct. Civ. R. 56.

<sup>8</sup> *Jeffery v. Seven Seventeen, Corp.*, 461 A.2d 1009, 1010 (Del. 1983) (internal citations omitted).

Supreme Court held that the permitted defenses are limited.<sup>9</sup> Generally, “only those claims or counterclaims arising under the mortgage may be raised in a *scire facias sur* mortgage foreclosure action.”<sup>10</sup> A defendant may plead payment or satisfaction, or avoidance of the mortgage.<sup>11</sup> A plea in avoidance must “relate to the mortgage sued upon, i.e., the plea must relate to the validity or illegality of the mortgage documents.”<sup>12</sup> These include acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.<sup>13</sup>

Here, Defendant did not plead payment, satisfaction or avoidance of the mortgage in her Answer. She admits to the existence of the Mortgage, and failure to pay, but is unable to determine the accuracy of the amount owed. Defendant has failed to set forth specific facts that a genuine issue of material fact exists and she has raised no defenses that may be properly asserted in an action for *scire facias sur* mortgage. Plaintiff’s Motion for

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<sup>9</sup> *Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass’n of Norwalk*, 520 A.2d 669 (Del. 1986), *aff’g* 1986 WL 9916 (Del. Super. Ct. Sept. 9, 1986) (citing *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 895-96 and 10 *Del. C.* § 5061).

<sup>10</sup> *Harmon v. Wilmington Trust Co.*, Del. Super., C.A. No. 94L-10-004, Walsh, J. (June 19, 1995) (holding that post-default collections of rents by bank had no relation to mortgagor’s pre-default obligations on the same mortgage).

<sup>11</sup> *Christiana Falls, L.P.*, 520 A.2d at 669.

<sup>12</sup> *American Nat. Ins. Co. v. G-Wilmington Associates, L.P.*, 2002 WL 31383924, at \*2 (Del. Super. Ct. Oct. 18, 2002).

<sup>13</sup> *Id.*

Summary Judgment must be **GRANTED**.

**Conclusion**

Based on the foregoing, Plaintiff's Motion for Summary Judgment is  
**GRANTED.**

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.