

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

BAC Home Loans Servicing, LP)
FKA Countrywide Home Loans)
Servicing LP Assignee of Mortgage)
Electronic Registration Systems,)
Inc. as Nominee for Countrywide)
Bank FSB)

Plaintiff,)

v.)

Ali Bas and Ayten Bas,)

Defendant.)

C.A. No. 10L-10-037 CLS

Date Submitted: June 14, 2011

Date Decided: September 14, 2011

On Defendant's Motion for Summary Judgment – **GRANTED.**

ORDER

Sarah M. Rutigliano, Esq., Lisa Keil Cartwright, Esq., 913 N. Market Street,
Suite 1011, Wilmington, DE 19801, Attorneys for Plaintiff.

Ali Bas, Ayten Bas, 212 Deep Creek Terrace, Wilmington, DE 19806,
Pro se.

Scott, J.

Introduction

Before the Court is Plaintiff's, BAC Home Loans Servicing ("Plaintiff"), Motion for Summary Judgment pursuant to Superior Court Civil Rule 56. The Defendants, Ali and Ayten Bas ("Defendants"), responded *pro se* in opposition to the Motion for Summary Judgment. The Court has reviewed the parties' submission and for the reasons discussed below, the Plaintiff's Motion for Summary Judgment is **GRANTED**.

Facts

This is a mortgage foreclosure action arising from Defendants' Mortgage with the Plaintiff. On August 28, 2007, Defendants executed and delivered the Mortgage to Plaintiff. Mortgage Electronic Registration Systems, Inc. ("MER") is the nominee for Countrywide Bank FSB. For valuable consideration, MER assigned its entire interest in the Mortgage to BAC. Plaintiff argues, and Defendants admit, that Defendants failed to pay their required monthly installments of the Mortgage. Plaintiff informed Defendants that failure to pay the arrearages due would cause acceleration of the Mortgage's total balance. Neither the arrearages nor the default have been paid by the Defendants.

On October 4, 2010, Plaintiff filed a Complaint ("Complaint") against Defendants seeking foreclosure on the property located at 212 Deep Creek

Terrace, Bear, Delaware 19701 (“Property”). The Defendants, in their Answer, admitted and acknowledged their failure to pay the monthly installments of the Mortgage when due.¹

Based on Defendants failure to pay the Mortgage, Plaintiff moved for summary judgment on May 16, 2011. Specifically, Plaintiff alleges that by failing to pay the Mortgage, the Plaintiff, upon notice and opportunity to cure, may accelerate the sum secured by the Mortgage and foreclose on the property. Plaintiff sent a letter to Defendants on February 3, 2011, requesting Defendants provide financial documents for the possibility of a mortgage workout agreement. As of May 13, 2011, Plaintiff did not receive financial documents from the Defendants.² Plaintiff argues there is no genuine issue of material fact because Defendants admit and acknowledge the amount due on the Mortgage.

Defendants filed their Response in Opposition to Plaintiff’s Motion for Summary Judgment on June 14, 2011. In their opposition, Defendants claim they asserted defenses in their Answer and Plaintiff received financial documentation on February 23, 2011. In addition, they claim that they are “in review for a modification with the plaintiff and is applying for alternate

¹ Defendants, in their Answer, explain their inability to pay their Mortgage as anticipated due to their Mother-in-law’s illness and the loss of their business. Defs. Answ., at ¶ 4.

² Defendants argue that they provided the financial documents on February 23, 2011. No copy of such documents, however, was attached to their Response in Opposition of Plaintiff’s Motion for Summary Judgment.

assistance with the Delaware Emergency Mortgage Assistance Program.”³

Therefore, Defendants argue there is a genuine issue of material fact.

Defendants wish to correct the default and establish a workout agreement.

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 party is entitled to summary judgment as a matter of law.”⁴ The moving party bears the initial burden of showing that no material issues of fact are present.⁵ 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.⁶ In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.⁷ “Summary judgment will not be granted when a more thorough

³ Defs. Resp. to Mot. Summ. J., at ¶ 5. The Defendants did not provide any documentation supporting their claim that they applied for alternate assistance with the Delaware Emergency Mortgage Assistance Program.

⁴ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

⁵ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁶ *Id.* at 681.

⁷ *Burkhart*, 602 A.2d at 59.

inquiry into the facts is desirable to clarify the application of the law to the circumstances.”⁸

Discussion

Pursuant to Superior Court Civil Rule 56, summary judgment is appropriate in this case. The Plaintiff, as the moving party is required to show that there are no genuine issues of material fact.⁹ In the complaint, Plaintiff alleges that Defendants are in default of their Mortgage in the amount of \$129,920.27, in addition to interest, late charges, counsel fees, costs and other sums due under the Mortgage. Defendants were informed of Plaintiff’s intention to accelerate the balance due if the arrearages were not paid. “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.”¹⁰

Defendants’ replied “yes” to all allegations in Plaintiff’s Complaint and provided a justification for failure to pay their Mortgage in their Answer.¹¹ Pursuant to Superior Court Civil Rule 8, Defendants must answer

⁸ *Phillips-Postle v. BJ Prod., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Apr. 26, 2006) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

⁹ Sup. Ct. Civ. R. 56.

¹⁰ *Jeffery v. Seven Seventeen, Corp.*, 461 A.2d 1009, 1010 (Del. 1983) (internal citations omitted).

¹¹ Defs. Ans., at ¶ 4.

the complaint with legal defenses.¹² Here, Defendants' justification for failure to pay the amount of the Mortgage is not a legal defense.¹³ Thus, because Defendants admitted to defaulting on their Mortgage and their Answer does not contain a legal defense, Plaintiff, as the moving party, have shown, that no genuine issues of material fact exist.

The burden now shifts to the non-moving party to show there are genuine issues of material fact to deny this motion for summary judgment. The Defendants filed, *pro se*, their Answer and Response in Opposition to the Motion for Summary Judgment.

The Defendants' Answer to the Complaint and Response to the Motion for Summary Judgment raises no genuine issue of material fact. The fact that Defendants claim they are involved in a mortgage modification program does not suffice as to deny a motion for summary judgment. The Defendants have not claimed, nor have they presented any evidence, showing they are not in default of the Mortgage with Plaintiff. Instead, they admitted to the default in their Response in Opposition of Plaintiff's Motion for Summary Judgment and claim they desire to work out an agreement.

¹² See Sup. Ct. Civ. R. 8.

¹³ See *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 895–96 (Del. Super. 1973) (providing recognized defenses to a mortgage foreclosure action). The Delaware Supreme Court recently held in *Savage v. US Nat. Bank Ass'n* that failure to give notice of the assignment of a mortgage is not a valid defense to a foreclosure action. 19 A.3d 202, *2 (Del. 2011) (TABLE).

The reasoning behind their excuse for non payment does not create a genuine issue of material fact.

At this stage in the proceedings, upon reviewing the record in the light most favorable to the Defendants, the Court finds that there are no genuine issues of material fact. Therefore, the moving party, Plaintiff, is entitled to a judgment as a matter of law. Plaintiff's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

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