

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

U.S. Bank, N.A., as trustee on behalf)	
of Conseco Finance Home Equity Loan)	
Trust 2002-C (owner of loan)	
originated by Conseco Finance)	C.A. No. N13L-11-014 ALR
Servicing Corp.),)	
)	
Plaintiff,)	
v.)	
)	
M. Patricia Quinn,)	
)	
Defendant.)	

Submitted: October 13, 2014
Decided: October 21, 2014

Upon Defendant's Motion to Vacate Default Judgment: GRANTED.
ORDER

This case involves Plaintiff's foreclosure action for the property located at 319 Rothwell Drive, Wilmington, Delaware 19804. Plaintiff initiated the foreclosure action on November 4, 2013. On February 18, 2014, the Court entered Default Judgment in Plaintiff's favor and scheduled a Sheriff's Sale. On August 27, 2014, Defendant filed a Motion to Vacate Default Judgment pursuant to Superior Court Civil Procedure Rule 60(b)(6). The Court stayed the Sheriff's Sale by Order dated August 28, 2013, pending the resolution of this motion.

In consideration of Defendant's Motion to Vacate Default Judgment and Plaintiff's opposition thereto, the Court finds as follows:

1. In 2002, Vivian M. Quinn and John G. Quinn ("Mortgagors") executed and delivered a promissory note ("Note") and a Mortgage to secure the Note to Conseco Finance Servicing Corporation ("Mortgagee") for the property located at 319 Rothwell Drive.¹
2. In 2007, after Mortgagors died, all rights, title, and interests in the property transferred to Defendant.
3. In 2012, the Delaware General Assembly enacted legislation establishing a Mediation Program to afford homeowners facing foreclosure an opportunity to explore alternative resolutions in lieu of foreclosure.² The Mediation Program encourages parties to reach a mutual agreement in order to avoid foreclosure by meeting face-to-face to discuss "loss mitigation programs . . . along with other potential resolutions that may allow the defendant to continue to own the property."³
4. The Mediation Program statutorily mandates mediation for properties subject to foreclosure that are: (1) owner-occupied and (2) one-to-four

¹ Mortgagee assigned the Note and Mortgage to Plaintiff as trustee on or about June 11, 2013.

² 2nd Quarter Foreclosure Filing Data, from Joseph R. Biden, Att'y Gen., Del. Dep't of Justice, to the Honorable Anthony J. DeLuca, President Pro Tempore and the Honorable Robert F. Gilligan, Speaker (June 29, 2012).

³ Admin. Directive No. 2013-2 (Del. Super. May 28, 2013) (Vaughn, P.J.).

family primary residences, unless the seller of the property holds the mortgage.⁴ Contrary to Plaintiff's assertions, the statute does not require that Defendant be the name of the borrower on the Mortgage to qualify for mediation.

5. On August 16, 2012, Mortgagee notified Defendant of its intention to foreclose on the Mortgage if Defendant did not cure the default.
6. On June 11, 2013, Mortgagee assigned the Note and Mortgage to Plaintiff as trustee. Plaintiff then notified Defendant of its intention to foreclose on the Mortgage if Defendant did not cure the default.
7. Plaintiff filed a Complaint seeking judgment on the Mortgage *in rem* on November 4, 2013.
8. Plaintiff alleged that this foreclosure action was not subject to the Mediation Program.
9. Defendant did not answer or appear.
10. On December 3, 2013, a Deputy Sheriff personally served Defendant with a Scire Facias Sur Mortgage. Defendant again did not answer or appear.

⁴ 10 *Del. C.* § 5062C(b).

11. On February 18, 2014, the Prothonotary entered default judgment against Defendant upon Plaintiff's direction, pursuant to 10 *Del. C.* § 5063 and Rule 55(b)(1).⁵
12. On August 27, 2014, Defendant filed a Motion to Vacate the Default Judgment pursuant to Rule 60(b)(6) on the grounds that Defendant was entitled to the benefit of the Automatic Residential Mortgage Foreclosure Mediation Program ("Mediation Program"), codified at 10 *Del. C.* § 5062C.
13. In opposition, Plaintiff maintains that the property is ineligible for the Mediation Program because Defendant is not the named borrower on the Mortgage and Defendant is not an owner-occupier of the property.
14. It is undisputed that the property is a one-to-four family primary residence and that the seller of the property does not hold the Mortgage. Therefore, if the property is owner-occupied by Defendant, then the property must proceed through the Mediation Program as mandated by statute.
15. Plaintiff's contention that Defendant is not an owner-occupier of the property is inconsistent with Plaintiff's own actions from the inception of this foreclosure action. First, Plaintiff expressly states in its complaint that Defendant resides in the property and that "[a]ll of the rights, title, and interest . . . in and to the property was transferred by devise and or bequest to

⁵ The Court, by Order dated August 28, 2014, stayed the Sheriff's Sale scheduled for September 9, 2014, pending the outcome of Defendant's Motion to Vacate.

Defendant.”⁶ On March 18, 2014, a Program Administrator from the Foreclosure Mediation Program division of the Delaware Department of Justice notified Plaintiff that Defendant and the property matter qualify for the Mediation Program because the complaint specifically states that Defendant resides at the property. Plaintiff has not moved to amend the allegations in its complaint. Second, Plaintiff mailed all notices relating to the foreclosure action to Defendant at the 319 Rothwell Drive property address. Indeed, a Deputy Sheriff personally served Defendant with a copy of the Scire Facias Sur Mortgage at the 319 Rothwell Drive property address. Plaintiff cannot argue that Defendant was merely a Terre Tenant (a property owner who does not reside at the property),⁷ while also asserting to have properly served and notified Defendant at the same property.

16. The statutory requirements for mandatory mediation are met because Defendant is the owner-occupier of 319 Rothwell Drive, which is a one-to-four family residence, and the seller does not hold the mortgage. Therefore, because Plaintiff improperly identified the property as ineligible for mandatory mediation resulted in non-compliance with the statute, the default judgment should not have been entered. Defendant is entitled to participate in the Mediation Program.

⁶ Compl. ¶¶ 3, 7.

⁷ 10 *Del. C.* § 5061.

17. Furthermore, Pursuant to Rule 60(b)(6), the Court may relieve a party from a final judgment for “any reason justifying relief from the operation of the judgment.” The Court shall liberally construe the rule governing relief from a default judgment and any doubt regarding errors surrounding the judgment should be resolved in favor of the party seeking relief because public policy prefers resolution on the merits to resolution by default.⁸ When a judgment is void on its face the Court will not prevent the defendant from presenting its attack even if there is an unreasonable delay in doing so.⁹

18. The order of default judgment must be VACATED and the foreclosure action shall continue to mediation.

NOW, THEREFORE, this 21st day of October, 2014, Plaintiff’s default judgment is hereby VACATED. Defendant must file an Answer to the Complaint within 30 days of the date of this Order.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

⁸ *Model Fin. Co. v. Barton*, 188 A.2d 233, 234 (Del. 1963); *Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 353 (Del. Super. 1953).

⁹ *E.J. Hollingsworth Co. v. Cesarini*, 129 A.2d 768, 769-70 (Del. Super. 1957).