IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ONEWEST BANK, F.S.B.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 6559-ML
	)	
DONALD L. FEENEY, JR. and,	)	
LAVETTE SHAWANN FEENEY,	)	
Husband and Wife, and	)	
PATRICIA FEENEY,	)	
	)	
Defendants.	)	

MASTER'S REPORT
(Motion to Vacate Default Judgment)

Date Submitted: March 20, 2013
Draft Report: June 19, 2013
Final Report: June 27, 2013
Corrected Final Report: November 5, 2013

Seth L. Thompson, Esquire of Sergovic, Carmean & Weidman, P.A., Georgetown, Delaware; Attorneys for Plaintiff.

Dean A. Campbell, Esquire of The Law Office of Dean A. Campbell, LLC, Georgetown, Delaware; Attorneys for Defendants.

LEGROW, Master

INTRODUCTION

Before me is a motion by the defendants, Donald L. Feeney, Jr., LaVette Shawann Feeney, and Patricia Feeney, to vacate the default judgment this Court entered in favor of the plaintiff, OneWest Bank, F.S.B., on December 21, 2011. The issue is whether the defendants are entitled to reopen the default judgment that was entered after they failed to respond to a complaint filed by OneWest in June 2011 that sought, among other things, reformation of a defective mortgage between OneWest and the defendants. The defendants have established excusable neglect for their failure to answer the complaint and appear before the Court for a hearing on the motion for the default judgment, but have failed to present a meritorious defense to the action that would allow for the possibility of a different outcome to the litigation if the matter was heard on its merits. I therefore recommend that the Court deny the motion to vacate the default judgment.

FACTUAL BACKGROUND

The following facts are derived from the parties' papers filed with and in response to the motion, including all attached exhibits, as well as the underlying complaint, filed in this Court by OneWest on June 13, 2011. Donald and LaVette Feeney (also referred to as "the Feeneys" throughout this report) were married in February 1997 and were husband and wife for the entire period at issue. Patricia Feeney is Donald's mother.[1] On October 25, 2005, Patricia executed a deed conveying certain lands located at 28349 Warwick Road in Millsboro, Delaware (the "Property") to Donald and LaVette. The deed bore the names of Donald and LaVette as owners of the Property. According to the defendants,

[1] I use the parties' first names for the sake of clarity. No disrespect is intended.

on March 1, 2006, Donald and Patricia submitted loan application paperwork for a conventional 30-year, fixed rate mortgage to IndyMac Bank, F.S.B. ("IndyMac"). The defendants also assert that with their application, they submitted a signed Truth-in-Lending Disclosure Statement that indicated that the loan, which had a construction loan component, would be a fixed rate, not an adjustable rate, loan. IndyMac issued them a one year adjustable rate mortgage loan for $397,000.[2] The mortgage note associated with that loan ("the Mortgage") incorrectly listed Donald and Patricia as joint tenants and owners of the Property. That is, Donald and Patricia were listed as the mortgagors, while the deed listed Donald and LaVette as the owners of the Property.

Between 2006 and 2011, Donald and LaVette, with the help of an attorney who also had assisted them with the settlement of the deed conveying the Property, attempted several loan modifications with their lender. Ultimately their mortgage modification negotiations failed, and Donald and LaVette filed for Chapter 7 bankruptcy protection. On August 24, 2010, the United States Bankruptcy Court for the District of Delaware discharged certain of their debts.[3] In March 2010, the Mortgage was assigned to OneWest Bank, F.S.B., ("OneWest") when IndyMac was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation (the "FDIC") was named its conservator.

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[2] *See* Pl.'s Answ. to Mot. to Vacate Default J. (hereinafter "Pl.'s Answ."), Ex. A. In Part I of the Uniform Residential Loan Application, the ARM (type): 1 Yr. Arm box is checked.

[3] According to the Schedule D – Creditors Holding Secured Claims form that was part of the Feeneys' bankruptcy petition, the Feeneys listed the OneWest loan as a secured claim. In the Chapter 7 Statement of Intention – Husband's Debts – the property securing the Mortgage is described as a home at 28349 Warwick Rd. in Millsboro. According to that form, the property was to be surrendered in satisfaction of the debt. *See* Pl.'s Answ., Ex. C.

i. *The Default Judgment*

On June 13, 2011, OneWest filed in this Court a verified complaint against the defendants in which OneWest sought (i) reformation of the Mortgage such that it would list Donald and LaVette as the mortgagors, (ii) a constructive trust on the Property, and (iii) damages for unjust enrichment against Donald and LaVette, who according to the complaint, had defaulted on the Mortgage. The defendants did not file any response to the complaint, and on September 22, 2011, OneWest moved for default judgment under Court of Chancery Rule 55. Neither the defendants nor any attorney acting in their stead appeared at the default judgment hearing. On December 21, 2011, following the hearing on the motion for default judgment, this Court entered a default judgment against the defendants and in favor of OneWest. The default judgment reformed the Mortgage so that it bears the proper names of Donald and LaVette, or, in the alternative, ordered that the Property be held in constructive trust in favor of OneWest.

ii. *The Parties' Contentions as to the Present Motion*

On February 6, 2013, Donald and LaVette filed a motion to vacate the entry of default judgment under Court of Chancery Rule 60. With their motion, Donald and LaVette submitted an affidavit in which they swore that: (i) they believed that the attorney who had assisted them with the settlement of the deed and their attempts at loan modification would appear on their behalf at the hearing for the default judgment; (ii) until early 2013, they were unaware that the default judgment had been entered against them; and (iii) since the default judgment was entered, to their knowledge, OneWest has

made no attempts to foreclose on the Mortgage or otherwise enforce the Mortgage.[4] In support of their statement that they believed their attorney, who does not represent the Feeneys in this motion, would appear on their behalf at the default judgment hearing, Donald and LaVette attach an email sent from that attorney on which Donald and LaVette were copied. In that email, which is dated October 25, 2011, the attorney told Donald and LaVette that he would be in touch with the attorney representing OneWest regarding the scheduling of any proposed hearing and that "[i]f a hearing is necessary, you will not have to attend. I will be attending as your attorney."[5] Donald and LaVette assert that, despite that email, their attorney did not appear at the default judgment hearing. The Feeneys only learned of the default judgment upon hiring new counsel to again attempt a mortgage modification. Donald and LaVette now argue that that they were the victims of predatory lending and fraud by IndyMac, that they were not actually eligible for the loan they received, and that their loan was a sub-prime loan based on a grossly inflated appraisal of the value of the Property conducted by IndyMac.

OneWest responds that the attorney on whom the Feeneys claim they relied was actually no longer serving as their attorney at the time of the default judgment hearing. To support that assertion, OneWest attaches a series of emails between the attorney and Seth L. Thompson, Esquire, who represented OneWest. In an email dated July 18, 2011,

[4] Mot. to Vacate Default J., Ex. C ¶ 3 – 5, 7.

[5] *Id*., Ex. B. Also attached to their motion is an email sent on October 24, 2011, one day before their attorney assured Donald and LaVette that they would not need to appear at the hearing, in which Donald and LaVette mention that Thompson has requested a hearing on the Motion for Default Judgment and state "[w]e aren't totally sure what this means so we'd appreciate any clarification you may be able to provide." *See id*., Ex. G. It was in response to this email from the Feeneys that their attorney told Donald and LaVette that they would not need to attend the hearing as he would be attending as their attorney.

the attorney identifies himself as representing the Feeneys and requests more time to file an answer to OneWest's complaint. On August 9, 2011, Thompson emailed the attorney to note that he had not entered his appearance in this action. On August 26, Thompson again emailed the attorney requesting an update and stating that "[m]y client is requesting that I file for the default."[6] On August 27, the attorney emailed Thompson stating that he "can file an answer next week (which would mostly admit the allegations) to keep the court action moving along."[7] On September 1, Thompson sent an email to the attorney stating that if he "could file an Answer, that would be appreciated."[8] Finally, in an email sent on December 19, 2011, the attorney requested a "courtesy copy of your Motion for Default" from Thompson and acknowledged that the motion was scheduled to be heard two days later, on December 21, 2011.[9] Thompson's reply to that email appears to attach the motion. OneWest argues that this chain of emails shows that the attorney no longer was representing the Feeneys by the time of the default judgment hearing. OneWest further contends that, as evidenced by the Affidavit of Mailing filed in this Court on December 20, 2011, on November 22, 2011, LaVette signed for both copies of the notice of the hearing that had been sent by certified mail. Based on these facts, OneWest argues that the Feeneys have not satisfied the requirements for the Court to set aside the default judgment.

[6] *See* Pl.'s Answ., Ex. B.
[7] *Id*.
[8] *Id*.
[9] *Id*.

LEGAL ANALYSIS

i. *Standard of Review*

When a default judgment results from a defendant's failure to respond, Delaware courts will err on the side of granting relief to promote the policy of deciding litigation on the merits.[10] In furtherance of this policy, the Court will resolve any doubts raised by the motion in favor of the moving party.[11] Although Delaware courts construe Rule 60 liberally, before a motion to vacate a default judgment will be granted, the movant must satisfy three elements: "(1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and (3) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted."[12] Because the first element is a threshold requirement, this Court will only consider the second and third factors if the defendants can give a satisfactory explanation for failing to answer the complaint, such as excusable neglect or inadvertence. Superior Court Civil Rule 60(b)(1) defines excusable neglect as "neglect which might have been the act of a reasonably prudent person under the circumstances." Court of Chancery Rule 60(b)(1) also lists excusable neglect as a reason for this Court to set aside a final judgment or

[10] *See Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (Del. 1977).
[11] *See Cohen v. Brandywine Raceway Assn.*, 238 A.2d 320, 325 (Del. Super. 1968).
[12] *Verizon Delaware, Inc. v. Baldwin Line Const. Co., Inc.*, 2004 WL 838610, at *1 (Del. Super. Apr. 13, 2004).

order. A judgment will not be vacated, however, where the defendant "has simply ignored the process."[13]

ii. *Gross Negligence of an Attorney is Excusable Neglect*

It is the defendants' burden to establish excusable neglect.[14] The Feeneys argue that they satisfy the requirements of excusable neglect because they relied upon the assurances of their attorney that he would represent them at the default judgment hearing, and that the attorney's failure to do so amounted to gross negligence. The Feeneys acknowledge that, generally, omissions or commissions by an attorney are imputed to the client.[15] They point, however, to the Superior Court's analysis in *Karman v. Board of Adjustment of Sussex County* to argue that the gross negligence of an attorney may justify the reopening of a case where there are other extenuating circumstances.[16] The *Karman* court relied on factors similar to those listed in *Nanticoke Memorial Hospital v. Uhde*[17] to determine whether the party had shown the requisite extenuating circumstances to justify relief from judgment. Although in *Nanticoke Memorial Hospital*, the Delaware Supreme Court was defining the factors that satisfy the "extraordinary circumstances" test under Rule 60(b)(6), which is a different standard than that applicable to Rule 60(b)(1), the Superior Court found these factors helpful in determining whether an attorney's mistake or neglect justified reopening a case. Applying those factors, I will consider: (i) whether the attorney's conduct amounted to gross negligence; (ii) whether the parties appear to

[13] *Stevenson v. Swiggett*, 8 A.3d 1200, 1205 (Del. 2010) (citing *Lee v. Charter Comm'ns VI, LLC*, 2008 WL 73720, at *1 (Del. Super. Ct. Jan. 7, 2008)).
[14] *See Apartment Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004).
[15] *See Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 169 (Del. 1970).
[16] 2005 WL 1155907, at *2 (Del. Super. Ct. Apr. 26, 2005).
[17] 498 A.2d 1071 (Del. 1985).

attach any significance to the dismissal; (iii) whether there is evidence that the notice of motion for default judgment was received by the defendants; and (iv) whether the passage of time appears to be prejudicial to OneWest.

Upon consideration of each of these factors, the Court finds that the Feeneys have shown that their neglect was excusable. First, there is evidence from which this Court could conclude that the attorney's conduct amounted to gross negligence. In October 2011, the Feeneys informed their attorney of the impending hearing for the motion for default judgment, and in an email responding to the Feeneys' inquiry about that hearing, the attorney assured them that if any hearing is necessary, they would not have to attend and that he would attend on their behalf.[18] The Feeneys' decision to rely on their attorney's assurance that he would appear on their behalf was one of a reasonably prudent person. The attorney had been acting as counsel to the Feeneys in their attempts to modify their mortgage for several years before this hearing. Further, the attorney's failure to file an answer to OneWest's complaint, despite his repeated assurance to Thompson that he would do so, constitutes an extreme departure from the exercise of ordinary skill and knowledge by an attorney.[19] As such, the attorney's conduct in his handling of the motion for default judgment was grossly negligent and his actions cannot be imputed to the defendants.

[18] Mot. to Vacate Default J., Ex. B. and Ex. G.

[19] Gross negligence is a higher level of negligence representing "an extreme departure from the ordinary standard of care." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (2d ed. 1955). *See also Spates-Moore v. Henderson,* 305 F. App'x 449, 450-51 (9th Cir. 2008) (describing the defense attorney in *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002), who committed gross negligence when he "abandoned his duties as an attorney" by failing to file papers, failing to oppose a motion to strike his answer, and failing to attend hearings, and noting that these actions were so egregious they could not "be characterized as simple attorney error or mere neglect.") (internal quotation marks omitted).

Second, it appears that neither party has attached significance to the default judgment order. In an affidavit attached to their motion to vacate, Donald and LaVette aver that they were unaware of the order until it was discovered in early 2013 by the new attorney they hired to attempt to reopen negotiations for a mortgage modification. For its part, it appears that OneWest has not foreclosed on the Mortgage despite the relief granted in the default judgment order. The third factor relates to notice to the defendants. Though LaVette received notice of the hearing, she would not reasonably infer from that notice that her attorney would not appear on her and Donald's behalf as he had promised. LaVette signed the certified mailing containing the notice of the hearing only one month after learning from her attorney that he would appear at any required hearing. Therefore, that notice alone would not raise the suspicion of a reasonably prudent person that the attorney had stopped serving as counsel to the Feeneys or that he was going to fail to appear on the Feeneys' behalf at the upcoming hearing. Fourth, I cannot conclude that the passage of time has been prejudicial to OneWest. Indeed, in its response to this motion, OneWest does not even attempt to argue that it is has been prejudiced by the amount of time that has passed since the default judgment was entered.

These factors persuade me that the Feeneys' neglect is excusable. In cases where Delaware courts have refused to reopen a matter, there often is an element of tactical neglect.[20] There is no evidence that such calculated decision-making occurred here, nor

[20] *See, e.g., Karman v. Board of Adjustment of Sussex County*, 2005 WL 1155907, at *4 (Del. Super. Ct. Apr. 26, 2005) (noting that "[i]t seems that what happened here was more of a tactical decision than gross negligence"); *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *4 (Del. Ch. Sept. 21, 2011) (finding that "[i]n light of [the defendant's] tactical gambit of conceding in Delaware to litigate in New Jersey,

does it appear that Donald and LeVette simply ignored the process. Upon receiving the notice of the default judgment hearing, and not understanding what that notice meant, the Feeneys made the decision to contact an attorney they reasonably believed was representing them. They then relied on that attorney's word that he would appear on their behalf at any necessary hearing. OneWest has failed to argue that the passage of time since the default judgment was entered has prejudiced it in any way, and as such, the Court finds that LaVette and Donald's neglect in this matter was excusable.

iii. *The Defendants Have Failed to Present a Meritorious Defense*

Having carried their burden of demonstrating that their neglect was excusable, the Feeneys have satisfied the initial threshold inquiry. The second step in deciding a motion to vacate a default judgment requires the Court to determine whether the defendants have a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits.[21] The defendants' showing need not be definitive; the possibility of a different result will suffice.[22] The Feeneys offer three possible defenses to satisfy this inquiry. The first is that the assignment of the Mortgage to OneWest is void under Delaware law. Their second defense is that the Mortgage cannot bind the Property because the Mortgage lists Patricia and Donald as the mortgagors, but the Property is owned by Donald and LaVette as tenants by the entirety. Finally, their third argument is that the Mortgage was discharged when they successfully filed for bankruptcy. I will consider each of these defenses in turn.

[defendant] cannot claim that the default judgment … resulted from mistake, inadvertence, or excusable neglect").

[21] *Verizon*, 2004 WL 838610, at *1. *See also Battaglia*, 379 A.2d at 1135.

[22] *Williams v. Delcollo Elec., Inc.*, 576 A.2d 683, 687 (Del. Super. 1989).

a. The Assignment of the Mortgage to OneWest Was Proper and Is Not Void

Donald and LaVette first argue that because there is no recorded power of attorney authorizing Brian Bly, the FDIC's attorney-in-fact, to assign the Mortgage to OneWest, the assignment of the Mortgage is void. To support this argument, the Feeneys point to this Court's discussion in *Council of Unit Owners of Pilot Point v. Realty Growth Investors* of the requirements to create a power of attorney to sell or dispose of interests in real estate.[23] Specifically, the Feeneys rely on language in that decision which states that

> … 25 *Del. C.* §171 provides in its effect that a power of attorney to sell or dispose of interests in real estate must be acknowledged in the same manner as an acknowledgement required for a deed. In addition, 25 *Del. C.* §172 indicates that a power of attorney to sell and dispose of lands must be acknowledged and recorded in order to empower the attorney in fact to acknowledge a deed disposing of such interests.[24]

On appeal, the Delaware Supreme Court did not entirely adopt this recitation of the requirements for the creation of a power of attorney, explaining that the "Court of Chancery noted the pertinent statutes but they are silent as to the exact form of the power."[25] The Supreme Court went on to explain that "[a] power of attorney is a written authorization used to evidence an agent's authority to a third person. Although the terms of the authorization should be certain and plain, *absent statutory requirements, no form*

[23] 436 A.2d 1268 (Del. Ch. 1981).
[24] *Id*. at 1275.
[25] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del. 1982).

or method of creation is mandated."[26] Subsequent decisions from this Court have embraced this language.[27]

The statutory sections on which the Feeneys rely do not require recordation of a power of attorney that authorizes an attorney-in-fact to assign a mortgage to another entity. Section 171 provides in relevant part, "[a] letter of attorney *to sell or dispose of lands, tenements or hereditaments* … may be acknowledged or proved, and the acknowledgment or proof certified, as prescribed in this chapter in respect to the acknowledgment or proof of a deed." Similarly, Section 172 relates to "a letter of attorney *to sell and dispose of lands*," and does not address mortgages.[28] Thus, neither Section 171 nor Section 172 creates a requirement that a power of attorney to assign a mortgage must be recorded, and neither of those sections suggest that the absence of such a recorded instrument renders the assignment of a mortgage "void." The Court notes further that the assignment of the Mortgage was proper. Under 25 *Del. C.* § 2109(a), "[a]n assignment of a mortgage or any sealed instrument attested by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor." Exhibit E to the Feeneys' motion contains a copy of the signed notarized assignment of mortgage document. Finally, 29 *Del. C.* § 4321(1), another statute on which the Feeneys rely, limits that statutory definition of assignment to the terms of that title and does not apply to the case at hand. For these reasons, the Feeneys' contention that the assignment of the

[26] *Id*. (emphasis added)
[27] *See, e.g.*, *Pryor v. IAC/InterActiveCorp*, 2012 WL 2046827, at *5 (Del. Ch. June 7, 2012) (stating "as our Supreme Court has noted, absent statutory requirements, no form or method of creation [of a power of attorney] is mandated").
[28] 25 *Del. C.* § 172 (emphasis added).

Mortgage to OneWest is void under Delaware law is not persuasive and that defense therefore does not offer the possibility of a different outcome if the default judgment is vacated.

b. That the Property is Held in a Tenancy by the Entirety is Not a Defense to Reformation

The Feeneys next argue that because the Property is held by Donald and LaVette as tenants by the entirety, the Mortgage, which lists Donald and Patricia as the mortgagors, cannot be enforced against the Property because the creditor of one spouse may not place a lien on real property held as tenants by the entirety.[29] But, as OneWest points out, the underlying complaint did not seek to enforce the Mortgage. Rather, the complaint sought reformation of the Mortgage so that it would reflect the true intent of the parties, which was to use the Property held by Donald and LaVette as collateral for the Mortgage. Equitable reformation of a formal document is designed to effectuate the original intent of the parties.[30] Reformation is appropriate upon a showing that the parties were laboring under a mutual mistake or, in appropriate cases, a unilateral mistake on the plaintiff's part coupled with knowing silence on the defendant's part.[31] The agreement as executed must stand unless the party seeking reformation can, by clear and

[29] In support of this proposition, the defendants cite to *Steigler v. Insurance Co. of North America*, 384 A.2d 398, 400 (Del. 1978) (explaining that for land title held in a tenancy by the entirety, "husband and wife are seized, not merely of equal interests, but of the whole estate during their lives and the interest of neither of them can be sold, attached or liened except by the joint act of both husband and wife") (internal quotation omitted).

[30] *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990).

[31] *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 2013 WL 1914714, at *8 (Del. May 9, 2013) (holding that under Delaware law, "reformation based on unilateral mistake is available where a party can show that it was mistaken and that the other party knew of the mistake but remained silent" and overruling any additional requirements) (internal quotation omitted).

convincing proof, provide the Court with a clear understanding of how the intended agreement conflicts with the formal instrument.[32] OneWest claims that it was the intention of its predecessor lender, IndyMac, and all three defendants that the Property would serve as collateral for the Mortgage. The Feeneys do not claim otherwise nor do they argue that reformation would be inappropriate. Rather, the Feeneys assert that because LaVette was not a party to the Mortgage, it cannot be reformed to include her as mortgagor. The Feeneys do not cite any authority to support that proposition, nor does existing law appear to support it. "Reformation allows a court of equity 'to make an erroneous instrument express correctly the real agreement between parties.'"[33] The record before the Court shows that Donald and LaVette attempted to modify the Mortgage terms over the course of several years. This evidence strongly suggests that it was the intention of the parties for Donald and LaVette to be the mortgagors. Regardless, the Feeneys' argument that Donald's status as mortgagor cannot bind the Property does not serve as a defense to an action for reformation of the Mortgage note. As such, the Feeneys are unable to show how they would succeed on this argument.

c. The Mortgage Was Not Discharged in Bankruptcy

Finally, the Feeneys assert that because the Mortgage was defective at the time they filed for bankruptcy, it effectively was an unsecured debt that was discharged upon receiving their bankruptcy order. This argument also must fail. First, as OneWest points out, in their Chapter 7 Statement of Intention, the Feeneys swore that the home at 28349

[32] *Hob Tea Room v. Miller*, 89 A.2d 851, 857 (Del. 1952).
[33] *Rudnitsky v. Rudnitsky*, 2000 WL 1724234, at *9 (Del. Ch. Nov. 14, 2000) (citing *Colvocoresses v. W.S. Wasserman Co.*, 28 A.2d 588, 589 (Del. Ch. 1942)).

Warwick Road was securing the debt owed to OneWest.[34] The Statement of Intention also shows that the Feeneys intended to surrender the property and that it was not claimed as exempt.[35] As such, it does not appear that the Feeneys actually believed that the Mortgage was an unsecured debt dischargeable in bankruptcy at the time they filed for Chapter 7 protection.

Moreover, the Feeneys appear to miss the fact that there are *two* types of mortgages, legal and equitable. "A mortgage is a conveyance of an estate, by way of pledge for the security of debt, and to become void on payment of it."[36] The *sine qua non* of a "mortgage" is not the form of the document but the intention of the parties to secure a debt with a pledge of real property.[37] In fact, the Delaware "form of mortgage" statute explicitly states that documents not conforming to its prescribed pattern may nevertheless be valid and fully effectual.[38] The Delaware Supreme Court has expressly recognized this Court's "equitable power to disregard defects in the execution of a mortgage" pursuant to the principles that (1) "equity regards substance rather than form," and that (2) "equity regards that as done which in good conscience ought to be done."[39]

[34] Pl.'s Answ., Ex C.
[35] *Id*.
[36] *Handler Const., Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356, 363 (Del. 1993) (citing 4 Kent, *Commentaries on American Law* *135 and *Fox v. Wharton*, 5 Del. Ch. 200, 226 (1878)).
[37] *See Handler Const., Inc.*, 633 A.2d at 363 (citing *Hall v. Livingston*, 3 Del. Ch. 348, 373-74 (1869)).
[38] 25 *Del. C.* § 2101(c).
[39] *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983).

Consequently, an equitable lien would have arisen from the Feeneys' defective mortgage and as such it would not be an unsecured loan that was discharged in bankruptcy.[40]

iv. *No Prejudice to OneWest*

Though the Court previously found that OneWest would not be prejudiced by a decision to reopen this default judgment, that finding is irrelevant where the Court has also found that the defendants have no meritorious defense to the underlying action.

CONCLUSION

Because I find that none of the Feeneys' defenses would change the outcome of this litigation, I recommend that the Court deny the motion to vacate the default judgment. This is my final report in this matter. Exceptions may be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery

[40] 4 Pomeroy's Equity Jurisprudence § 1237 (5th ed. 1941) (explaining that even though some informality or defect renders a mortgage invalid, it will nevertheless generally create an equitable lien upon the property).