IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,	:	C.A. No. 05L-06-008 WLW
Plaintiff,	:	
v.	:	
EARL STRONG,	:	
Defendant.	:	

Submitted: August 5, 2011
Decided: October 19, 2011

ORDER

Upon Defendant's Motion to Reopen and
Vacate Default Judgment.
Case Dismissed Without Prejudice and
Transferred to Chancery Court.

Thomas D. H. Barnett, Esquire, Atlantic Law Firm, Georgetown, Delaware; attorney for the Plaintiff.

Earl Strong, *pro se*.

WITHAM, R.J.

FACTS

Earl Strong (hereinafter "Defendant") entered into a mortgage agreement with MIT Lending on October 22, 2004, which named Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS" or "Plaintiff") as a nominee. In exchange for a loan in the amount of $205,277.00, Defendant agreed to a mortgage on his property at 11 Gooseneck Lane, Smyrna, Delaware. The agreement provided that Defendant would make monthly payments of $1,133.55.

Defendant failed to tender payments as required, and MERS filed a foreclosure action on June 10, 2005. Default judgment was entered on November 3, 2005. MERS filed a writ of levari facias on January 31, 2006. The foreclosure was halted due to an automatic stay when Defendant filed for bankruptcy. Plaintiff received relief from the automatic stay on October 24, 2007, but Defendant filed a second bankruptcy petition on August 13, 2008, resulting in another stay. The second bankruptcy case was dismissed on September 4, 2008. Defendant subsequently filed for bankruptcy a third time on July 1, 2009, resulting in yet another stay. Plaintiff obtained relief from the third automatic stay on May 5, 2010. According to Plaintiff, it "received a recorded assignment in favor of Wells Fargo Bank" on November 23, 2010. Plaintiff filed a writ of levari facias in the name of Wells Fargo Bank on January 11, 2011.

This Court held a hearing on March 25, 2011. In a letter dated March 28, 2011, the Court directed Plaintiff's lawyer to submit a memorandum detailing the history of the mortgage and explaining the significance of the assignment. The Court

informed Defendant that he could file a motion to vacate default judgment if he wished to contest its legitimacy. Plaintiff filed a short response on April 8, 2011, which did not explain why the assignment was valid. Instead of filing a memo with the Court explaining the history of the mortgage up to the current date as directed, Plaintiff submitted an amalgam of papers that apparently constituted its file for this case. Defendant's motion to reopen and vacate the default judgment, filed on April 12, 2011, rambled and did not comply with Court standards. It appeared to challenge the validity of the assignment on the basis that it is inconsistent with the terms of the original mortgage agreement. It also appeared to argue that the assignment somehow divested MERS of the authority to foreclose on the property. Plaintiff filed a proper memorandum on June 30, 2011 as was originally ordered on March 28, 2011.

In this memorandum, Plaintiff provides a copy of the mortgage and a copy of the note without the second page. Plaintiff also discusses the history of the mortgage and the note and the present legal issue regarding assignment.[1] Plaintiff's memorandum appears to invalidate Defendant's claims of fraud and forgery as Plaintiff presented the Court with exhibits evidencing Defendant's attempts at a loan modification and what appears to be a reaffirmation agreement filed in the U.S. Bankruptcy Court in Delaware, though it is not signed by a bankruptcy judge. This

[1]There is an outstanding issue regarding the mortgage/loan assignment. The note was assigned to Wells Fargo on November 15, 2010, which had been the servicer of the MERS mortgage up to that point. The original complaint and default judgment is in the name of MERS. Plaintiff suggests two possible solutions: 1) as the assignment is alleged to have been filed in error, vacate it through filing a motion; or 2) let the assignment stand and substitute Wells Fargo, N.A., as plaintiff.

Court sees little merit in any of Defendant's claims. Given the contentious nature of this litigation, the Court has carefully examined the loan documents. A much more significant issue is present. The mortgage and note do not appear to be properly sealed, and thus, there is a jurisdictional issue for this Court

Standard of Review

A mortgage must be under seal for it to be enforced at law.[2] Valid mortgages not under seal may be enforced in equity.[3] The word "seal" pre-printed to the right of the space reserved for a signature is sufficient to constitute a sealed instrument when signed.[4] "Other [Superior Court] decisions have held the inclusion of the word 'seal' near the signature coupled with a clause stating that the parties are signing and sealing the document is sufficient."[5] Nevertheless, the Delaware Supreme Court has asserted that mere use of the words "witness my hand and seal," or words of similar import do not make the instrument one under seal.[6]

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[2]*Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734, 736-38 (Del. 1983).

[3]*Id.* at 736-37.

[4]*Bank of New England, N.A. v. Blue Ball Properties, L.P.*, 1991 WL 35693 (Del. Super. Mar. 6, 1991).

[5]*Id.* at *1.

[6]*Monroe Park*, 457 A.2d at 738 n.5; *see also Armstrong v. Pearce*, 5 Del (5 Harr.) 351, 352 (Super. 1851) ("The expression in the body of the note 'witness my hand and seal,' does not make the seal; and there is not even any thing to leave to the jury, to show there was ever a seal made to the note.").

The Court may raise the issue of subject matter jurisdiction *sua sponte*.[7] Delaware Superior Court Civil Rule 12(h)(3) states: "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."

Regarding transfer of a case to a court with jurisdiction, 10 Del. C. § 1902 states in pertinent part:

> No civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected, within 60 days after the order denying the jurisdiction of the first court has become final, files in that court a written election of transfer, discharges all costs accrued in the first court, and makes the usual deposit for costs in the second court.

CONCLUSION

After review of the mortgage and the note, the only reference to a seal is above the signature line: "WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED." According to the precedents mentioned above, this mere recital is inadequate to form a sealed instrument. Thus, under Delaware law, the instrument can only be enforced at equity. Pursuant to Delaware Superior Court Civil Rule

[7] *Boyce Thompson Inst. v. MedImmune, Inc.*, 2009 WL 1482237, at *10 (Del. Super. May 19, 2009). The Court cites Delaware Superior Court Civil Rule 12(h)(3) along with several Delaware Chancery Court cases, the United States District Court for the District of Delaware, and the Third Circuit. *Id.* at n.78.

12(h)(3) and 10 Del. C. § 1902, this Court hereby dismisses this case, without prejudice, to be filed within 60 days of this Order in the Court of Chancery.

IT IS SO ORDERED.

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William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Thomas Barnett, Esquire
Mr. Earl Strong, *pro se*
File