

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

CITIMORTGAGE, INC.)	
)	
Plaintiff,)	C.A. No. 09L-09-377 CLS
)	
v.)	
)	
JONATHAN I. KINE and)	
PURNIMA R. KINE,)	
)	
Defendants.)	

Date Submitted: August 8, 2011
Date Decided: November 1, 2011

On Plaintiff's Motion for Partial Summary Judgment against
Purnima R. Kine.
GRANTED.

ORDER

Lisa R. Hatfield, Esq., Morris, Hardwick & Schneider, LLC, 284 East Main Street, Newark, Delaware 19711.
Attorney for Plaintiff.

J Jackson Shrum, Esq., Archer & Greiner, P.C., 300 Delaware Avenue, Suite 1370, Wilmington, Delaware 19801.
Attorney for Defendant, Purnima Kine.

Scott, J.

Introduction

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

Facts

This is a mortgage foreclosure action arising from Defendant's Mortgage with the Plaintiff. The Defendant delivered and executed a Mortgage on a residential property in Wilmington, Delaware. A mortgage agreement was executed on June 22, 2004, and recorded on June 24, 2004. Mortgage Electronic Registration Systems, Inc. ("MER") is the nominee for Commerce Bank, N.A. MER assigned its interest to Plaintiff on or about December 8, 2009.

On September 29, 2009, Plaintiff filed a *scire facis sur* Mortgage Complaint seeking judgment against the property and judicial sale for non-payment of the Mortgage. The Defendant, in her Answer, admitted to the existence of the Mortgage and to the terms and conditions within the Mortgage. However, the Defendant did not admit to defaulting on the

Mortgage. The Defendant also claims eight affirmative defenses¹ and a crossclaim² against Jonathan I. Kine (“Mr. Kine”).

Based on the Defendant’s failure to pay the Mortgage, Plaintiff moved for summary judgment on July 5, 2011. Specifically, Plaintiff alleges that by failing to pay the Mortgage, Plaintiff, upon thirty (30) days notice, may accelerate the sum secured by the Mortgage and foreclose on the property.³ Plaintiff argues there is no genuine issue of material fact because Defendant failed to provide a valid defense to the non-payment of the Mortgage and her crossclaim is not permitted.

Defendant filed her Response to Plaintiff’s Motion for Summary Judgment on August 8, 2011. First, Defendant claims in her opposition that she asserted legal defenses in her Answer that would prevent foreclosure. Second, on or about July 6, 2011, Defendant served Plaintiff with her First Set of Interrogatories and First Request for Production of Documents

¹ Defendant asserted the following affirmative defenses in her Answer: (1) the Complaint fails to state a claim upon which relief can be granted; (2) Plaintiff’s claims are barred by the doctrines of laches, waiver and/or estoppel; (3) the Complaint is barred by the applicable statute of limitations; (4) the Plaintiff’s claims are barred by the unclean hands doctrine; (5) the claims stated in the Complaint are barred by the doctrines of set-off and recoupment; (6) Plaintiff is not the proper party in interest and lacks standing to bring this action; (7) the claims in Plaintiff’s complaint are moot; and (8) Defendant reserves the right to assert additional defenses which may arise during the course of this litigation.

² The crossclaim alleges that Defendant is entitled to 60% of the marital property and title to the home at issue in this complaint shall be transferred to Defendant’s daughter.

³ While a Fair Debt Collection Practices Act notice was attached to the Complaint as Exhibit B, there is no information regarding when and to whom the letter was sent and whether it was received.

(“Discovery”).⁴ The Discovery requests were answered on August 30, 2011 by Plaintiff. Third, Defendant argues she lacks the requisite knowledge to agree or disagree with Plaintiff’s assertions (accounting, manner of default, validity of legal notices or acceleration) because her estranged ex-husband, Mr. Kine, maintained the books and records. Finally, Defendant argues that she never received the “Fair Debt Collection Practices Act” notice (“letter”). For these reasons, she asserts that genuine issues of material fact exist and summary judgment should be denied.

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.”⁵ The moving party bears the initial burden of showing that no material issues of fact are present.⁶ Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material

⁴ Defendant requested, among other things, all documents supporting Plaintiff’s claim, including the Note, all communications between Plaintiff and co-Defendant Jonathan I. Kine, and documents supporting or refuting the Defendant’s affirmative defenses. Defendant also requested documents that support the calculation of past due amounts, Mortgage payment history, and other related communications. Defs. Resp. to Mot. Summ. J., at ¶ 4, 8.

⁵ Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

⁶ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

issues of fact in dispute.⁷ In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.⁸ “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 circumstances.”⁹

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.¹⁰ In the *scire facias sur* Mortgage Complaint, Plaintiff alleges Defendant is in default of her Mortgage, with Mr. Kine, in the amount of \$137,335.40, with interest, late charges, and advances to the date of confirmation and reasonable attorney’s fees and costs.

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.”¹¹ While Plaintiff alleges that a letter was sent to Defendant to notify her of the

⁷ *Id.* at 681.

⁸ *Burkhart*, 602 A.2d at 59.

⁹ *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Apr. 26, 2006).

¹⁰ Super. Ct. Civ. R. 56.

¹¹ *Jeffery v. Seven Seventeen, Corp.*, 461 A.2d 1009, 1010 (Del. 1983) (internal citations omitted).

default in Mortgage payments and possible foreclosure, Defendant submits that she never received this letter. The letter was attached to the Motion for Summary Judgment. Thus, at some point, Plaintiff received the letter. Defendant also argues that she requested Discovery from Plaintiff that would support or oppose her legal defenses. This argument is meritless. Defendant requested discovery from Plaintiff on July 7, 2011. Plaintiff responded to the Discovery request on August 30, 2011.

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 Supreme Court held that the permitted defenses are limited.¹² Generally, “only those claims or counterclaims arising under the mortgage may be raised in a *scire facias sur* mortgage foreclosure action.”¹³ A defendant may plead payment or satisfaction, or avoidance of the mortgage.¹⁴ A plea in avoidance must “relate to the mortgage sued upon, i.e., the plea must relate

¹² *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).

¹³ *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).

¹⁴ *Christiana Falls, L.P.*, 520 A.2d at 669.

to the validity or illegality of the mortgage documents.”¹⁵ These include acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.

Here, Defendant asserted affirmative defenses and a counterclaim against Mr. Kine. The counterclaim did not relate to this mortgage action, as it concerned division of marital property. The affirmative defenses raised, some of which include equitable remedies, do not plead payment, or satisfaction or avoidance of the mortgage. Thus, Kine 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 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.

¹⁵ *American Nat. Ins. Co. v. G-Wilmington Associates, L.P.*, 2002 WL 31383924, at *3 (Del. Super. Ct. Oct. 18, 2002).