

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WELLS FARGO BANK, N.A., successor)
by merger with Wachovia Mortgage, FSB,)
fka World Savings Bank, FSB,)
)
Plaintiff,)
)
v.) C.A. No. 10L-08-214 JOH
)
LAWRENCE K. KENNEDY,)
)
Defendant.)

Date Submitted: April 5, 2012

Date Decided: July 16, 2012

Upon Motion of Plaintiff for Summary Judgment—GRANTED

Upon Motion of Defendant for Summary Judgment—DENIED

Kimberly E. C. Lawson, Esquire, Reed Smith, LLP, Wilmington, Delaware, Attorney for Plaintiff Wells Fargo.

Lawrence K. Kennedy, Bear, Delaware, *pro se* defendant.

HERLIHY, Judge

The Court has before it cross motions for summary judgment in this mortgage foreclosure action. While the defendant, Lawrence K. Kennedy (“Kennedy”), claims that he paid whatever was owed on the note secured by the mortgage on his property, the Court finds there is no genuine issue of material fact and further that a document upon which Kennedy relies to show he and the bank reached an accommodation is of very dubious authenticity. Plaintiff Wells Fargo Bank’s motion for summary judgment is GRANTED.

Factual Background

In July 2007, Kennedy borrowed \$59,500 from a predecessor in interest (through a series of merger and assignment transactions not at issue in this case) to Plaintiff Wells Fargo Bank NA, (“Wells Fargo”). That loan was secured by a mortgage on property at 102 West 23rd Street in Wilmington, Delaware. The loan was marketed as a “Pick-a-Payment Loan” which allowed the borrower to choose to pay an increased payment based on an accelerated self-amortizing 15-year schedule, the full amount due based on a normal self-amortizing 30-year schedule, only the accrued interest, or a “minimum payment” under which unpaid interest would be added to the outstanding principal, resulting in negative amortization of the loan.¹ Monthly loan statements sent to Kennedy itemized how payments would be applied among current and deferred interest, principal,

¹ Defendant’s Motion for Summary Judgment [hereinafter “Def.’s Mot.”], Exhibit E, World Savings Deferred Interest Acknowledgement (Bates Number WAC0160).

escrow deposits and late fees, depending upon which payment option he chose.² These payments all included sums that the lender deposited in escrow to pay taxes and insurance on the property. In addition to the adjustable rate feature of the loan, the monthly payments were scheduled to escalate over the first ten years of repayment, starting (in the case of the “minimum payment”) at \$219.33 and climbing (assuming no interest rate change) to \$562.62.³ The loan disclosure also provided that late payments would incur a late charge of six percent of the payment.⁴

At least as early as January of 2009, Kennedy consistently made payments less than the interest due and accrued late charges in doing so;⁵ thus, the loan was being negatively amortized, causing the outstanding principal balance to grow. In March of 2009, Wells Fargo’s predecessor in interest began sending automated letters notifying Kennedy of late or insufficient payments. Those letters suggested alternative arrangements, such as loan modification or assumption of the mortgage on sale of the property, and stressed the importance of bringing the loan current.⁶ On April 16, 2010

² Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment [hereinafter “Pl.’s Opp’n”], Exhibit B (Bates Numbers WAC0025, WAC0027, WAC0038 and WAC0046).

³ Def.’s Mot., Exhibit D, World Savings Federal Truth in Lending Disclosure Required by Regulation Z (Bates Number WAC0233).

⁴ *Id.*

⁵ Def.’s Mot., Exhibit B, Wachovia Mortgage Customer Account Activity Statement (Bates Numbers WAC0008 – WAC0016).

⁶ Pl.’s Opp’n, Exhibit C (Bates Numbers WAC0069-0072, WAC0074-77).

Wells Fargo sent Kennedy a letter notifying him of intent to foreclose.⁷ Wells Fargo contends that Kennedy defaulted on the loan on April 15, 2010 by failing to make payments for four consecutive months.⁸ After notifying Kennedy that it intended to foreclose on the mortgage, he attempted to tender a bank check (the “Reinstatement Check”) in the amount he thought was necessary to cure the default.⁹ The Reinstatement Check was insufficient to cure the default so Wells Fargo returned it to him and filed this foreclosure action on August 26, 2010.

Kennedy asserts in his Answer that he tendered the Reinstatement Check pursuant to an accommodation extended to him in a telephone conversation with a Wells Fargo employee on August 9, 2010. He claims Wells Fargo memorialized the agreed upon accommodation in a letter dated August 19, 2010 (the “Reinstatement Letter”).¹⁰

Procedural History

Kennedy’s claim about the Reinstatement Letter in his Answer raises the affirmative defense of payment.¹¹ The Court issued a Scheduling Order prescribing deadlines for discovery, filing of dispositive motions, and alternative dispute resolution. The dates in the Scheduling Order have been delayed after Kennedy failed to comply

⁷ Pl.’s Opp’n, Exhibit C (Bates Number WAC0078).

⁸ Plaintiff’s Motion for Summary Judgment [hereinafter “Pl.’s Mot.”], ¶ 1 and Exhibit A, Affidavit of Michael Dolan, ¶¶ 4-5.

⁹ Kennedy includes copies of receipts for the bank check and a money order and associated proof of mailing in his Answer as proof; *see* Defendant’s Answer, ¶ 2.

¹⁰ Defendant’s Answer [hereinafter “Def.’s Ans.”], Exhibit D.

¹¹ Def.’s Ans., ¶ 2; *see also* Super. Ct. Civ. R. 8(c).

adequately with Wells Fargo's discovery requests.¹² When Kennedy still failed to comply, Wells Fargo successfully moved the Court to compel Kennedy to provide the requested discovery. On December 14, 2011, Wells Fargo filed a motion for summary judgment, noting in it that Kennedy still had not complied with his discovery obligations, despite the Court's Scheduling Order and Order to Compel.¹³ The time for filing dispositive motions under the Court's revised Scheduling Order expired on December 15, 2011. On December 27, 2011, Kennedy filed a response to Wells Fargo's motion for summary judgment, and despite expiration of the time for filing such dispositive motions, filed his own motion for summary judgment on January 3, 2012. Wells Fargo responded in opposition to this untimely-filed motion on February 15, 2012. Thus, the Court is presently confronted with cross-motions for summary judgment supplemented by mutual opposing responses to them, and an affirmative defense of payment.

Parties' Contentions

In its motion for summary judgment, Wells Fargo argues that there are no genuine issues of material fact in dispute. With respect to the Reinstatement Letter, Wells Fargo provides an affidavit from one of its employees Mr. Michael Dolan (the "First Dolan Affidavit"), an operations analyst with personal knowledge of the bank's correspondence management system. The First Dolan Affidavit explains the codes and characteristics of

¹² As alleged by Wells Fargo, the highlights of this include failing to produce the original "Reinstatement Letter" or other specifically-requested correspondence and documentation sent or allegedly sent to Kennedy by Wells Fargo, and failing to account for or remit to Wells Fargo rental income that Kennedy may have been deriving from the property since commencement of the foreclosure process.

¹³ Pl.'s Mot., ¶ 8.

the bank's computer-generated borrower correspondence, and asserts that the Reinstatement Letter was not in fact generated by or sent to Kennedy from Wells Fargo. Wells Fargo also notes that during discovery, Kennedy failed to respond to its request for admission that he did not in fact receive the Reinstatement Letter from Wells Fargo, and under Superior Court Civil Rule 36, this assertion is, therefore, deemed admitted.¹⁴

Examining his response to Wells Fargo's motion for summary judgment and his own motion for summary judgment together, Kennedy asserts that Michael Dolan has not been properly qualified as an expert to testify as an affiant in the First Dolan Affidavit. He notes that several other loan documents lack some of the characteristics of the system-generated letters discussed in the First Dolan Affidavit, including a manually-signed certified letter sent by a Wells Fargo employee to him and a portion of an appraisal report. He also asserts that he was not behind, but was in fact ahead in his payment of the note. He additionally alleges that Wells Fargo has settled claims related to Pick-A-Payment mortgage loans in other jurisdictions.

In its opposition to Kennedy's untimely motion for summary judgment, Wells Fargo disputes Kennedy's claim that he was ahead in his mortgage payments, claiming that he is misinterpreting the Customer Account Activity Statement for the loan. Wells Fargo offers another affidavit from Michael Dolan (the "Second Dolan Affidavit") to explain the Customer Account Activity Statement in support of this, and to distinguish the characteristics of the system-generated letters from the other documents to which

¹⁴ Pl.'s Mot., ¶ 10; Super. Ct. Civ. R. 36(a).

Kennedy refers. After oral argument on February 29, 2012 on the cross-motions for summary judgment, Wells Fargo provided a third affidavit from Michael Dolan (the “Third Dolan Affidavit”) further explaining why the Reinstatement Letter could not have been generated by Wells Fargo’s correspondence management system.

Applicable Standard

Summary Judgment will only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹⁵ When cross-motions for summary judgment are filed, as here, the Court must still consider whether there is a genuine issue of material fact presented.¹⁶ If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.¹⁷ Further, in raising payment as an affirmative defense under Rule 8(c) in his Answer, Kennedy has assumed the burden of proving it.¹⁸

Discussion

Kennedy’s claim that he was actually ahead rather than behind in his mortgage payments is demonstrably incorrect as evidenced by the Customer Account Activity Statement for the period January 1, 2009 through November 24, 2010. Kennedy even admitted in his answer that “the tenants in my unit were having financial issues. I asked

¹⁵ *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 844 (Del. 1987).

¹⁶ *Empire of America v. Commercial Credit*, 551 A.2d 433 (Del. 1988).

¹⁷ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

¹⁸ See, e.g., *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. Supr. 2005).

for an extension to making the one payment coming due along with the deferred interest and fees.”

By consistently paying less than even the current interest due and doing so late, Kennedy built up late fees, past due amounts and arrearages in his escrow account that eventually absorbed every payment he made while still leaving those deficits unsatisfied. This circumstance is nowhere more evident than in the mortgage statement dated July 29, 2010 which Kennedy attached to his Answer, listing an amount of \$1564 due on August 15, 2010.¹⁹ Kennedy also attached to his answer a copy of a cashier’s check and mailing receipts for this amount, but on their face they reflect that they were not purchased or sent before September 8, 2010, nor received by Wells Fargo until September 9, 2010. Compound interest calculations arithmetically necessitate that any curative payment tendered after a stated due date will exceed the amount due on that stated due date; so without more, these documents do not establish an affirmative defense of payment.

Likewise, Kennedy’s quibbling with Michael Dolan’s qualifications to make the assertions he does in his affidavits is meritless. Wells Fargo is not putting him forward as an expert, but rather as the custodian of business records and an employee with personal knowledge of the operations of that particular dimension of its business. The affidavits are properly submitted and considered by the Court.

¹⁹ Def.’s Ans., Exhibit A.

Kennedy's observation that Wells Fargo has settled Pick-A-Payment mortgage loans in other jurisdictions may be true, but is irrelevant.²⁰ He even asserts that he is not a party or class member to any of those settlements, and points to no judgment or finding which could be used as a basis for collateral estoppel or *res judicata* as to the present claim.

In addition to the defense of payment and the meritless attack on Wells Fargo's affiant, Kennedy also claims that he reached an agreement with Wells Fargo as evidenced by the Reinstatement Letter. Wells Fargo provides solid independent grounds for disregarding the Reinstatement Letter. The Court is deeply troubled by Kennedy's submission of it in this matter. As Wells Fargo points out in its motion for summary judgment, Kennedy failed to respond to its request for admission that Kennedy did not in fact receive the Reinstatement Letter. Under Superior Court Civil Rule 36(a) his failure to respond to the request for admission can result in the Court considering the item admitted. The Reinstatement Letter includes numerous suspicious irregularities, including many highlighted by Wells Fargo in its Motion for Summary Judgment²¹ and others facially apparent to the Court itself. For example, every other system-generated letter in evidence is "signed" by the issuing department of Wells Fargo ("Loan Counseling Department," "Foreclosure Department," etc.) immediately before the debt collection notice at the end. Further, although the Court has thus far only been able to examine

²⁰ Kennedy provided no verification of this or how the so-called settlement has any relevance to this case.

²¹ See Pl.'s Mot., Exhibit A, Affidavit of Michael Dolan, ¶¶ 6-21.

electronic or photostatic copies of the letter and has not seen the actual documents generated and sent to Kennedy by Wells Fargo for comparison, it is curious that the letterhead of the copy submitted appears to be black-and-white despite the fact that color images on other parts of Kennedy's Answer were captured in the Court's filing system.

Given the possibility that Kennedy prepared or knowingly submitted this suspect document intending to perpetrate fraud upon the Court, the Court is sorely tempted to impose sanctions under from Rule 11 including costs and opposing counsel fees. Instead, a copy of this opinion will be sent to the Department of Justice for further investigation.

In sum, the Court is satisfied that the Reinstatement Letter is not a genuine document produced to evidence an accommodation offered by Wells Fargo. Kennedy's payment history and mortgage are attached to Wells Fargo's motion for summary judgment. Kennedy is in default on the loan and there are no genuine issues of material fact remaining in this case. Wells Fargo is entitled to judgment as a matter of law.

Conclusion

Defendant has not borne his burden of proof in raising the affirmative defense of payment, and no genuine issues of material fact remain that the mortgage is in default, therefore, Wells Fargo's motion for summary judgment is GRANTED. Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

J.