

Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

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November 26, 2013

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Mr. and Mrs. William W. Stevenson, III
1313 Idlewood Road
Wilmington, DE 19805

Submitted: August 27, 2013
Decided: November 26, 2013

RE: Citimortgage, Inc. v. William W. Stevenson, III and Linda M. Stevenson
C.A. No. N10L-09-311 JRJ

Upon Plaintiff's Motion for Summary Judgment – GRANTED.

Dear Counsel and Mr. & Mrs. Stevenson:

The Court has reviewed and considered Plaintiff's Motion for Summary Judgment and the Stevensons' opposition thereto.

On October 22, 2004, the Stevensons executed a mortgage (the "Mortgage") securing a loan (the "Loan") against real property located at 1313 Idlewood Road, Wilmington, Delaware 19805, Tax Parcel No. 07-035.20-166 (the "Property").¹ The Mortgage identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee and only as a nominee for the lender.² On September 22, 2010, MERS assigned the Mortgage to Citimortgage.³ Citimortgage later recorded the Mortgage in the New Castle County Recorder's office on October 17, 2010 - instrument number 20101007-0053628.⁴ The 30-year Loan secured by the Mortgage was for

¹ Pltf. Mot. for S.J. ("S.J. Mot."), Trans. ID 45517060, Ex. A, Mortgage Agreement ("Mort."), Ex. B, Aff. of Jeanne Pezold ("Pezold Aff.") ¶ 3.

² Mort.; Pezold Aff. ¶ 4.

³ Pezold Aff. ¶ 5; Mot. S.J., Ex. C, Mort. Assignment.

⁴ Mort. Assignment.

\$158,400.00 and payable at an annual interest rate of 6% until November 1, 2034.⁵ Pursuant to the Mortgage, if the Stevensons failed to make a payment when due, and failed to cure the nonpayment within 30 days, the mortgagee could accelerate all amounts due and foreclose upon the Property.⁶

On September 28, 2010, Citimortgage commenced this *in rem scire facias* mortgage action against the Stevensons for failure to make several mortgage payments.⁷ The Stevensons filed their Answer and Affidavit on November 4, 2010, asserting accord and satisfaction as their only affirmative defense.⁸ In their Affidavit, the Stevensons admit that they “fell behind two payments.” Under the express terms of the mortgage, this means they defaulted.⁹

A motion for summary judgment should be granted if the moving party establishes that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.¹⁰ While viewing the facts in a light most favorable to the non-moving party, the Court should accept all uncontroverted evidence as true.¹¹ Once the moving party has properly supported its motion, the burden shifts to the non-moving party to demonstrate that there exists material issues of fact so as to make summary judgment inappropriate.¹² The non-movant cannot create a genuine issue of fact with bare assertions or conclusory allegations, but must produce specific evidence that would sustain a verdict in its favor.¹³

The Court finds that there are no genuine issues of material fact in this case. The Stevensons have presented no evidence to show that they did not default on their monthly payments. In fact, the Stevensons expressly admitted that they “fell behind” on their Mortgage payments.¹⁴ The Stevensons’ evidence of payments made in June, July and September 2010 does not create an issue of material fact, rather it supports their admission that they “fell behind.”¹⁵ That harmonizes with Citimortgage’s own records that the Stevensons were behind on their payments and failed to cure the default.¹⁶ At that point, according to the express terms of the

⁵ Pezold Aff. ¶ 7; Compl., Trans. ID 33491353, ¶ 4; Stevensons’ Ans. to Compl., (“Ans.”), Nov. 9, 2010, Trans. ID 34271571, ¶ 4.

⁶ The parties’ Mortgage at ¶ 22 states:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement [in the Mortgage]. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date not less than 30 days from the date the notice is given to Borrower by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [Mortgage], foreclosure by judicial proceeding and sale of the Property.

⁷ Compl. ¶ 6.

⁸ Ans. at p. 2.

⁹ Stevensons’ Aff.

¹⁰ *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001); Super. Ct. Civ. R. 56.

¹¹ *Guardian Const. Co. v. Tetra Tech. Richardson, Inc.*, 583 A.2d 1378, 1381 (Del. Super. 1990).

¹² *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

¹³ *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁴ See Ans. at p. 3; Defts.’ post-hearing submission, dated Nov. 26, 2012, ¶ 7; Defts.’ Corrected Aff., dated Jan. 7, 2013, Trans. ID 48771735, ¶ 1.

¹⁵ Stevensons’ Mot. to Dismiss S. J. Mot. (“Stevensons’ Mot”) ¶ 5, Exs. D-F; See also Ans. at p. 3; Defts.’ post-hearing submission, dated Nov. 26, 2012, ¶¶ 7, 9; Defts.’ Corrected Aff., dated Jan. 7, 2013, Trans. ID 48771735, ¶ 1.

¹⁶ Pezold Aff. ¶¶ 8-10; See Stevensons’ Mot., Exs. G-H.

mortgage, Citimortgage was authorized to accelerate the Mortgage.¹⁷

While the Stevensons claim that Citimortgage agreed to an accord and satisfaction, there is no evidence to support it. The Stevensons have failed to present any evidence of an agreement between the parties that would make the foreclosure proceedings invalid. While the Stevensons allege the Loan was modified by an oral agreement, they also concede that Citimortgage never agreed to a modification or settlement.¹⁸ In a *scire facias* mortgage foreclosure action, “only those claims or counterclaims arising under the Mortgage may be raised.”¹⁹ Any available defenses are “limited to payment, satisfaction, absence of seal, or a plea in avoidance of the deed.”²⁰ The Stevensons’ argument that the Loan was modified by an oral agreement made during a telephone conversation with a Citimortgage employee, permitting additional monthly mortgage payments until the arrearages were paid, does not arise under the Mortgage, nor was it related to any actual payments made. Accordingly, the Stevensons are precluded by law from raising such defense.

Given the foregoing undisputed facts, the Court finds that Citimortgage is entitled to summarily enforce its foreclosure rights under the Mortgage.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ: mls
cc: Prothonotary

¹⁷ See *Jeffrey v. Seven Seventeen Corp.*, 461 A.2d 1009, 1010 (Del. 1983).

¹⁸ Ans. at p. 3-4; Defts.’ Second Aff., dated Jan. 7, 2013, Trans. ID 48771735, ¶ 3; Pezold Aff. ¶ 10.

¹⁹ *LaSalle Nat’l Bank v. Ingram*, 2005 WL 1284049, at *1 (Del. Super. May 19, 2005) (citation omitted); *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 895-6 (Del. Super. 1973)).

²⁰ *Id.*