

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

Vaughn W. Charlton and Deborah)	
C. Charlton,)	
)	
Plaintiffs,)	
)	
v.)	
)	
Ryan E. Gallo and Ryan Gallo Tree)	C.A. No. 08L-01-127 CLS
Service, Inc., a Delaware)	
Corporation,)	
)	
Defendants.)	

On Defendants' Motion to Dismiss. **DENIED.**

ORDER

Henry A. Heiman, Esq., 1000 West Street, 10th Floor, The Brandywine Building, Wilmington, Delaware 19899, Attorney for Defendants.

William P. Brady, Esq., 3200 Concord Pike, Wilmington, Delaware 19803, Attorney for Plaintiffs.

Scott, J.

This 29th day of May, 2009, it appears to the Court that:

1. On November 9, 2005, Defendant Ryan Gallo (“Gallo”) purchased property in Landenburg, Pennsylvania from Plaintiffs on behalf of his company Ryan Gallo Tree Service, Inc. (“Gallo Tree”). He executed the mortgage solely on behalf of Gallo Tree. He executed the promissory note on behalf of Gallo Tree and in his individual capacity.

2. In September 2007, Gallo stopped making payments under the Note. Plaintiffs filed a *Scire facias sur* mortgage action against Gallo and Gallo Tree on January 18, 2008 seeking relief *in rem* on the mortgage and *in personam* on the promissory note. On January 26, 2009, Gallo filed this Motion to Dismiss.¹ On April 24, 2009, Plaintiffs voluntarily withdrew their *in personam* claim from the Complaint.² The Court signed an Order dismissing the claim on May 9, 2009.³

3. Upon a motion to dismiss, the Court must accept all well-pleaded allegations from the complaint as true.⁴ If Plaintiff presents any reasonably conceivable set of facts susceptible of proof to support its claim, the motion against

¹ Mot. to Dismiss, Docket Item (“D.I.”) 15.

² Notice of Dismissal of Count I of Plaintiffs' Complaint, D.I. 22.

³ Order, D.I. 23.

⁴ *Velocity Exp., Inc. v. Office Depot, Inc.*, 2009 WL 406807 (Del. Super., Feb. 4, 2009), citing *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

it must be denied.⁵ A complaint will not be dismissed unless it is clearly without merit.⁶

4. Gallo claims that the mortgage foreclosure action must be dismissed for two reasons. First, he claims the Complaint was improperly filed because it asserts an *in personam* claim for which relief cannot be granted as part of a *Scire facias sur* mortgage action. Plaintiff's claim for *in personam* relief has been dismissed from the Complaint therefore this argument is moot.

5. Gallo next claims that the Complaint was improperly filed as a *Scire facias sur* mortgage action because it precludes him from raising certain defenses, such as *inter alia*, fraud in the inducement, fraudulent misrepresentation, and conspiracy. Under Delaware law, fraud may not be asserted as a defense in a *Scire facias sur* mortgage foreclosure action.⁷ Therefore, Gallo is required to bring his fraud in the inducement claim in a separate action. The failure to do so lies solely with Gallo and thus does not warrant dismissal of this action. Because Gallo fails to set forth a basis for dismissal, his motion is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

⁵ Velocity Exp., Inc. v. Office Depot, Inc., 2009 WL 406807 (Del. Super., Feb. 4, 2009), citing Spence v. Funk, 396 A.2d 967, 968 (Del.1978).

⁶ *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52, 58 (Del.1970).

⁷ *Quillen v. Sayers*, 482 A.2d 744, 748 (Del.1984), see *Clarkson v. Goldstein*, 2007 WL 914635 (Del. Super., Feb. 28, 2007) (Defenses that may be asserted in a *Scire facias sur* mortgage action are limited to satisfaction, payment, discharge, release, or the absence of a valid lien from the inception.).