IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHASE MANHATTAN MORTGAGE CORPORATION f/k/a ADVANTA NATIONAL BANK,	:	C.A. No. 03L-06-012 WLW
Plaintiff,	:	
v.	:	
GWEN MONTAGUE and WAYNE V. MONTAGUE,	:	
Defendants.	:	

Submitted: November 21, 2003
Decided: December 3, 2003

ORDER

Upon Plaintiff's Motion for Summary Judgment. Granted.
Upon Defendants' Motion to Amend Affidavit of Defense. Denied.

Janet Z. Charlton, Esquire of Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware, attorneys for the Plaintiff.

Richard H. Cross, Jr., Esquire and Mark D. Olivere, Esquire of Cross & Associates, LLC, Wilmington, Delaware, attorneys for the Defendants.

WITHAM, J.

Introduction

Before this Court is Plaintiff's Motion for Summary Judgment and Defendants' Motion to Amend the Affidavit of Defense. Defendant opposes Plaintiff's motion and Plaintiff opposes Defendants' motion.

Background

Gwen and Wayne Montague ("Defendants" or "Montagues") entered into a mortgage contract with Chase Manhattan Mortgage Corporation ("Plaintiff" or "Chase"). The Montagues fell behind on their mortgage payments in 2002. The Defendants mailed a check to Chase on March 28, 2003, for $2,500 in an attempt to bring their account up to date. Chase did not cash that check, but when Ms. Montague spoke with Chase on April 19, 2003, Chase advised that an additional $1,370 would be required to bring the account current. The $1,370 payment was made over the phone and Chase allegedly advised Ms. Montague that the funds would be withdrawn from her checking account on April 30, 2003 and that they would hold the $2,500 check until that date. Chase attempted to cash the $2,500 check on April 21, 2003, and the check was returned unpaid. On May 2, 2003, the $1,370 payment was presented and paid. The Montagues contend that they relied on Chase's statement that the check would not be cashed until April 30, 2003, and arranged their finances so funds would be available on April 30, 2003, but not prior to that date.

Chase filed a mortgage foreclosure action on June 18, 2003. In the Complaint, Chase demanded that the Montagues answer the allegations of the

Complaint by affidavit pursuant to Title 10, Section 3901 of the Delaware Code. On July 16, 2003, the Defendants filed an answer to the Complaint which failed to comply with the requirements of Title 10, Section 3901. Affidavits signed by the Montagues were attached to the answer, but the affidavits and answer did not satisfy the statutory requirements. On August 14, 2003, after the Plaintiff stipulated to allow Defendants to amend their answer, the amended answer was filed which included only an affidavit signed by Gwen Montague. The amended answer did set forth the specific nature and character of the defenses and the factual basis for the defenses, but did not specify the sum which the Defendants admit to be due and the sum in dispute. The Montagues merely stated that they believed they were responsible for payments and interest only until April 30, 2003, the date Chase stated they would cash the checks.

In October 2003, Chase filed this motion for summary judgment. Defendants filed a motion requesting to amend the affidavit of defense in November 2003. The Court heard arguments on both motions on November 21, 2003.

Analysis

Title 10, section 3901 states in relevant part

> (a) In all actions upon bills [and] notes . . . for the payment of money . . . and in all actions of scire facias on recognizances, judgments or mortgages, the plaintiff may specifically require the defendant or defendants to answer any or all allegations of the complaint by an affidavit setting forth the specific nature and character of any defense and the factual basis therefor, by the specific notation upon the face of the complaint that those allegations must be answered by affidavits.

> (b) If defense is to a part only of the cause of action, the defendant . . . shall, in such affidavit, specify the sum which the defendant . . . admits . . . to be due, and judgment shall be entered for the plaintiff at the plaintiff's election for the sum acknowledged to be due.[1]

The first issue is whether the affidavit of defense filed by the Defendants is sufficient. If it is not sufficient, the Court must then determine whether the motion to amend should be granted after the statutory time for filing the affidavit has expired.

The affidavit is insufficient.

Plaintiff requested that this Court grant a motion for summary judgment based on the Defendants' failure to comply with the requirements for an affidavit of defense. Specifically, the Defendants failed to have Mr. Montague execute a new affidavit for the amended answer and failed to specify the sum which the Defendants admit to be due.

In *Elmwood Federal Savings Bank v. Forest Manor Estates, Inc.*[2] the Superior Court concluded that the defendant was required to specify in its affidavit of defense the amount it admitted was due. As the Court stated, "Generalization does not satisfy the requirement for an affidavit of defense."[3]

The Montagues have admitted that they owe Chase for mortgage payments

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[1] 10 Del. C. § 3901 (2003).

[2] 621 A.2d 354 (Del. Super. Ct. 1992).

[3] *Id.* at 356.

and interest up to April 30, 2003. However, they contend that it is impossible for them to calculate the exact figure and that Chase has not provided them with the amount owed up to that date. It is clear that the Montagues owe Chase some amount and it is up to the Montagues to determine how much that is and include it in their affidavit of defense. Without specifying the sum they admit is due, when they clearly indicate that they owe Chase mortgage payments through the end of April 2003, the Defendants' affidavit of defense does not meet the statutory requirements of title 10, section 3901. In addition, the failure of one of the Defendants, Wayne Montague, to execute a new affidavit of defense with the filing of the amended answer renders the answer invalid under the same statute.

Amendment is not permitted.

The next issue for the Court to determine is whether amendment to the affidavit of defense should be permitted. Traditionally the Courts have prohibited amendments to affidavits of defense after the time for filing the original affidavit has passed.[4] More recently, the Courts have relaxed this rule. The Delaware Supreme Court has held that an amendment to an affidavit of defense should be permitted when the defect is purely technical in nature, the plaintiff was informed in the answer as to the nature of the defense and no unfair surprise or prejudice will result to the plaintiff from the amendment.[5]

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[4] *Hance Hardware Co. v. Howard,* 8 A.2d 26 (Del. 1939).

[5] *Donahue v. Ridge Homes,* 390 A.2d 413, 414 (Del. 1978).

In this case, the answer and affidavits filed by the Defendants set forth the defenses and the factual basis supporting those defenses. However, the amended answer did not include the affidavit of Wayne Montague and did not specify the sum the Defendants admit is due. The defects with the answer and affidavit are technical, particularly since the Plaintiff is on notice of the nature of the defense and would not be surprised by the changes proposed by the Defendants. However, the Defendants have already had one opportunity to amend their answer and affidavits in an attempt to comply with the statutory requirements. In addition, the affidavits of defense proposed by the Defendants and attached to their Motion to Amend still do not satisfy the statutory requirements. Again, the Defendants have failed to specify the sum they agree is owed to Chase.

While the Court disfavors the loss of substantive rights resulting from a technical error in pleadings, there must be a limit to the number of times a defendant may amend an affidavit of defense. Permitting a defendant to repeatedly amend an answer or an affidavit would result in prejudice to a plaintiff. The General Assembly adopted title 10, section 3901 in an attempt to "assure speedy disposition of claims of the type specified in the statute."[6] Permitting the Defendants to repeatedly amend the affidavit of defense would defeat the purpose of section 3901. Therefore, this Court concludes that the Defendants should not be permitted to amend, for the second time, the affidavits of defense. It is important to note that

[6] *First Federal Savings and Loan Association of Philadelphia v. Damnco Corp.*, 310 A.2d 880 (Del. Super. Ct. 1973).

even if the Court did allow the proposed amendment, the new affidavits still would fail to satisfy the statute.

Defenses fail on the merits.

In addition to the failure of the affidavits of defense, the Montagues' defenses fail on their merits. Chase cited a Superior Court case to support its contention that the absence of consideration rendered Chase's alleged offer to wait until April 30 to cash the check unenforceable. In *Seven Seventeen Corp. v. Jeffrey*,[7] the Court concluded that the mortgagee's offer to wait 15 days before instituting a foreclosure action was not binding upon the parties in the absence of consideration and granted summary judgment in favor of the mortgagee. Chase argued that the payment of $2,500 was tendered to Chase two weeks prior to the alleged promise to delay depositing it. Because it was an amount indisputably owed to Chase, there was no bargained for exchange. Chase spells it out clearly in its brief – the Montagues have not paid their mortgage and Chase should be entitled to foreclose.

Defendants assert that even in the absence of consideration, the facts support their defenses and that a sufficient factual dispute exists to overcome the summary judgment motion. In order to succeed on a claim for equitable estoppel, the Defendants must establish that (1) they lacked knowledge of and the means of learning the true facts; (2) they relied upon the conduct of the party against whom estoppel is asserted; and (3) they suffered a prejudicial change in position as a result

[7] 1982 Del. Super. LEXIS 1065 at *6.

of such reliance.[8] Defendants contend that they relied upon the promise of Chase that the funds would be withdrawn on April 30 and arranged their finances based upon the promise.

Defendants maintain that there is also sufficient evidence to support a claim of promissory estoppel. To establish this, the Defendants must establish that Chase made a promise with the intent to induce action or forbearance, that the Defendants actually relied on the promise, and that they suffered an injury as a result.[9] Defendants argue that Ms. Montague relied upon Chase's promise to delay depositing the $2,500 check and Chase's statement that the account would be up to date when she authorized the $1,370 check.

Both of these defenses fail because Ms. Montague was not relying on any promises by Chase when she wrote and mailed the $2,500 check to Chase. In addition, the Defendants have not established how they suffered injury based on Chase's alleged promises. Their mortgage payments were past due when the $2,500 check was mailed and the mortgage payments were still past due after Chase attempted to cash the $2,500 check. The foreclosure proceedings were instituted because the Montagues remained past due on their mortgage payments in June 2003.

Conclusion

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[8] *Id.* at *4.

[9] *VonFeldt v. Stifel Financial Corp.,* 714 A.2d 79 (Del. 1998).

Based on the foregoing discussion, Plaintiff's motion for summary judgment is ***granted*** on two bases: (1) the defective answer and affidavits of defense filed by the Defendants, and (2) the lack of merit of the defenses raised in the answer. In addition, Defendants' motion to amend is ***denied***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File