

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
P.O. BOX 746
GEORGETOWN, DE 19947
(302) 856-5257

March 11, 2004

Stephen W. Spence, Esquire
1200 N. Broom Street
Wilmington, DE 19806

VIA FACSIMILE AND US MAIL

John A. Sergovic, Jr.
P.O. Box 875
Georgetown, DE 19947

RE: Solomon v. Duggan, C.A. No. 92L-10-019

Dear Counsel:

This constitutes my decision on the motion of James P. Owings, Trustee (“Owings”) to intervene in the above-captioned mortgage foreclosure action and to stay the pending Sheriff’s Sale scheduled to take place on March 16, 2004.

The above-captioned matter was initiated in 1992, when Wilmington Savings Fund Society, FSB (“WSFS”) filed this action against defendant William T. Duggan (“Duggan”) seeking a mortgage foreclosure on property Duggan owned in Dewey Beach, Delaware (“the property”) and a judgment on the note secured by the property. Default judgment was entered on March 24, 1993, for \$160,418.86, plus UCC and mortgage satisfaction fees, plus prejudgment

interest from December 15, 1992 until the entry of judgment at the rate of 16% per annum, plus post-judgment interest at the rate of 16% per annum from the date of judgment until the date of the confirmation of the Sheriff's Sale, plus court costs. On May 3, 1993, WSFS filed a writ of levamur facias. A Sheriff's Sale was conducted, but the Court set it aside and ordered it void on June 30, 1993. On July 2, 1993, WSFS, in consideration of \$135,000.00 in hand paid, assigned to Daniel Solomon ("Solomon") the note and mortgage at issue and all rights accruing thereby.

Solomon filed a writ of levamur facias on October 20, 2003, but it was returned by the Sheriff because it was not in proper form due to problems with the named parties. A stipulation substituting Solomon as plaintiff and changing the caption to reflect this substitution was filed in December, 2003. Solomon then filed his next levamur facias on January 13, 2004. The writ shows that the debt is \$160,481.86, plus interest in the amount of \$279,029.20 with a per diem rate thereafter in the amount of \$73.14, plus costs and fees. This paperwork shows that Solomon is contending nothing has been paid on the note since 1993. Solomon has submitted an affidavit dated March 9, 2004, wherein he confirms that Duggan has not make any payments on the note. The Sheriff's Sale based on that execution is scheduled for March 16, 2004.

Meanwhile, Owings was seeking to recover monies from Duggan. In March, 1997, Owings and Duggan entered into a consent judgment which was recorded in the District of Columbia. The judgment, which included principal, interest from 1994 until July 12, 2002, and attorneys fees, totaled \$216,060.91. In September, 2002, Owings transferred his foreign judgment to Sussex County Superior Court. He commenced execution on his judgment in May, 2003. The property was sold at a Sheriff's Sale, but that sale was set aside in October, 2003, and a written order to that effect was entered on January 12, 2004.

On February 18, 2004, Owings filed the pending motion to intervene and stay Sheriff's Sale. He maintains as follows. If Duggan is able to sell the property, then Duggan may discharge Owings' judgment as a lien. Owings argues that the following events give rise to his suspicions that the mortgage actually was satisfied years ago or the amount owed is not the amount claimed in the writ of *levari facias*:

1) Solomon took no action to enforce the judgment for a period of ten (10) years.

2) Nothing was paid on the judgment for ten (10) years.

2) Just before the Sheriff's Sale on Owings' execution took place, Solomon sent Owings' attorney a letter dated August 18, 2003, maintaining that the total amount owed on the note was \$814,672.88, which was impossible.

3) Duggan threatened foreclosure of the Solomon mortgage if Owings persisted and "otherwise acted and behaved as if he was the holder of the mortgage and judgment or was in collusion with Solomon."

Owings argues he has a right to intervene because he has an interest in the property; the disposition of the action will impair his ability to protect that interest; and the existing parties are not adequately representing his interest. He requests he be allowed to intervene and the sale be stayed until Owings has the opportunity to depose Solomon to determine whether his suspicions are founded.

Solomon opposes the motion. In his response in opposition to the pending motion, it is explained that the quote of \$814,672.88 came about because Duggan incorrectly compounded interest. Although Solomon has submitted two affidavits in this matter, he does not provide any statement supporting this explanation. In the two affidavits, he maintains he paid WSFS

\$135,000.00 in consideration of the assignment and the \$135,000.00 came from his personal funds or from funds of a corporation or other legal entity he controlled and not from any of Duggan's funds.

In Superior Court Civil Rule 24(a)(2), it is provided:

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when an applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention in mortgage foreclosure proceedings is strictly limited. It is allowed where there is a dispute concerning priorities. Pennamco, Inc. v. Nardo Management Co., 435 A.2d 726 (Del. Super. 1981) ; J.I. Kislak Mortgage Corporation of Delaware v. William Matthews Builder, Inc., 287 A.2d 686 (Del. Super. 1972), aff'd, 303 A.2d 648 (Del. 1973); Gordon v. Gordon, Del. Super., C.A. No. 97L-10-013, Terry, R.J. (January 12, 1998). See Merrill Lunch Mortgage Capital, Inc. v. Greentree Apartment Associates, L.P., Del. Super., C.A. No. 95L-01-043, Herlihy, J. (October 31, 1995). It also is allowed where the intervenor asserts a claim which is an integral part of the mortgage foreclosure transaction, such as a claim challenging the validity of the mortgage. Fox v. Christina Square Assoc., L.P., Del. Super., C.A. No. 91L-04-6-1-MT, Alford, J. (April 5, 1994), rearg. den., Del Super., C.A. No. 91L-04-6-1-MT, Alford, J. (June 3, 1994).

This case is very unusual on its facts. There is a ten year lapse from the time Solomon acquired rights in the judgment and began to execute on the default judgment. The paperwork submitted shows that Duggan did not pay Solomon anything at all on the mortgage during that

ten year period. In a normal debtor/creditor relationship, the creditor either receives payment or executes on a judgment. The ten years of nonpayment and lack of action by the creditor arouses suspicions about the amount of debt owed. These suspicions have been heightened by Solomon's mistake or misrepresentation to Owings of the amount owed. Due to the unusual facts of this situation, the Court considers it appropriate to allow Owings the opportunity to cross-examine Solomon on his affidavit, to verify that Duggan did not play any role in providing any of the \$135,000.00 paid to WSFS, and to question Solomon about any financial scenarios which might have constituted a forgiveness of Duggan for the debt owed.

In this case, if the mortgage has been satisfied, then Owings actually becomes first in line. If it should turn out that the mortgage is not satisfied but more money has been paid on the mortgage than is represented in the writ of *levari facias*, then that fact affects both the bidding prices at the Sheriff's Sale and the payoffs after the sale. Thus, questions of priority and the amount of payoff exist. Owings has an interest in the property. The current parties will not be protecting Owings' interest. Intervention is granted as a matter of right.

The next issue concerns whether to stay the Sheriff's Sale. The pendency of the issues could chill the bidding process. Discovery needs to be undertaken to resolve these issues. Accordingly, the sale is stayed until these issues are resolved.

For the foregoing reasons, the Court rules as follows:

- 1) Owings is granted leave to intervene;
- 2) Owings must conduct discovery on the amount of debt Duggan owes Solomon on or before May 14, 2004;
- 3) Any oral depositions must take place during the hours of 8:30 a.m. through 5:00 p.m.,

Monday through Friday, so that the parties may contact this Judge if an issue arises regarding the scope of the discovery; and before scheduling the deposition(s), the parties must contact this Judge's secretary to ensure that the Judge will be in Georgetown on the scheduled date(s);

4) The Sheriff's Sale scheduled for March 16, 2004, is stayed until further notice;

5) Owings must reimburse Solomon for all costs incurred in connection with the Sheriff's Sale which has been stayed;

6) At the end of this case, if it turns out that Owings' suspicions were baseless, this Court will entertain motions by Solomon for costs incurred due to the delay in this matter. Depending upon the procedural posture of the case, such motions may include a request for reimbursement for attorneys fees on the ground that equity requires it. Burge v. Fidelity Bond and Mortgage Company, 648 A.2d 414, 421-22 (Del. 1994);

7) Owings must post a surety bond in the amount of \$7,500.00, to cover the costs of any attorneys' fees which might be ordered to be paid; and if this sum is not posted within twenty (20) days from the date of this order, then Solomon will be allowed to proceed with a newly-noticed Sheriff's Sale and Owings will not be allowed to seek a stay thereof.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: A. Dean Betts, Esquire
William T. Duggan
Sheriff of Sussex County, c/o Lynn Kleb
Sussex County Revenue Department
Prothonotary's Office