

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

VICTOR F. BATTAGLIA, d/b/a)
BIGGS AND BATTAGLIA,)
)
Plaintiff,)
) C.A. No. 03M-11-021 MMJ
v.)
)
ALBERT VIETRI and JOSEPH)
CAPANO,)
)
Defendants.)

Submitted: July 27, 2004
Decided: November 5, 2004

MEMORANDUM OPINION

Jeffrey M. Weiner, Esquire, Fox Rothschild LLP, Wilmington, Delaware, Attorney
for Plaintiff

Adam L. Balick, Esquire, Balick & Balick, Wilmington, Delaware, Attorney for
Defendants

JOHNSTON, J.

Victor F. Battaglia, doing business as the law firm of Biggs & Battaglia (“Biggs & Battaglia”), filed a complaint on November 6, 2003 seeking a Rule to Show Cause why a June 29, 1987 mortgage in the amount of \$25,000 (“Mortgage”)¹ should not be marked satisfied pursuant to 25 *Del. C.* § 2115. The Mortgage is secured by property located at 560 North Union Street, Wilmington, Delaware (“Property”). The Mortgagees are Albert Vietri and Joseph Capano.

The Court held an evidentiary hearing on May 28, 2004 (“Hearing”). The parties submitted post-hearing memoranda.

The primary issue is whether the debt secured by the Mortgage was paid in full when the Property was sold to Robert J. DelCollo and Michael K. Mahon in 1988. Biggs & Battaglia conducted the October 28, 1988 closing. The pivotal factual dispute is whether Vietri and/or Capano negotiated the Mortgage payoff check issued at the closing.

UNDISPUTED FACTS

In the early 1980's, Vietri and Capano purchased the Property, which they intended to use as a restaurant. In 1985, Vietri and Capano sold the Property to Joseph Zambanini and Karla Zambanini.

¹The Mortgage is located in the mortgage records of the New Castle County Recorder of Deeds at Mortgage Book 882, Page 238.

On June 29, 1987, Joseph and Karla Zambanini conveyed the Property to DelCollo and Mahon. The settlement sheet ("1987 Settlement Sheet") lists "Payoff Vietri" in the amount of \$25,000. The 1987 Settlement Sheet also lists "Loan from Vietri ... \$25,000" to be paid on behalf of borrowers DelCollo and Mahon. A Mortgage secured by the Property, dated June 29, 1987, in favor of Vietri and Capano in the principal amount of \$25,000 is recorded with the Recorder of Deeds of New Castle County. The debtors are DelCollo and Mahon.

On October 28, 1988, DelCollo and Mahon sold the Property to L&B Partnership ("L&B"). Robert D. Goldberg, Esquire, of Biggs & Battaglia, represented L&B, handled the closing, and prepared the settlement sheet ("1988 Settlement Sheet"). Line 506 contains a notation, "Mtge – J. Capano & Al Vietri" followed by the amount \$25,175.36, indicating that Biggs & Battaglia was to withhold that amount from the settlement proceeds due to DelCollo and Mahon.

DISPUTED FACTS

Biggs & Battaglia contends that the Mortgage was paid in full out of the October 28, 1988 settlement proceeds. In answer to the complaint, Vietri and Capano stated that they had no knowledge of receiving the Mortgage payment.

At the Hearing, however, Vietri stated that he was sure that he had not received payment. Capano failed to appear at the Hearing.²

Lack of a paper trail on the part of both Biggs & Battaglia and Vietri and Capano has fostered this dispute. Neither Vietri nor Capano was able to produce a record of, or reference to, the Mortgage after 1988. They had no books of account or any documents tracking the Mortgage or listing it as an asset on their personal records.

Biggs & Battaglia's settlement file contains payoff letters confirming payment to other lien holders . There is no payoff letter to Vietri and Capano in Biggs & Battaglia's file. Goldberg testified that he has no specific recollection of seeing a payoff letter or check payable to Vietri and Capano at the time of settlement. The file contains a power of attorney authorizing Biggs & Battaglia to satisfy the Mortgage. According to Vietri and Capano, however, the document was never signed. Vietri testified that he does not remember anyone from Biggs & Battaglia asking him to sign such a form.

The actions of Vietri and Capano with regard to the Mortgage in this case have been inconsistent. They made no effort to collect the Mortgage from the

²In a civil action, a court may draw an adverse inference against parties who refuse to testify in response to probative evidence offered against them. An adverse inference is warranted when a party "fails to take the stand at all, when it would have been natural to do so." *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976) (*quoting* 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970)).

October 28, 1988 settlement until October 2003. Vietri admitted that he and Capano were in financial distress during this time period as a result of other failed investments. Vietri testified that both Vietri and Capano participated in other real estate transactions over the years. Yet, neither of them was able to produce a bank record which listed the Mortgage as an asset.³

Goldberg prepared a letter to Vietri and Capano dated March 1, 2000, requesting that they satisfy the Mortgage. Despite receiving no response to this letter, Biggs and Battaglia took no further steps to secure release of the Mortgage until the filing of this action on November 5, 2003.

Goldberg's Hearing testimony outlined the customary procedures employed by Biggs & Battaglia for real estate settlements. Biggs & Battaglia's real estate secretary was responsible for obtaining all payoff figures. The real estate secretary made notes directly on the title searcher's abstract of the Mortgage. The notes detailed the efforts made by Goldberg's office to obtain a payoff figure for the Mortgage. The notes of the real estate secretary were generated in the ordinary

³In a Personal Financial Statement submitted by Vietri on July 22, 1988, prior to the mortgage payoff, Vietri listed the Mortgage as an asset, but he failed to list the Mortgage as an asset after 1988 because, in his words, such disclosure was "unnecessary." Vietri and Capano claim that the fact that financial disclosure documents prepared on behalf of Vietri and Capano do not disclose the Mortgage as an asset does not mean that it must have been paid. Vietri claims that the difference in the disclosures made by Vietri in the July 1988 financial statement and an April 1996 financial statement is easily explained by the nature of the questions posed on the respective forms. The 1996 statement does not clearly invite the applicant to disclose partial interests in real estate. The 1988 statement specifically required such disclosure. The Court need not resolve this issue and is not relying on the contents of any financial statements in the disposition of this case.

course of Biggs & Battaglia's business. Goldberg placed the notes in the settlement file in accordance with customary practice.⁴

The handwritten notes list \$25,000 as the principal amount, and *per diem* interest of \$5.48. The secretary's notes recite: "Becky @ Capano's office said to use 10/27/88 figure." At the time, "Becky" was a controller in Capano's office and was responsible for keeping track of Capano's loans. The secretary wrote: "Vietri will come in for check and to sign POA [Power of Attorney] (Stoltz Realty)." Vietri was employed by Stoltz Realty in 1988. The 1998 Settlement Sheet notes a payoff of \$25,175.36.⁵

In accordance with the settlement procedures employed by Goldberg's office, the settling attorney personally conducts the closing. Funds are paid in the manner indicated on the settlement sheet. Goldberg testified that there are layers of protection built into the process employed by Biggs & Battaglia and as required by the Delaware Lawyers' Rules of Professional Conduct. The real estate secretary requests the necessary payments, but the office bookkeeper writes the

⁴The notes were introduced during the testimony of Goldberg, who identified the document. The Court overruled the hearsay objection to the document, finding the availability of the declarant immaterial pursuant to Delaware Rule of Evidence 803(6) (records of regularly conducted activity). To the extent the notes speak for themselves, the Court has accorded the evidence the weight it deserves.

⁵The payoff amount appears to have been calculated erroneously in favor of Vietri and Capano. As of the 10/28/88 settlement date, the amount should have been \$25,153.55. Thus, \$25,175.36 reflects four days of unearned interest included in the payoff amount.

actual checks. The bookkeeper reconciles the settlement account. An independent accountant checks settlement account reconciliations on an almost monthly basis. The closing attorney signs the settlement sheet, certifying that, to the best of his knowledge, the figures are true and accurate.

Goldberg testified that if the check issued to pay the Mortgage had not been cashed, the funds would have remained on Biggs & Battaglia's books and would have been discovered by the bookkeeper and/or the accountant. Biggs & Battaglia would have initiated procedures to contact Vietri and Capano to determine why the check had not been cashed.

Vietri and Capano contend that Biggs & Battaglia would not have released the payoff check without first having the release signed. In fact, absence of a signed release is advanced by Vietri and Capano as proof that the Mortgage had not been satisfied. In response, Goldberg testified that it is the norm for payoff checks to be sent to mortgage holders prior to receiving a signed satisfaction piece. Mortgage payments are time sensitive. If a mortgage payment is not timely received, additional interest not calculated at closing could be due.

Goldberg further testified that he was sure that the obligation was satisfied because if it had not been satisfied, he could not have provided the title insurance policy to his client's lender. The lender's loan commitment required that all prior liens be satisfied in order that the lender's mortgage be in first position. Based

upon the procedures detailed in his testimony, Goldberg was confident the Mortgage had been paid out of the 1988 settlement proceeds.

BURDEN OF PROOF

This action was commenced pursuant to 25 *Del. C.* § 2115.⁶ Section 2115 vests jurisdiction in the Superior Court for the purpose of issuing a rule to show cause why a mortgage should not be marked satisfied. The burden of proving payment is on the Petitioner.⁷ The Court must be satisfied that the mortgage has been paid before entering an order of satisfaction. The Court's action in any given case will depend upon all the evidence presented.⁸

⁶25 *Del. C.* § 2115(a) states in pertinent part:

In all cases where mortgages or judgments are liens on real estate in this State and the same have been paid and the mortgagee or obligee or their executors, administrators or assigns refuses or neglects to enter satisfaction of such mortgage or judgment on the record thereof in the office where the same is recorded or entered, forthwith after the payment thereof, the mortgagor or obligor or their heirs or assigns may, upon sworn petition to the Superior Court of the county in which such mortgage or judgment is recorded or entered, setting forth the facts, obtain from such Court a rule on the mortgagee or obligee or their executors, administrators or assigns, returnable at such time as the Court may direct, requiring such mortgagee or obligee or their executors, administrators or assigns to appear on the day fixed by the Court and show cause, if they have any, why such mortgage or judgment shall not be marked satisfied on the record thereof...

⁷*Bailey v. Blodgett*, 119 A.2d 756, 758 (Del. Super. 1955).

⁸*Id.* at 760.

DISCUSSION

The Court is the finder of fact. Wherever conflicting facts are found, the Court will attempt to harmonize them or to determine what testimony is most believable.⁹ The Court finds Goldberg to be a credible and reliable witness. The testimony of Vietri was inconsistent and incredible to the extent Vietri simply could not remember most of the relevant facts. Capano declined to appear at the Hearing, thus failed to provide testimony to rebut Biggs & Battaglia's evidence.

As a finder of fact, the Court relies extensively on Goldberg's testimony about the procedures followed during real estate closings at Biggs & Battaglia as proof that the Mortgage was paid off. Biggs & Battaglia has been unable to produce a cancelled check as proof that the payment was in fact made at the time of the 1988 settlement.¹⁰ Nevertheless, a preponderance of the evidence demonstrates that it is more likely that Vietri picked up and negotiated the check than that the check was never delivered to Vietri or Capano.

⁹The applicable Superior Court pattern jury instruction provides:

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

¹⁰Goldberg provided undisputed testimony that in 2001, the offices of Biggs & Battaglia moved to a new location. Check ledgers and cancelled checks for 1988 were inadvertently thrown away.

There is little relevant Delaware case law to assist in disposition of this case. In *In re Mortgage of Kallos*,¹¹ the purchasers filed a petition to compel entry of satisfaction of mortgage pursuant to 25 *Del. C.* § 2115. An office memorandum indicated that \$5,995 was paid from settlement proceeds. A handwritten disbursement record from the settlement indicated the payment. A transmittal letter addressed to the sellers referred to an enclosed check and a power of attorney authorizing satisfaction. The purchasers were unable to locate any record of a negotiated check. The sellers claimed that they never saw a settlement sheet. Additionally, the sellers could not remember receiving any payment. Subsequent to the settlement, the debtor became bankrupt. The sellers therefore presumed that their interest in the property was lost. Consequently, the sellers never sought payment of the \$5,995.

The *Kallos* Court held that the petitioners had failed to carry their burden of proving payment. The *Kallos* court found that while it was clear that the purchasers had paid the funds at settlement necessary to satisfy the mortgage, and that the closing attorney had issued a check to satisfy the obligation, there was no evidence that the check was ever received or negotiated. There was no explanation for the missing payoff check.¹²

¹¹Del. Super., 1989 WL 206399 (1989), *reargument denied*, 1990 WL 63912 (1990).

¹²*Id.*

In the instant case, the Court relies on the consistent and trustworthy testimony of Goldberg, an officer of the Court, that the cancelled payoff check was inadvertently thrown away when Biggs & Battaglia moved to a new location.

The Court finds it significant that at the beginning of the case, Vietri and Capano stated they could not recollect receiving the Mortgage payment, but by the time of the Hearing, Vietri was sure that they had not received payment. It appears to the Court that Vietri and Capano changed their testimony to take advantage of the fact that Biggs & Battaglia was unable to produce the cancelled check.

Funds to pay off the Mortgage were collected by Biggs & Battaglia. The payoff amount is no longer in Biggs & Battaglia's real estate trust account. The Court concludes that considering Biggs & Battaglia's accounting safeguards, as well as the accounting procedures mandated by the Delaware Supreme Court, the Mortgage payoff check was negotiated.

CONCLUSION

THEREFORE, the Court is satisfied that Plaintiff has met its burden of proving payment by a preponderance of the evidence in accordance with 25 *Del. C.* § 2115. The Mortgage, together with all interest and costs due, has been paid.

IT IS HEREBY ORDERED that the Mortgage located at Mortgage Book 882, Page 238 in the office of the Recorder of Deeds for New Castle County is paid and satisfied, and the Recorder of Deeds for New Castle County is directed to enter on the record full and complete satisfaction of the Mortgage.

The Honorable Mary M. Johnston

Original: Prothonotary's Office - Civil Division