

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LASALLE NATIONAL BANK, AS	:	
TRUSTEE UNDER THE POOLING	:	C.A. NO: 98L-10-025 RBY
AND SERVICING AGREEMENT	:	
DATED 3-1-98, SERIES 1998-1,	:	SCIRE FACIAS SUR MORTGAGE
	:	IN REM ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
WILLIAM P. INGRAM and	:	
MARGARET INGRAM,	:	
	:	
Defendants.	:	

ORDER

On October 27, 1998, Plaintiff, Lasalle National Bank, filed a mortgage foreclosure action against Defendants, William P. Ingram and Margaret A. Ingram. The defendants subsequently filed an Answer, Counterclaim and an Affidavit of Defense. In their Counterclaim, Defendants assert that Plaintiff failed to follow through with an oral agreement to fund two additional loans in connection with the original mortgage, and failed to comply with the 30-day notice provision in the original mortgage agreement. Plaintiff now has moved to dismiss Defendants' Counterclaims and related affirmative defenses. Plaintiff argues that Defendants' counterclaims are not permissible in a scire facias action because they do not arise out of the original mortgage transaction.

DISCUSSION

The Law

Generally, "only those claims or counterclaims arising under the mortgage may be raised in a scire facias sur mortgage foreclosure action."¹ The Superior Court held in *Gordy v. Preform Building Components, Inc.*² that the defendant in that case could not assert the counterclaim of set off, and that the available defenses or counterclaims in a scire facias sur action were limited to payment, satisfaction, absence of seal, or a plea in avoidance of the deed.³ The court in *Gordy* adopted the reasoning of *Stockman v. McKee*⁴ which held that to permit counterclaims beyond those arising out of the initial transaction (in that case a mechanic's lien) would "infuse an *in personam* litigation and judgment based upon a different transaction into an action which was essentially an *in rem* action."⁵ The court also held that nothing in the court rules or the applicable statutes evidenced an intent to allow permissive counterclaims in scire facias sur actions.⁶ For these same reasons,

¹ *Harmon v. Wilmington Trust Co.*, 1995 WL 379214, at *2 (Del. Supr.). See also *Quillen v. Sayers*, 482 A.2d 744, 748 (Del. 1984); *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 896 (Del. Super. Ct. 1973) (holding that permissive counterclaim rules do not specifically apply to sci. fa. sur. mortgage foreclosures).

² 310 A.2d 893 (Del. Super. Ct. 1973).

³ *Gordy*, 310 A.2d at 895-96.

⁴ 71 A.2d 875 (Del. Super. Ct. 1950).

⁵ *Gordy*, 310 A.2d at 896.

⁶ *Id.* ("[N]othing in the statute as it now exists (10 Del. C. ss 5061–67) shows a legislative purpose to permit set off or to depart from the recognized case law. Nothing in the Rules of this Court shows an intent to apply the permissive counterclaim specifically to sci. fa. actions.").

counterclaims that are permissive by virtue of their non-association with the mortgage transaction may not be adjudicated in a scire facias sur action.⁷

Defendants' Counterclaims

Because Defendants have not defended on the grounds of payment, satisfaction, or absence of seal, their only recourse is a plea in avoidance of the original mortgage transaction. A plea in avoidance “relate[s] to the validity or illegality of the mortgage documents” and consequently must relate to the original mortgage sued upon.⁸ Such pleas may include: acts of God, assignment, conditional liability, discharge, duress, exception or proviso of statute, forfeiture, fraud, illegality of transaction, justification, nonperformance of conditions precedent, ratification, unjust enrichment, or waiver.⁹ It is not sufficient that defenses exist to other matters arising from an underlying loan transaction of which the mortgage is a part if the attacks are not on the original mortgage transaction itself.¹⁰

In their Counterclaim, Defendants allege that Plaintiff: 1) failed to fund two additional loans in connection with this mortgage; 2) failed to give the proper 30-day notice as required by the mortgage agreement; and 3) otherwise engaged in a pattern of misrepresentation and deceptive trade practices. Defendants allege specifically

⁷ See *Wilmington Trust Co. v. Bethany Group Limited P'ship*, 1993 WL 258686, at *2 (holding that “where a counterclaim is permissive by virtue of its nonassociation with the mortgage transaction in issue, that counterclaim may not be adjudicated with the pending action.) See also *Bank of Delaware v. Stevenson*, 1991 WL 138363 (Del. Super.); *Gordy*, 310 A.2d at 896.

⁸ *American National Insurance Company v. G-Wilmington Associates, L.P.*, 2002 WL 31383924, at *2 (Del. Super.).

⁹ *Gordy*, 310 A.2d at 895-96.

¹⁰ *Bank of Delaware*, 1991 WL 138363, at *2.

that “ through the misrepresentations and deceptive trade practices by allonge endorsement, the plaintiff failed to fund the loans promised to support this loan.” In their Affidavit of Defense to support this counterclaim, Defendants allege “ [m]isrepresentation and deceptive trade practices by American Investment Mortgage, Inc. and, by allonge endorsement, the plaintiff Lasalle National Bank, regarding the failure to close the two additional supporting loans.”

Defendant’ s counterclaims of misrepresentation, fraud and failure to fund two additional loans are unsupported factually,¹¹ and are otherwise barred because they do not arise out of the initial mortgage transaction.¹² While these counterclaims may be legitimate permissive counterclaims and even legitimate pleas in avoidance if related to the original transaction, in this situation they are not related to the original mortgage documents but rather to alleged agreements made outside the original mortgage transaction. Defendants’ counterclaims of fraud and, misrepresentation, as well as the claim that Plaintiff failed to follow through on an oral promise to fund additional loans, consequently fail because they are not related to the original mortgage transaction.

Defendants also seek to recover damages for the plaintiff’ s alleged failure “ to give a valid 30 day notice as required by paragraph 21 of the Mortgage.” Although Defendants fail to offer more specific clarification of the lack of notice, it appears that the notice provision arises from the original mortgage document. It

¹¹ See *Teeven v. Kearns*, 1993 WL 1626514, at *4 (Del. Super) (holding that an unsupported defense does not by itself raise a genuine issue of fact to fulfill the purposes of an affidavit of defense and prevent the entry of a default judgment).

¹² See generally *Gordy*, at 896; *Christiana Falls, L.P. v. First Federal Savings & Loan Association of Norwalk*, 520 A.2d 669 (Del. 1986).

may, accordingly, be brought as a counterclaim in this action. Plaintiff contends that Defendants' counterclaim of insufficient notice lacks merit because Defendant was sent notice on August 28, 1998 and the foreclosure action was not filed until late in October of 1998. Plaintiff also maintains that Defendant, William Ingram, acknowledged receipt of this notice by letter dated September 15, 1998. Plaintiffs have included a copy of the notice sent to Defendants. There is, however, no clear proof in the file of the date the notice was sent. In addition, there is no copy of the letter acknowledging Defendants' receipt of the notice. Without any proof of compliance with the notice provision, a ruling on that issue is premature. Therefore, because the counterclaim of lack of notice is sufficiently related to the underlying mortgage transaction, Plaintiff's motion as to Defendants' specific counterclaim of lack of notice under the mortgage documents is denied.

Practical Considerations of Dismissing the Counterclaims

In a letter to the parties dated April 6, 2005, I expressed concern that, if Defendants' counterclaims were dismissed, Defendants could file the same claims in a new cause of action, move to consolidate these claims with the present action, and possibly bring the case to the same posture in which it now stands. In response to that letter, Plaintiff's counsel noted that there would not be identical parties or issues between these two cases if Defendants brought a separate action based on their current counterclaims. As Plaintiff asserts, it is only an assignee of the mortgage, whereas Defendants' counterclaims (e.g. the allegations of misrepresentation) lie against the parties involved in the original mortgage transaction. While the parties and issues will most likely be very similar to the present case, if Defendants bring a new cause of action based on their counterclaims, and a motion to consolidate could conceivably be granted. No such

motion is before the Court at present.

In any event, such practical considerations must be put aside in order to keep in step with the line of settled and consistent cases in the Superior Court and Delaware Supreme Court beginning with *Gordy* holding that all counterclaims and defenses must relate directly to the underlying mortgage transaction. Hence, Defendants' counterclaims, other than the counterclaim for damages for lack of notice, must be dismissed. To hold otherwise would improperly infuse an *in personam* action into an *in rem* action based on the original mortgage transaction.¹³

CONCLUSION

Therefore, Plaintiff's Motion to Dismiss is GRANTED in part and DENIED in part. Plaintiff's Motion to Dismiss all of Defendants' counterclaims except the Defendants' counterclaim for damages based on alleged failure to comply with the notice provision in the original mortgage document is GRANTED. The Motion addressed to the issue of notice is DENIED because that claim is sufficiently related to the original mortgage, and is proper in this action. Defendants' remaining counterclaims, while pursuable in a separate cause of action, do not belong in this scire facias sur action.

IT IS SO ORDERED.

/s/ Robert B. Young

Judge

DATED: May 19, 2005

oc: Prothonotary

xc: Stephen Doughty, Esquire

William and Margaret Ingram

¹³ See *Gordy*, 310 A.2d at 896; *Wilmington Trust Co. v. Bethany Group Limited Partnership*, 1993 WL 258686 (Del. Super.).