

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

November 27, 2006

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RE: Greenpoint Mortgage Funding, Inc. v. William J. McCabe
C.A. 03L-03-011 _____

_____ Date Submitted: August 23, 2006 _____

Dear Counsel:

_____ This is my decision on The Pacific West Group, Inc.'s Motion to Vacate Judgment, Set Aside Sheriff's Sale and Objection to Confirmation.

Statement of Facts

William McCabe ("McCabe") owned that real property known as RR 3, Box 181A, Millsboro, Sussex County, Delaware (the "Property"). Greenpoint Mortgage Funding, Inc. ("Greenpoint") had a \$71,000 first mortgage (the "First Mortgage") and a \$14,500 second mortgage (the "Second Mortgage") on the Property. Greenpoint filed a foreclosure action on the First Mortgage on March 5, 2003. The Court entered a judgment in favor of Greenpoint on May 16, 2003.

Greenpoint assigned the Second Mortgage to The Pacific West Group, Inc. ("Pacific West") by a written Assignment of Mortgage (the "Assignment") on January 26, 2005. Pacific West did not record the Assignment with the Sussex County, Delaware, Recorder of Deeds.

William McCabe filed for bankruptcy on August 19, 2005. Pacific West sent funds to

Greenpoint on August 19, 2005, in an amount sufficient to cure William McCabe's default under the First Mortgage. Greenpoint got relief from the automatic stay on February 3, 2006. It then scheduled a sheriff's sale of the Property for May 16, 2006. Greenpoint mailed its "Notice to Lien Holders of Sheriff's Sale" on May 8, 2006, but did not send a copy to Pacific West. The Sheriff sold the Property to Donald Spencer for \$100,000 on May 16, 2006. Pacific West is now seeking to set aside the sale of the Property.

Discussion

Pacific West makes two arguments in support of its motion. One, Pacific West argues that Superior Court Civil Rule 69(g) required Greenpoint to give written notice of the sheriff's sale to Pacific West. Two, Pacific West argues that since it "cured" William McCabe's default and "reinstated" his rights under the First Mortgage, that Greenpoint could not go forward on the judgment that it had previously obtained against the Property.

The Superior Court has broad discretion to confirm or set aside a sheriff's sale.¹ This equitable power derives from the inherent control of the court over its own process "for the correction of abuses or the prevention of injury."² This discretion is not without limitation, however. For instance, a court may not arbitrarily or capriciously refuse to confirm a sale, where there are no irregularities in the sale proceedings and no fraud, unfairness, or other extraneous matter

¹ 2 Victor B. Wooley, *Practice in Civil Actions in Delaware*, § 1108 (1906); *Petition of Adair*, 190 A. 105, 107 (Del. Super. Ct. 1936); *Central National Bank of Wilmington v. Industrial Co.*, 51 A.2d 854, 856 (Del. Super. Ct. 1947); *Petition of Seaford Hardware Co.*, 132 A. 737, 738 (Del. Super. Ct. 1926). *Matter of Spencer*, 115 B.R. 471, 482 (D.Del. 1990)("The Delaware Superior Court's power to confirm a sheriff's sale is strictly limited...").

² *Petition of Seaford Hardware Co.*, 132 A. at 738.

demonstrating unfairness to one of the interested parties is shown.³

Rule 69(g)

Pacific West is a lien holder. It has, by virtue of the Assignment, a second mortgage lien on the Property. Rule 69(g) provides that no sheriff's sale of real estate shall be held unless at least seven days before the sale the plaintiff, or his counsel of record, shall send by certified mail, return receipt requested, to holders of liens on the real estate which is the subject of such sale who have acquired such liens at least 30 days prior to the sheriff's sale a "Notice to Lien Holders, Tenants, Record Owners and Persons Having an Interest of Sheriff's Sale of Real Estate." There are other categories of persons entitled to notice, but Pacific West does not fall within any of them.⁴ Pacific West acquired its second lien on the Property on January 26, 2005, approximately 16 months before the sheriff's sale of the Property. Rule 69(g) requires that the notice of sheriff's sale shall be addressed to holders of liens at the address which appears upon the recorded or filed instrument creating the lien or upon the record of the lien, or to the counsel of record for the holder of such lien, or if such addresses are not ascertainable from the public records, at the last known available or reasonably ascertainable address of the holders of such liens. The Assignment does list Pacific West's address. However, Pacific West never recorded the Assignment with the Sussex County, Delaware, Recorder of Deeds, resulting in Greenpoint's attorney's title search not disclosing Pacific West's second lien on the Property. Therefore, since there was no "record notice" of Pacific West's

³ 59 C.J.S. *Mortgages* § 744(2)(a).

⁴Tenants, terre tenants and persons having an equitable or legal interest of record are also entitled to get notice. Pacific West is not a tenant or "terre tenant." It is also not an equitable or legal interest holder "of record." Indeed, there is no "record" reflecting Pacific West's interest in the Property.

lien, Greenpoint's attorney did not send Pacific West the notice of the sheriff's sale. Rule 69(g), by its language, places an obligation on a lien holder to record its lien so as to be entitled to receive notice of the sheriff's sale. The rule, again by its language, requires that the party conducting the sheriff's sale to look beyond the public records for an address only where the address is not ascertainable from the public records. Given this, I have concluded that because Pacific West did not record its Assignment, as it should have done, that Greenpoint had no obligation under Rule 69(g) to give Pacific West notice of the sheriff's sale of the Property.

Pacific West argues that even though it didn't record the Assignment that Greenpoint should have still given it notice of the sheriff's sale because it knew that Pacific West had a second lien on the Property. Greenpoint's response is that, even though it knew at one point in time that Pacific West had a second lien on the Property, after it assigned the Second Mortgage to Pacific West that it was in no position, and had no reason, to keep track of what Pacific West did with its second lien and that, as between the two of them, Pacific West was in the better position, and had the greater motivation, to protect its second lien by simply recording the Assignment, which is nothing more than a clerical task. I agree with Greenpoint's reasoning. As between Greenpoint and Pacific West, Pacific West had the motivation and ability to protect its second lien on the Property by simply recording the Assignment. The failure to do this, as well as the consequences that flow from it, rests solely with Pacific West.

This Court reached a similar result in *PNC Bank v. GMAC Mortgage Corporation v. Cowan*.⁵ PNC and GMAC both had liens on a property owned by Cowan. GMAC foreclosed on its lien and sold Cowan's property at a sheriff's sale, but did not give notice of the sheriff's sale to PNC. PNC

⁵2004 WL 1427019 (Del. Super.).

misspelled Cowan's name on its mortgage. It spelled Cowan with an "e" instead of an "a." Thus, because of this error, GMAC's title search did not disclose that PNC had a lien on Cowan's property. The Court refused PNC's request to set aside the sheriff's sale, reasoning that GMAC and the Recorder of Deeds could not be held responsible for what clearly was PNC's error. The outcome should be no different in this case. Pacific West, not Greenpoint, must be responsible for its own error.

The First Mortgage

Pacific West argues that because it sent enough money to Greenpoint to "cure" McCabe's default and "reinstate" his rights under the First Mortgage that paragraph 18 of the First Mortgage required Greenpoint to vacate its judgment and reinstate the First Mortgage. Paragraph 18 states:

Borrower's Right to Reinstate. If the Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at **any time prior to** the earlier of: (A) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the property . . . or (b) entry of a judgment enforcing this Security Instrument . . . Upon reinstatement **by Borrower**, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred . . . (emphasis added).

Aside from the problems that Pacific West has in trying to assert rights set forth in an agreement that it was not a party to,⁶ the right to reinstate is, by its terms, only applicable if it is exercised before a judgment is entered. Greenpoint obtained its judgment against McCabe on May 16, 2003. Pacific West tendered its money to Greenpoint on August 19, 2005, over two years after Greenpoint obtained its judgment. Thus, the right to reinstate was untimely exercised and is inapplicable.

⁶*U.S. Borax and Chemical Corporation v. Szmokaluk*, 1981 WL 404963 (Del. Super.).

Conclusion

Pacific West's motion is denied for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office
Donald Spencer