

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

WELLS FARGO BANK, N.A., D/B/A  
AMERICAS SERVICING COMPANY

Appellee

v.

CHRIS HIPWELL

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1147 EDA 2013

Appeal from the Judgment Entered April 2, 2013  
In the Court of Common Pleas of Montgomery County  
Civil Division at No(s): 2011-29525

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.\*

MEMORANDUM BY MUNDY, J.:

**FILED DECEMBER 03, 2013**

Appellant, Chris Hipwell, appeals from the April 2, 2013 *in rem* judgment entered in favor of Appellee, Wells Fargo Bank, N.A., d/b/a Americas Servicing Company (Wells Fargo), following the trial court's grant of Wells Fargo's motion for summary judgment. After careful review, we affirm.

The trial court summarized the relevant facts and procedural history of this case as follows.

This is a residential mortgage foreclosure action commenced on October [2]0, 2011. The Complaint averred that [Appellant] made and executed a Mortgage [o]n December 28, 2004[,] in

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\* Former Justice specially assigned to the Superior Court.

favor of The Bryn Mawr Trust Company on property in Bridgeport, Montgomery County, PA. The Complaint additionally averred that the Mortgage was assigned to [Wells Fargo] pursuant to an Assignment of Mortgage recorded on February 10, 2011. The Complaint further averred that the Mortgage had been in default since September 1, 2010, and that [] Appellant had been provided with Notice of Intent to Foreclose pursuant to Act 6 and Notice of Homeowner's Emergency Assistance Program pursuant to Act 91. Appellant filed an Answer on November 21, 2011. [Wells Fargo] filed its Motion for Summary Judgment on May 7, 2012, and Appellant filed a response in the form of a Memorandum in Opposition/Motion to Dismiss on May 25, 2012. Following oral argument on March 21, 2013, the [trial court] granted [Wells Fargo's] Motion by Order of March 28, 2013.

Trial Court Opinion, 6/14/13, at 1-2.<sup>1</sup> Within that order, the trial court entered an *in rem* judgment in favor of Wells Fargo in the amount of \$69,957.17, plus interest and costs.<sup>2</sup> On April 16, 2013, Appellant filed a timely notice of appeal.<sup>3</sup>

On appeal, Appellant raises the following issue for our review.

[1.] The [trial] court failed to delineate the required proof to foreclose on the subject property (i.e. the underlying note controls); failed to find that MERS [(Mortgage Electronic Registration

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<sup>1</sup> We note that the trial court opinion does not contain pagination. Therefore, we have assigned each page a corresponding page number for ease of reference.

<sup>2</sup> This order was filed on April 2, 2013. Also on that date, the Prothonotary's Office of Montgomery County provided notice to the parties of this filing.

<sup>3</sup> Appellant and the trial court have complied with Pa.R.A.P. 1925.

System, Inc.)) lacked the power to transfer the note to [Wells Fargo]; failed to find that [Wells Fargo] lacked standing to proceed; failed to require [Wells Fargo] to produce the original note; failed to find that the note and mortgage were impermissibly split; and failed to find that there are genuine issues of material fact in this matter[?]

Appellant's Brief at 3.

We begin by noting our well-settled standard and scope of review. "[O]ur standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law[,] and our scope of review is plenary." ***Petrina v. Allied Glove Corp.***, 46 A.3d 795, 797-798 (Pa. Super. 2012) (citations omitted). "We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Barnes v. Keller***, 62 A.3d 382, 385 (Pa. Super. 2012), *citing* ***Erie Ins. Exch. v. Larrimore***, 987 A.2d 732, 736 (Pa. Super. 2009) (citation omitted). "Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered." ***Id.*** The rule governing summary judgment has been codified at Pennsylvania Rule of Civil Procedure 1035.2, which states as follows.

**Rule 1035.2. Motion**

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any

party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

[O]ur responsibility as an appellate court is to determine whether the record either establishes that the material facts are undisputed or contains insufficient evidence of facts to make out a prima facie cause of action, such that there is no issue to be decided by the fact-finder. If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.

***Babb v. Ctr. Cmty. Hosp.***, 47 A.3d 1214, 1223 (Pa. Super. 2012) (citations omitted), *appeal denied*, 65 A.3d 412 (Pa. 2013), *citing Reeser v. NGK N. Am., Inc.*, 14 A.3d 896, 898 (Pa. Super. 2011), *quoting Jones v. Levin*, 940 A.2d 451, 452–454 (Pa. Super. 2007) (internal citations omitted).

Although Appellant purports to raise one issue on appeal, Appellant has in actuality raised six separate issues. At the outset, we address Appellant's fourth and fifth issues together. Within these arguments,

Appellant claims the trial court erred by not requiring the production of the original note and by not determining the note and the mortgage were separated. Appellant's Brief at 3. Both of these issues are absent from Appellant's 1925(b) statement.

Our Supreme Court has held that Pennsylvania Rule of Appellate Procedure 1925(b) "sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered[, and a]ny issues not raised in a Rule 1925(b) statement will be deemed waived[.]" **Commonwealth v. Hill**, 16 A.3d 484, 494 (Pa. 2011); **accord** Pa.R.A.P. 1925(b)(4)(vii). Appellant's issues regarding the production of the original note and the separation of the note and mortgage were not raised in Appellant's timely Rule 1925(b) statement. Instead, Appellant raised these issues for the first time within her brief to this Court. Following our Supreme Court's directive in **Hill**, we conclude Appellant has waived these issues on appeal. We now proceed to address Appellant's remaining four arguments.

We elect to address Appellant's first three claims on appeal together as they are interrelated and pertain to Wells Fargo's standing within the underlying mortgage foreclosure action. Within Appellant's first three issues, she asserts Wells Fargo "failed to produce evidence to show that it rightfully held the applicable Note to the subject property." Appellant's Brief at 3. Additionally, Appellant argues Mortgage Electronic Registration System, Inc. (MERS), who assigned the mortgage and note to Wells Fargo, did not have

authority to assign the note. *Id.* at 6-7. This argument is premised upon Appellant's belief that MERS "acted as a **nominee** under the terms of the Mortgage[]" for another entity. *Id.* at 6 (emphasis added; quotation marks omitted).

Pennsylvania Rule of Civil Procedure 2202 provides "[e]xcept as otherwise provided ... all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parol contracts." Pa.R.C.P. 2002(a). "[A] real party in interest is a [p]erson who will be entitled to benefits of an action if successful.... [A] party is a real party in interest if it has the legal right under the applicable substantive law to enforce the claim in question." *U.S. Bank N.A. v. Mallory*, 982 A.2d 986, 993-994 (Pa. Super. 2009) (citation and quotation marks omitted; some brackets in original). "[T]he mortgagee is the real party in interest in a foreclosure action." *Wells Fargo Bank, N.A. v. Lupori*, 8 A.3d 919, 922 n.3 (Pa. Super. 2010); *see Mallory, supra*, at 994.

Additionally, Pennsylvania Rules of Civil Procedure 1141-1150 address mortgage foreclosure actions. Rule 1147 outlines the pleading requirements for such actions. The applicable section of that rule follows.

**Rule 1147. The Complaint**

- (a) The plaintiff shall set forth in the complaint:
  - (1) the parties to and the date of the mortgage, and of any assignments, and a statement of the place of record of the mortgage and assignments;

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Pa.R.C.P. 1147.

In the case *sub judice*, Wells Fargo averred that it was the owner of the instant mortgage. Complaint, 10/20/11, at ¶ 3. In conformance with Rule 1147, Wells Fargo pled the date of the original mortgage, the date it was assigned the mortgage and the place where this assignment is recorded. ***Id.*** In addition, Wells Fargo attached to its motion for summary judgment copies of the original mortgage and note, as well as the complete chain of assignments of these documents. Motion for Summary Judgment, 5/7/12, Exs. A-A4. As Appellant's standing argument hinges upon this chain of assignments, we will review the assignments in turn.

On December 28, 2004, the original mortgagee, The Bryn Mawr Trust Company, assigned the mortgage "with the note or notes therein described or referenced to," to Aurora Financial Group (Aurora). Motion for Summary Judgment, 5/7/12, Ex. A2. Thereafter, on December 29, 2004, Aurora assigned the mortgage "together with the note(s) and obligations therein described" to MERS. ***Id.***, Ex. A3. Several years later, on January 19, 2011, MERS transferred the mortgage "[t]ogether with all [r]ights, [r]emedies and incidents thereunto belonging [a]nd all its [r]ight, [t]itle, [i]nterest, [p]roperty, [c]laim and [d]emand, in and to the same[]" to Wells Fargo. ***Id.***, Ex. A4. As provided, Wells Fargo instituted the present action against

Appellant on October 20, 2011, as owner of the mortgage. Complaint, 10/20/11, at ¶ 3.

Instantly, Appellant argues that the trial court erred in “fail[ing] to find that MERS lacked the power to transfer the note to [Wells Fargo.]” Appellant’s Brief at 3. Appellant repeatedly refers to MERS as a “nominee” under the terms of the mortgage. *Id.* at 6, 8-9. Additionally, Appellant claims “[t]here is no mention of the applicable Note” within Aurora’s assignment to MERS “nor does the language confer any authority on MERS to assign the note.” *Id.* at 6-7. As illustrated by the chain of assignments, Appellant’s recitation of the facts is not supported by the record. In this case, MERS was not assigned the mortgage as the nominee of another entity. *See* Motion for Summary Judgment, 5/7/12, Ex. A3. Aurora assigned the note solely to MERS. *Id.* Also, Aurora assigned the mortgage “**together with the note(s)** and obligations therein described” to MERS. Motion for Summary Judgment, 5/7/12, Ex. A2 (emphasis added).

Upon review of the foregoing chain of assignments, we disagree with Appellant’s assertion that Wells Fargo did not properly hold the instant mortgage and note. As outlined by the assignments above, Wells Fargo held both the underlying mortgage and note. Therefore, Appellant’s claim that Wells Fargo lacked standing to bring the action is devoid of merit, lacks evidentiary support, and must fail.



Lastly, Appellant argues that the trial court committed an error of law when it found no material issues of fact existed to preclude the grant of summary judgment in the instant matter. Appellant's Brief at 3. Specifically, Appellant argues as follows.

[T]he [trial] court broadly states that the Note and Mortgage were assigned to [Wells Fargo and] there is no evidence to support such a finding. There was no evidence before the [trial] court to show a proper assignment of the Note, just the Mortgage. Furthermore, a review of [] "[Wells Fargo's] Affidavit in Support of its Motion for Summary Judgment" reveals that the affiant fails to provide any information concerning the applicable Note. Again, there is mention of the assignment of the Mortgage, but the Note does not follow the Mortgage and should not be so implied. There needs to be specific evidence from [Wells Fargo] to demonstrate Noteholder status and the revelation that the Note and the Mortgage were not split. There was no such evidence presented to the [trial] court and, thus, the [trial] court erred in its Opinion in making such a finding.

***Id.*** at 14.

In addressing Appellant's final claim, we are guided by the following.

In an action for mortgage foreclosure, the entry of summary judgment is proper if the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount. This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings.

***Cunningham v. McWilliams***, 714 A.2d 1054, 1057 (Pa. Super. 1998), *appeal denied*, 734 A.2d 861 (Pa. 1999) (citations omitted). Furthermore,

Rule 1029 provides in relevant part as follows.

**Rule 1029. Denials. Effect of Failure to Deny**

...

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand of proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

(c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

*Note:* Reliance on subdivision (c) does not excuse a failure to admit or deny a factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. **See *Cercone v. Cercone***, 386 A.2d 1 ([Pa. Super.] 1978).

...

Pa.R.C.P. 1029(b)-(c) (parallel citation omitted). “[H]owever, ... in mortgage foreclosure actions, general denials by mortgagors that they are without information sufficient to form a belief as to the truth of averments as to the principal and interest owing **must be considered an admission of those facts.**” ***First Wisconsin Trust Co. v. Strausser***, 658 A.2d 688, 692 (Pa. Super. 1995) (emphasis added).

In this instance, Wells Fargo averred in its complaint that the mortgage was in default. Complaint, 10/20/11, at ¶ 5. In Appellant’s

responsive pleading, she did not admit or deny this averment.<sup>4</sup> Answer, 11/21/11, ¶ at 5. As Appellant did not admit or deny this averment, the trial court deemed it admitted. Trial Court Opinion, 6/14/13, at 6; **see Strausser, supra**, at 692. Likewise, Wells Fargo pled within its complaint the specific amount due on the mortgage, including the outstanding interest. Complaint, 10/20/11, at ¶ 6. Appellant generally denied this averment.<sup>5</sup> Answer, 11/21/11, at ¶ 6. Again, the trial court deemed this averment admitted. Trial Court Opinion, 6/14/13, at 6; **see Strausser, supra**, at 692. Additionally, Wells Fargo attached to its motion for summary judgment the original note, mortgage, and their assigning instruments. **See** Motion

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<sup>4</sup> Paragraph 5 of Appellant's answer states the following.

As to Paragraph 5, [Appellant] states that she attempted to make payments, after falling behind in her monthly payments, but such attempts were not well received by [Wells Fargo] and [Appellant] was informed that no payments would be acceptable unless all past payments were paid in one lump sum. [Appellant] states that she is attempting to obtain a loan modification to avoid foreclosure[.]

Answer, 11/21/11, at ¶ 5.

<sup>5</sup> Paragraph 6 of Appellant's answer provides as follows.

After reasonable investigation, [Appellant] is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 6.

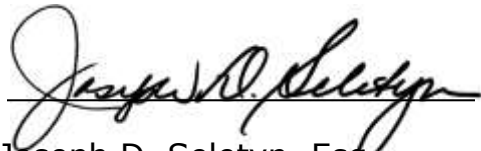
Answer, 11/21/11, at ¶ 6.

for Summary Judgment, 5/7/12, Exs. A-A4. The trial court found these documents established Wells Fargo's right to summary judgment, as no material issue of fact existed. Based upon the pleadings and their supplemental documents, we conclude the trial court did not err in reaching this decision. As a result, Appellant's final claim fails.

Based on the foregoing, we conclude Appellant's issues are waived or devoid of merit. Therefore, we affirm the April 2, 2013 judgment.

Judgment affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/3/2013