

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NATIONSTAR MORTGAGE, LLC,

Appellee

v.

MANUEL RODRIGUEZ, JR., A/K/A
MANUEL RODRIQUEZ, JR.,
ELIZABETH RODRIGUEZ A/K/A
ELIZABETH RODRIQUEZ,

Appeal of: Manuel Rodriguez, Jr.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1151 EDA 2012

Appeal from the Order entered March 14, 2012,
in the Court of Common Pleas of Lehigh County,
Civil Division, at No(s): 2010-C-3228

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 18, 2013

Manuel Rodriguez, Jr., aka Manuel Rodriquez, Jr., (“Appellant”), appeals from the trial court’s grant of summary judgment in favor of Nationstar Mortgage, LLC (“Nationstar”). After careful review, we affirm.

On June 30, 2010, Nationstar filed a mortgage foreclosure action against Appellant, which it amended on August 25, 2010. Nationstar averred that on December 29, 2006, Appellant and his former wife entered into a mortgage with Mortgage Electronic Registration Systems, Inc., as a nominee for Fremont Investment & Loan, (“Fremont”), in the amount of

*Retired Senior Judge assigned to Superior Court.

\$104,000. See Nationstar's Amended Complaint, 8/25/10. Fremont assigned Appellant's mortgage to Nationstar on July 8, 2010, and the assignment was recorded on September 1, 2010. *Id.*

The mortgage was secured by Appellant's home located at 802 S. Armour Street, Allentown, PA. *Id.* Nationstar averred that "[t]he mortgage is in default because monthly payments of principal and interest...due 03/01/2010 and each month thereafter are due and unpaid, and by the terms of said mortgage, upon failure of mortgagor to make such payments...the entire principal balance and all interest due thereon are collectible forthwith." *Id.* at 3. Nationstar noted the "total amount due was \$110,249.26," including, *inter alia*, amounts for *per diem* interest charges, cumulative late fees, and attorney's fees. *Id.* at 4.

On November 5, 2010, Appellant filed an answer and new matter to Nationstar's amended complaint. Appellant averred that he has two mortgages with Fremont, which hindered his ability to "reasonably respond" to Nationstar's averments of the amounts due and owing by Appellant under the mortgage. See Appellant's Answer and New Matter, 11/5/10, at 1-4. Nationstar filed a reply to Appellant's new matter on February 7, 2011.

On September 9, 2011, Nationstar moved for summary relief. Nationstar reiterated that "[Appellant's] mortgage payments due March 1, 2010 and each month thereafter are due and unpaid." Nationstar's Affidavit in Support of its Motion for Summary Judgment, 9/9/11, at 1. Nationstar

noted that the total amount due on the mortgage had increased to \$119,881.89. *Id.* at 2.

On December 5, 2011, Appellant filed his opposition to Nationstar's motion for summary judgment. Appellant indicated that "[a]t all times since late October 2010, [Appellant] and [Nationstar's] counsel have been in communication in regard to both the principal and second mortgages from [Nationstar]." Appellant's Response to [Nationstar's] Motion for Summary Judgment, 12/5/11, at 3. Appellant claimed that there was a "settlement accord" between Appellant and Nationstar, which "resolved both of [Appellant's] mortgages [with Nationstar], but [Nationstar] refuses to recognize this accord." *Id.*

In his affidavit opposing Nationstar's motion for summary judgment, Appellant asserted that he received a loan modification proposal from Nationstar on April 8, 2011, dated April 7, 2011, which was to be returned to Nationstar via facsimile by April 15, 2011, with the original fully executed documents to follow no later than April 18, 2011. *See* Appellant's Affidavit, 11/29/11, at 3. Appellant indicated that after "fruitless communications" with a "rude" and "elusive" representative of Nationstar to address Appellant's concerns regarding the terms of the April 7, 2011 loan modification, Appellant's counsel was told on May 12, 2011 that the original loan modification documents had to be returned to Nationstar by May 13, 2011. *Id.* at 4. Since Appellant was out of town at the time of this 24-hour

request, Appellant's counsel was only able to forward the documents to Nationstar on May 18, 2011. *Id.*

Appellant notes that he received a second set of loan modification documents from Nationstar in July 2011. *Id.* The July 2011 loan modification proposal required "sizable payments up front on short notice," which had not been required by the April 7, 2011 loan modification proposal. *Id.* Appellant "considers [that his] reasonable response and ultimate timely submission [constitutes] valid loan modifications with Nationstar[,] including for the principal first mortgage[,]...which [Nationstar] is attempting to invalidate via its newer proposals of mid-July 2011." *Id.* at 5.

On December 5, 2011, the trial court granted summary relief in Nationstar's favor. On December 15, 2011, Appellant moved for reconsideration of the trial court's December 5, 2011 Order. On January 4, 2012, the trial court vacated its December 5, 2011 Order and agreed to hear arguments on Nationstar's motion for summary judgment on January 27, 2012.

On March 14, 2012, the trial court granted summary judgment in Nationstar's favor in the amount of \$119,881.89 plus interests and costs. Appellant's timely appeal followed. Both the trial court and Appellant have complied with Pa.R.A.P. 1925.

Appellant presents the following issue for our review:

Whether the Trial Court committed an error of law and/or an abuse of discretion in not determining pursuant to Pa.R.C.P. 1035.1 et seq. that there remain genuine issues of material fact

particularly regarding Appellant's contention that the parties have entered into a mortgage loan modification agreement which resolved all the issues between the parties?

Appellant's Brief at 4.

Regarding Appellant's challenge to the entry of summary judgment, we recognize:

Our scope of review...[of summary judgment orders]...is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered.

Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Summary judgment is proper 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. Thus a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion.

Chris Falcone, Inc. v. Ins. Co. of the State, 907 A.2d 631, 635 (Pa. Super. 2006) (citation omitted).

Appellant contends that his May 18, 2011 execution and submission of the April 7, 2011 loan modification proposal precludes Nationstar's entitlement to summary relief. See Appellant's Brief at 11-13. We disagree.

The trial court determined:

Foreclosure proceedings are in rem and any defense must go to the existence and validity of the mortgage. See *First Federal Savings & Loan Ass'n of Erie v. McAfee*, 15 Pa.D. & C.3d 287 (Pa. Com. Pl. 1980); See also *First Wisconsin Trust Co. Strausser, supra*. (counterclaim not permitted because facts which gave rise to the counterclaim occurred after the creation of the mortgage and after [defendants] were in default of the mortgage). Here, [Appellant] does not assert that the loan was invalid at its conception, but instead argues it is no longer valid as a result of a loan modification.

Trial Court Opinion, 6/8/12, at 5.

The April 7, 2011 loan modification proposal required Appellant to resume making monthly mortgage payments on June 1, 2011. Additionally, the April 7, 2011 proposal specified:

If at any time during the effective dates of this Modification Agreement the Borrower fails to timely make payments as specified hereinabove and such default or failure continues for more than thirty (31) [sic] days, then this Modification Agreement, at the option of Lender, shall terminate and all terms of the Note as originally executed shall be reinstated in full, effective as of the date of this Modification Agreement, and the amounts due and payable under the terms of the Note shall be as originally stated therein, as if this Modification Agreement had never existed. Time is of the essence with regard to all payments specified hereunder. Nothing contained herein shall prevent or preclude Lender from enforcing any of Lender's rights or remedies under the Note, or under any document or instrument evidencing or securing the indebtedness created by or under the Note, or shall be construed as a waiver of any of Lender's rights or remedies thereby created.

Nationstar's Loan Modification Proposal, 4/7/11, at 1.

Therefore, under the terms of the agreement which Appellant contends modified the mortgage, "time [was] of the essence," and Appellant was required to resume making mortgage payments on June 1, 2011. *Id.* Appellant admits he did not execute the April 7, 2011 modification documents by their initial April 15, 2011 deadline, nor did he submit them by their subsequent May 13, 2011 time limit. See Appellant's Affidavit, 11/29/11, at 3. Further, Appellant made no payments on June 1, 2011, nor at any time thereafter, as required by the April 7, 2011 proposal. Thus, we agree with the trial court's determination that the record does not "support a finding" that Appellant entered into a loan modification with Nationstar. Trial Court Opinion, 6/8/12, at 5.

Further, we affirm the trial court's grant of summary relief in Nationstar's favor. As noted by the trial court:

'Summary judgment is properly granted in mortgage foreclosure actions where the mortgagor admits that he is delinquent in mortgage payments.' *First Wisconsin Trust Co. v. Strausser*, 439 Pa. Super. 192, 204, 653 A.2d 688, 694 (1995). Here, [Appellant] has specifically admitted that he is delinquent in mortgage payments, and, accordingly, [Nationstar] was entitled to judgment as a matter of law.

Trial Court Opinion, 6/8/12, at 5. **See *New York Guardian Mortg. Corp. v. Dietzel***, 524 A.2d 951, 952-953 (Pa. Super. 1987) (affirming summary judgment in mortgagee's favor where mortgagor admitted he had failed to make timely payments and had defaulted on mortgage).

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Order affirmed.