NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DEUTSCHE BANK TRUST COMPANY AMERICAS Appellee v. STEPHEN KRAVITZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1911 EDA 2013

Appeal from the Order June 3, 2013
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2011-02466

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY PANELLA, J.: **FILED JULY 02, 2014**

Appellant, Stephen Kravitz, appeals from the order entered June 3, 2013, by the Honorable Wallace H. Bateman, Court of Common Pleas of Bucks County, which entered summary judgment in favor of Appellee, Deutsche Bank Trust Company Americas ("Deutsche Bank"). We affirm.

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

> On February 8, 2007, Stephen F. Kravitz executed a Mortgage to Mortgage Electronic Registration Systems, Inc. [("MERS"),] as a Nominee for GMAC Mortgage, LLC which mortgage is recorded in the Office of the Recorder of Bucks County, in Mortgage Book No. 5347, Page 38. The mortgage was for property located at 43 Steeplechase Drive, Holland, Pennsylvania. The mortgage was assigned to [Appellee, Deutsche Bank]. The Assignment of Mortgage was recorded on February 17, 2011 in Book No. 6657, Page 2230. On March 15, 2011, [Deutsche Bank] filed a complaint in mortgage foreclosure, alleging that [Kravitz] defaulted under the mortgage. Following a conciliation

> conference where no agreement could be reached, [Kravitz] filed preliminary objections to the complaint, which the trial court overruled. On June 27, 2012, [Kravitz] filed an answer to the complaint, generally denying the averments alleged in the complaint, along with a new matter. On July 13, 2012, [Deutsche Bank] filed a reply to [Kravitz's] new matter.
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> On December 21, 2012, [Deutsche Bank] filed a motion for summary judgment. As part of their motion, [Deutsche Bank] attached various documents and the affidavit of GMAC, Mortgage, LLC Authorized Officer, Thomas E. Kennedy. In his affidavit, Kennedy stated that [Kravitz] defaulted on the mortgage in April of 2010 and owed a principle balance of $590,592.66. [Kravitz] filed his response on January 21, [2013], arguing that the rule in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932) prohibited the entry of summary judgment in favor of [Deutsche Bank]. This [c]ourt granted [Deutsche Bank's] motion for summary judgment on July 2, 2013. [Kravitz] then filed this timely appeal.

Trial Court Opinion, 8/28/13, at 1-2.

> On appeal, Kravitz raises the following issues for our review:
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> Did the trial court commit an error of law in its grant of summary judgment upon a defective note transfer and mortgage assignment?
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> Did the trial court commit an error of law in its grant of summary judgment upon an inadmissible hearsay testimonial affidavit predicated upon an indecipherable hearsay "loan history"?

Appellant's Brief, at 9.

> We review a challenge to the entry of summary judgment as follows.
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> [We] may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. *See* Pa.R.C.P., Rule 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the nonmoving

> party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review 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.

E.R. Linde Const. Corp. v. Goodwin, 68 A.3d 346, 349 (Pa. Super. 2013) (citation omitted).

In actions for *in rem* foreclosure due to the defendant's failure to pay a debt, summary judgment is proper where the defendant admits that he had failed to make payments due and fails to sustain a cognizable defense to the plaintiff's claim. ***See Gateway Towers Condo. Ass'n v. Krohn***, 845 A.2d 855, 858 (Pa. Super. 2005); ***First Wis. Trust. Co. v. Strausser***, 653 A.2d 688, 694 (Pa. Super. 1995).

Kravitz first argues that Deutsche Bank was without standing to enter judgment in this matter. Pennsylvania Rule of Civil Procedure 2002(a) provides that "[e]xcept as otherwise provided ... all actions shall be prosecuted by and in the name of the real party in interest…." Pa.R.C.P. 2002(a). A 'real party in interest,' as required to have standing to maintain an action, is the person who has the power to discharge the claim upon which suit is brought and to control the prosecution of the action brought to enforce rights arising under the claims. ***See Spires v. Hanover Fire Ins. Co.***, 364 Pa. 52, 58, 70 A.2d 828, 831 (1950), *overruled in part on other grounds by* ***Guy v. Liederbach***, 501 Pa. 47, 459 A.2d 744 (1983). Where

an assignment is effective, however, the assignee stands in the shoes of the assignor and assumes all of his rights. ***See Smith v. Cumberland Group, Ltd.***, 687 A.2d 1167, 1172 (Pa. Super. 1997). It therefore follows that "the assignee is usually the real party in interest and action on the assignment must be prosecuted in his name." ***Wilcox v. Regester***, 417 Pa. 475, 480, 207 A.2d 817, 820 (1965).

Although Kravitz maintains that the original holder of the mortgage, MERS, did not have the authority to assign the mortgage to Deutsche Bank, he provides no binding authority to support his claim. ***See*** Appellant's Brief, at 14. Regardless, we find the mortgage note itself belies Kravitz's argument. As previously noted, the mortgage lists MERS as the mortgagee under the security instrument and as nominee for lender, GMAC Mortgage, LLC. ***See*** Mortgage, at 1-2. The mortgage further provides that:

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) **and to the successors and assigns of MERS**, the following described property….

Mortgage, at 3. Clearly, the security instrument specifically contemplates MERS's authority to assign the note, and Kravitz's continued obligation to

the assigns thereafter.[1] Kravitz's unsupported claim that MERS was without the authority to do so is patently without merit.

We likewise reject Kravitz's argument that the assignment to Deutsche Bank was in some manner defective. The assignment of the mortgage to Deutsche Bank was recorded with the Bucks County Recorder of Deeds on February 10, 2011. Deutsche Bank subsequently filed a complaint in foreclosure on March 15, 2011. In its complaint, Deutsche Bank set forth the date and existence of the mortgage under which MERS, as nominee for

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[1] MERS aims to facilitate "by streamlining, successive interbank sales of mortgages." ***Union County, Ill***. ***v. MERSCORP, Inc.***, 735 F.3d 730, 732 (7th Cir. 2013). As the Court explained:

> Although MERSCORP [the parent company of MERS] is the mortgagee of record, the assignment of a mortgage to it is not substantive. MERSCORP is not the lender; and as it does not pay the assignor for the assignment it does not become the lender—in fact it has zero financial interest in the mortgage. In a previous decision we described MERSCORP as "a membership organization that records, trades, and forecloses loans on behalf of many lenders, acting for their accounts rather than its own." ***Mortgage Electronic Registration Systems, Inc. v. Estrella***, 390 F.3d 522, 524–25 (7th Cir.2004). *The purpose of assigning a mortgage to MERSCORP is merely to enable repeated de facto assignments of the mortgage by successive mortgagees.* We call those assignments "de facto" because MERSCORP remains the official assignee (it prefers to be called the "nominee" of the lender and of the lender's successors and assigns). These "assignments" are not recorded, and so B in our example can transfer the mortgagor's promissory note—the homeowner's debt to the bank—to another financial institution without the transfer being recorded in a public-records office.

Id. (emphasis added).

GMAC Mortgage, LLC, was mortgage holder, and the mortgage had been assigned to Deutsche Bank and recorded as such. ***See*** Complaint, 3/15/11 at ¶ 3. We are therefore satisfied that Deutsche Bank sufficiently advised Kravitz of its claim of interest to the subject mortgage and find no defect apparent on the face of the recorded assignment. ***See***, ***e.g.***, ***US Bank N.A. v. Mallory***, 982 A.2d 986 (Pa. Super. 2013). Therefore, this claim, too, is without merit.

Kravitz's remaining argument raised on appeal is two-fold. Kravitz first argues that the trial court erred when it deemed as admitted his general denials to the factual averments in Deutsche Bank's complaint. In its complaint, Deutsch Bank stated the following:

> 5. The mortgage is in default because monthly payments of principal and interest upon said mortgage due 04/01/2010 and each month thereafter are due and unpaid, and by the terms of said mortgage, upon failure of mortgagor to make such payments after a date specified by written notice sent to Mortgagor, the entire principal balance and all interest due thereon are collectible forthwith.
>
> 6. The following amounts are due on the mortgage:
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> | | |
> |---|---|
> | Principal Balance | $482,970.62 |
> | Interest 3/01/2010 through 12/08/2010 | $27,861.81 |
> | Late Charges through 12/08/10 | $1398.40 |
> | Property Inspections/Property Preservation | $435.00 |
> | **TOTAL** | **$512,311.33** |

Complaint, at ¶¶ 5-6.

In Kravitz's answer, he denied executing and delivering the mortgage and the assignment of the mortgage to Deutsche Bank. ***See*** Answer at ¶3.

Kravitz further denied defaulting on the payment obligation under the Mortgage, and amounts due and owing under the Mortgage as "conclusions of law."

> 5. Denied. Said averment is a conclusion of law to which no response is required. By way of further answer, after reasonable investigation Answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment and therefore, said averment is expressly denied and strict proof thereof is demanded at the time of trial.
>
> 6. Denied. Said averment is a conclusion of law to which no response is required. By way of further answer, after reasonable investigation Answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment and therefore, said averment is expressly denied and strict proof thereof is demanded at the time of trial. Moreover, post-acceleration late charges, and "property inspections/property preservations," are strictly denied, and proof thereof is demanded at the time of trial.

Answer, at ¶¶ 5-6.

In ***First Wis. Trust. Co. v. Strausser***, 653 A.2d 688, 694 (Pa. Super. 1995), the mortgagor similarly responded to the bank's allegation in the complaint regarding the total amount due by denying the allegation as a conclusion of law. ***See*** 653 A.2d at 694. The panel noted that such an assertion by the mortgagor "amounted to nothing more than general denials which are considered admissions under Pa.R.C.P. 1029(b)…." ***Id***. Thus, the panel found the trial court's entry of summary judgment was proper.

Here, as in ***Strausser***, Kravitz responded to Deutsche Bank's allegation by denying it as a conclusion of law. While it is true that mere conclusions of law require no denial because they are deemed to be denied,

Deutsche Bank's averments also include assertions of fact that require specific denials.

The assertion that Kravitz is in default of his mortgage is indeed a conclusion of law to which Deutsche Bank needs factual support and to which Kravitz need not reply. However, Deutsche Bank also makes factual assertions that Kravitz failed to make timely payments starting in April 2010. Such assertions of fact are well within the knowledge of the mortgagor. ***See***, ***e.g.***, ***New York Guardian Mortg. Corp. v. Dietzel***, 524 A.2d 951, 952 (Pa. Super. 1987). Because Kravitz is the only party, aside from Deutsche Bank, to have the specific knowledge to refute the assertion, his general denial amounts to an admission under Pa.R.C.P. 1029(b).

Likewise, the averments in paragraph 6 are entirely factual. Thus, Kravitz's failure to plead specific facts in response to the amounts due contained therein must also be considered admissions under Pa.R.C.P. 1029(b).[2] As we find that Kravitz effectively admitted to all of Deutsche Bank's allegations in the Complaint regarding his failure to make payments under the mortgage and the amounts due and owing, we agree with the trial

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[2] To the extent that Kravitz's statements that he was unable to form a belief as to the truth of the factual averments "after reasonable investigation" may constitute a denial under Pa.R.C.P. 1029(c), our case law has made it clear that a party cannot rely on Pa.R.C.P. 1029(c) to excuse the failure to properly admit or deny factual allegations when, as here, it is clear that the pleader must know whether a particular allegation is true or false. ***See Dietzel***, 524 A.2d at 952; ***Cercone v. Cercone***, 386 A.2d 1, 4 (Pa. Super. 1978).

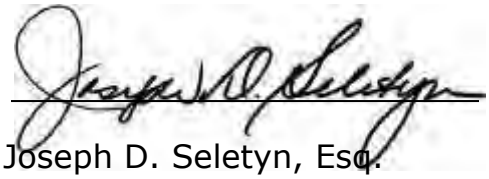
court that there are no genuine issues of material fact regarding Kravitz's default. Accordingly, we find no error in the trial court's entry of summary judgment in favor of Deutsche Bank.

Lastly, Kravitz argues that summary judgment was improperly entered based solely on the testimonial affidavit attached to the complaint in violation of the rule announced in ***Nanty-Glo v. American Surety Co.***, 163 A. 523 (Pa. 1932). ***See*** Appellant's Brief, at 18. Pursuant to ***Nanty-Glo***, "summary judgment may not be entered where the moving party relies exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact *except* where the moving party supports the motion by using *admissions of the opposing party* or the opposing party's own witness." ***First Philson Bank, N.A. v. Hartford Fire Insurance Co.***, 727 A.2d 584, 587 (Pa. Super. 1999) (emphasis added) (citation omitted). As noted above, Kravitz's general denials to the specific factual allegations in Deutsche Bank's complaint are deemed admissions. Therefore, the rule in ***Nanty-Glo*** does not preclude the entry of summary judgment in this case.

Based on the foregoing, we agree with the trial court that there exists no genuine issue of material fact such that the entry of summary judgment was proper. Accordingly, we affirm the order of the trial court.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014