NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

AK VALLEY CREDIT UNION, Appellee v. BARBARA MONTELEONE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 335 WDA 2014

Appeal from the Judgment entered January 29, 2014,
in the Court of Common Pleas of Westmoreland County,
Civil Division, at No(s): 08 CJ 14119

BEFORE: BENDER, P.J.E., BOWES, and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 23, 2014**

Barbara Monteleone, ("Appellant"), appeals from the trial court's order denying her petition to strike or satisfy the mortgage foreclosure default judgment, which the trial court entered against Appellant and in favor of AK Valley Credit Union, ("Credit Union"). We affirm.

From our review of the record, we glean the following details which are germane to our disposition of this appeal: On December 4, 2008, Credit Union filed a Complaint in Mortgage Foreclosure against Appellant. The complaint averred that "[o]n or about October 11, 2006, [Credit Union and Appellant] entered into a written Mortgage and Note agreement" regarding a property located at "235 Claremont Drive, Lower Burrell, Westmoreland County, Pennsylvania 15068 ["the property"]." Credit Union's Complaint in Mortgage Foreclosure, 12/4/08, at 1-2 (unnumbered). Credit Union further

averred that "[u]nder the terms and conditions of the aforesaid written Mortgage and Note agreement, [Appellant] applied for and received a mortgage loan with [Credit Union] in the amount of $232,000.00 [dollars]..." and Appellant "was to remit regular monthly installment payments in the amount of $3,813.70." ***Id.*** at 2 (unnumbered). Credit Union pled that "[Appellant] defaulted … by failing to remit the regular monthly installment payments due and owing to [Credit Union]." ***Id.*** at 4 (unnumbered). Credit Union averred that "the failure of [Appellant] to pay the regular monthly installment payments due and owing under the aforesaid Mortgage and Note constitutes a material breach of [Appellant's] obligation and therefore permits [Credit Union], in accordance with the express terms and conditions of the Mortgage and Note to accelerate the entire balance due and owing on the Mortgage Loan and Note and declare it to be payable immediately." ***Id.*** at 5 (unnumbered). According to Credit Union, "the total unpaid delinquent balance due and owing under the aforesaid Mortgage and Note is $229,241.82, plus continuing interest and costs." ***Id.***

On March 4, 2009, Credit Union filed an affidavit of service indicating that Appellant was served with the complaint on February 26, 2009. Affidavit of Service of Complaint in Mortgage Foreclosure, 3/4/09, at 1. On April 20, 2009, Credit Union filed a Praecipe for Entry of Default Judgment in Mortgage Foreclosure. On the same date, a default judgment was entered against Appellant.

On May 22, 2009, Appellant filed a Petition to Reopen a Default Judgment, and averred as follows:

> 6) In this matter[,] [Appellant] has a complete Defense to the within lawsuit; to wit:
>
> a. The mortgage under which [Credit Union] claims relief is invalid.
>
> b. First, the mortgage may only reach the property the mortgagor owned at the time the parties agreed to the loan.
>
> c. This loan occurred on or about October 20, 2006 and was to be secured by [the property].
>
> d. [The property] is a house that rests upon three city lots within Lower Burrell, Pennsylvania.
>
> e. As of October 20, 2006[,] [the property] was held as tenants in common between Joseph E. Trettel and Minerva Trettel according to the parties [sic] 1982 deeds filed at Westmoreland County Recorder of Deeds Book number 2456[,] pages 219 through 227.
>
> f. Joseph and Minerva Trettel are [Appellant's] parents.
>
> g. As of 2006[,] Joseph Trettel passed away on December 9, 1990 but no one raised an estate on his behalf because no one realized the [property] was held as tenants in common and that a defect in the title existed. It is not until August 30, 2007 that an estate is raised for Joseph Trettel at Westmoreland County Register of Wills number 1548 of 1991.
>
> h. Thus because [Appellant] did not own the property at the time she received the proceeds for the mortgage it cannot attach to the entire real property and it is a mere unsecured debt.
>
> i. Moreover, [Appellant] disputes the second signature in the mortgage instrument as it is her position that she could not agree to a mortgage for estate property without prior Court approval and second she did not sign the instrument in the capacity as executrix for her mother and

> this script was added later such that she did not sign in the proper capacity.

Appellant's Petition to Reopen a Default Judgment, 5/22/09, at 1-2 (unnumbered).

On May 22, 2009, the trial court issued a rule "upon [Credit Union] to show cause why the Default Judgment should not be opened," directed Credit Union to "file an answer to the petition within (20) days," and ordered "[d]iscovery … [to] be completed within 60 days of the date of th[e] order." Rule, 5/22/09, at 1.

On May 29, 2009, Credit Union responded to Appellant's petition to reopen the default judgment, and averred that Appellant "did in fact own [the property] at the time that she received a mortgage from [Credit Union]." Credit Union's Response to [Appellant's] Petition to Reopen a Default Judgment in Mortgage Foreclosure, 5/29/09, at 3-4. Credit Union "[s]pecifically … denied that the second signature on the mortgage instrument [was] improper in any manner whatsoever[.]" ***Id.*** at 4.

On July 28, 2009, Credit Union deposed James Irwin, an attorney who "represented [Appellant] in a number of personal matters, and in addition, recently [had] been handling [Appellant's] mother's estate on [Appellant's] behalf." N.T., Deposition of James Irwin, Esquire, 7/28/09, at 10. Attorney Irwin had also known Appellant's mother, Minerva Trettel, for "probably 20 or 25 years" prior to her death. ***Id.*** Attorney Irwin additionally handled the estate of Appellant's father, Joseph Trettel. ***Id.*** at 11. Attorney Irwin

agreed that "[t]he records from Westmoreland County show that Mr. and Mrs. Trettel purchased the subject property in 1968, and did so apparently as tenants by the entireties … [which] somehow was … severed in 1982 by two separate deeds." ***Id.*** at 15. The execution of the two separate deeds resulted in each spouse owning "a non-divided one half interest [of the property] as tenants in common." ***Id.*** at 15-16. Attorney Irwin discovered the tenancy in common "when we were attempting to sell the [property] whenever [Mrs. Trettel] died." ***Id.*** at 16.

Attorney Irwin confirmed that "under the last will and testament of [Mrs. Trettel], … she gave her undivided one half interest to her daughter, [Appellant][.]" ***Id.*** at 17. Attorney Irwin further confirmed that Mr. Trettel "bequeath[ed] his interest in the subject property to [Appellant] as well[]" subject "to a life estate in [Mrs. Trettel]" which would allow Mrs. Trettel to live in the property until her death. ***Id.*** at 18-19. Attorney Irwin was asked his "opinion" regarding whether "when [Appellant] applied for and was approved for a mortgage loan with [Credit Union], did [Appellant], in fact, own 100 percent of the subject property[.]" ***Id.*** at 28. Attorney Irwin replied that "I think legally she did[.]" ***Id.*** On redirect examination, Attorney Irwin agreed that "[Appellant] … held equitable title at a minimum … to the subject property based on the last will and testament of her father … and her mother." ***Id.*** at 34-35.

On October 26, 2009, Credit Union filed a brief opposing Appellant's petition to open the default judgment. On October 28, 2009, the trial court issued an order finding as follows:

> 1. [Appellant] has failed to provide a meritorious defense which would compel [the trial court], pursuant to Pa.R.C.P. 206.7, and the case law interpreting it, to open the default judgment in mortgage foreclosure entered on April 20, 2009.
> 2. [Appellant] was the 100% owner of [the property] … at the time she entered into the Mortgage and Note with [Credit Union].

Order, 10/26/09, at 1. The trial court's order decreed that Appellant's petition was "dismissed and the previous Rule issued May 22, 2009 is discharged." ***Id.*** at 2. Appellant did not file a notice of appeal from the trial court's order denying her petition to open the default judgment.

On November 10, 2009, Credit Union filed a petition for writ of execution in mortgage foreclosure. On December 3, 2009, Credit Union filed an affidavit of service of notice of sheriff sale on lienholders. On December 16, 2009, Credit Union filed an affidavit of service of notice of sheriff sale on Appellant. On July 2, 2010, Credit Union filed a motion to continue the sheriff's sale of the property, and averred that "a sheriff sale of [the property] ha[d] been scheduled for July 6, 2010." Credit Union's Motion to Continue Sheriff Sale of Real Estate, 7/2/10, at 1 (unnumbered). Credit Union further averred that Appellant "filed a Voluntary Petition for Relief under Chapter 13 of the Bankruptcy Code with the United States Bankruptcy Court for the Western District of Pennsylvania on or about February 26,

2010." ***Id.*** at 2 (unnumbered). Given the entry of an automatic stay pursuant to Appellant's bankruptcy proceedings, Credit Union sought "to continue the current sale for 90 days." ***Id.*** On July 2, 2010, the trial court issued an order granting a 90 day continuance of the sheriff sale of the property. On October 8, 2010, Credit Union again sought to continue the sheriff's sale of the property until January 3, 2011. ***See generally*** Credit Union's Motion to Continue Sheriff Sale of Real Estate, 10/8/10. On October 6, 2010, the trial court granted Credit Union the requested continuance until January 3, 2011. Subsequently, at Credit Union's request, the trial court's October 8, 2010 order was vacated and the sheriff's sale of the property was postponed without a date certain.

On September 27, 2013, Credit Union filed a praecipe for writ of execution in mortgage foreclosure after having secured relief from the automatic stay imposed relative to Appellant's bankruptcy proceedings. Appellant did not appeal the bankruptcy court's order lifting the automatic stay as to Credit Union's mortgage foreclosure action against Appellant. On or about October 16, 2013, Appellant filed a motion to strike or satisfy the default mortgage foreclosure judgment, averring that the mortgage in question had been modified in a post-judgment agreement during the course of Appellant's bankruptcy proceedings. Appellant describes the post-judgment agreement as follows:

> During the pendency of [Appellant's] Bankruptcy [proceedings], the parties to this appeal filed a joint stipulation providing for a permanent modification of [Appellant's]

> mortgage. The stipulation provided for a mortgage term of 240 months, with a principal balance of $196,756, an interest rate of 5.5%, monthly payments of $1,353.48, and first payment due on the month following final confirmation of the Chapter 13 Plan. Said stipulation also stated the modification was a permanent loan modification.

Appellant's Brief at 3.

On October 16, 2013, the trial court issued a rule upon Credit Union to show cause why the judgment should not be opened or satisfied, and directing Credit Union to file a response within 20 days of the order. On October 29, 2013, Credit Union filed a response and new matter to Appellant's motion to strike the judgment. On November 15, 2013, Credit Union filed a petition to discharge the October 16, 2013 Rule, which the trial court denied the same day.

On January 28, 2014, "[a]fter careful consideration" of Appellant's motion to strike or satisfy the judgment, "the written submissions of the parties and after oral argument thereon," the trial court denied Appellant's motion to strike the judgment. Order, 1/28/14, at 1. On February 24, 2014, Appellant filed a notice of appeal.

The trial court did not enter an order directing Appellant to comply with Pa.R.A.P. 1925. On March 7, 2014, the trial court issued a decree "in accordance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure … stat[ing] that the reasons for the decision appear in the Decision and Order dated January 28, 2014[.]" Decree, 3/7/14, at 1.

Appellant presents a single issue for our review:

> 1. Did the Trial Court err in failing to strike, quash, satisfy or otherwise discontinue the [Credit Union's] foreclosure judgment when the parties agreed to permanently modify the mortgage in another forum, thereby eliminating the original mortgage underlying the Appellant's judgment?

Appellant's Brief at 2.

Initially, we recognize that a petition to strike a judgment constitutes a demurrer to the record. ***See Cargitlada v. Binks Mfg.Co.,*** 837 A.2d 547, 549 (Pa. Super. 2003) (internal citations omitted). To grant a petition to strike a judgment, the judgment must have a fatal defect, which is apparent on the face of the record. ***See Williams v. Wade,*** 704 A.2d 132, 134 (Pa. Super. 1997) ***quoting U.K. LaSalle, Inc. v. Lawless,*** 618 A.2d 447, 449 (Pa. Super. 1992). "As such, it is not a matter calling for the exercise of discretion." ***Wade, supra,*** at 134. We will not disturb the trial court's denial of Appellant's petition to strike the default judgment where the judgment is not fatally defective on its face. ***See Boatin v. Miller***, 955 A.2d 424, 427 (Pa. Super. 2007).

Appellant presents a tripartite argument challenging the trial court's denial of her motion to strike or satisfy the default judgment. In the first section of her argument, Appellant asserts:

> The Appellant's purpose in filing the Petition to Strike or Satisfy the [Credit Union's] mortgage foreclosure judgment was to give effect to the parties' post-judgment agreement. **Because the trial court cannot consider the subsequent agreement under present law,** it could not recognize the underpinnings of the old judgment do not exist in this new economic reality. **While such a result is correct as the law presently exists**, the circumstances of this case require a narrow expansion of the Trial Court's review in a Petition to Strike.

Appellant's Brief at 6 (emphasis supplied). We disagree.

Our review of the record and applicable jurisprudence reflects that the trial court did not err in denying Appellant's petition to strike the judgment because the judgment was not fatally defective. Indeed, even Appellant's argument, as set forth above, concedes this point. ***See id*; *see also Id.*** at 4 ("[t]he parties to this appeal do not dispute the validity of the [Credit Union's] foreclosure judgment at the time of its entry[.]"). Significantly, Appellant acknowledges that "[t]he trial court's opinion correctly restates current jurisprudence for a petition to strike." ***Id.*** at 5. Appellant argues, however, that "under the unusual circumstances of this case, this Court must create an exception to the general rule for striking a judgment." ***Id.*** We cannot accept Appellant's exhortation to ignore binding precedent in order to grant relief. ***See Sorber v. American Motorists Ins. Co.,*** 680 A.2d 881, 882 (Pa. Super. 1996). Accordingly, Appellant's challenge to the trial court's denial of her petition to strike the judgment fails.

Appellant further argues that the trial court should consider the "post-judgment mortgage modification" in deciding Appellant's petition to strike. Appellant's Brief at 6. However, as Appellant acknowledges, "[u]nder current law, a Petition to Strike can only consider the record in the original docket, and cannot consider any extraneous matters, including questions of equity." Appellant's Brief at 9 ***citing Resolution Trust Corp. v. Copley Qu-Wayne Associates,*** 683 A.2d 269, 273 (Pa. 1996). Indeed, Appellant fails to cite any cases where post-judgment agreements were considered in

the context of a petition to strike a judgment. Rather, Appellant only cites cases dealing with the consideration of subsequent agreements within the ambit of petitions to open judgments. ***See*** Appellant's Brief at 7 (stating that "[u]nder Pennsylvania law, a Court may permit opening of a judgment or the quashing of an action based on a collateral or modified agreement," and relying on ***Yezbak v. Croce,*** 88 A.2d 80 (Pa. 1952), ***Gettier v. Friday,*** 99 A.2d 899 (Pa. 1953), and ***PNC Bank v. Kerr,*** 802 A.2d 634 (Pa. Super. 2002)). Significantly, Appellant concedes that "Appellant has not found a case that expands the principals in ***Yezbak*** to a Petition [such as Appelant's] to Strike [a judgment], as opposed to a Petition to Open." Appellant's Brief at 9. Likewise, our research has not found such application, and we again decline Appellant's proposition that we create "an exception to the general rule for striking a judgment, wherein a trial court may consider a settlement agreement as part of a Petition to Strike[.]" Appellant's Brief at 9.

In the second part of her argument, Appellant posits that "[i]n the alternative to striking the judgment, the trial [c]ourt should have considered Appellant's Petition as a Petition to Open, and after notice and an opportunity to respond, continue with the Rule to Show Cause on that basis." Appellant's Brief at 10. However, as Appellant acknowledges, but would have us ignore, we have previously determined that a "trial court did not have the authority to consider a Petition to Strike as one to open[.]" Appellant's Brief at 12 (***citing Kophazy v. Kophazy,*** 421 A.2d 246, 249 (Pa. Super. 1980) and noting that "the ***Kophazy*** court stated that the trial

court erred by converting a Motion to Strike into a Motion to Open, and then deciding the matter as a Motion to Open"). Again, we cannot ignore prior binding precedent. ***See also Bell v. Willis,*** 80 A.3d 476, 479 (Pa. Super. 2013) (internal citation omitted) ("As an intermediate appellate court, this Court is obligated to follow the precedent set down by our Supreme Court. It is not the prerogative of an intermediate appellate court to enunciate new precepts of law or to expand existing legal doctrines. Such is a province reserved to the Supreme Court.").

Appellant maintains that "[i]f this matter is remanded, the Appellant would have a strong case for opening the judgment." Appellant's Brief at 12. We cannot agree. To open a default judgment, the movant must promptly file a petition to that effect, must plead a meritorious defense to the claims raised in the complaint, and provide a reasonable excuse for not filing a responsive pleading. ***See Seeger v. First Union National Bank***, 836 A.2d 163, 165 (Pa. Super 2003). First, Appellant did not file a petition to open a judgment, but rather a petition to strike a judgment. Further, Appellant has not pled a meritorious defense. Indeed, the post-judgment mortgage modification Appellant relies on does not change the validity and enforceability of the default judgment, and therefore does not constitute a meritorious defense to the judgment. We have expressed:

> [I]in general, the acceptance of a new obligation is not satisfaction of an existing note or judgment unless so intended. *Greiner v. Brubaker, Adm'x,* 151 Pa.Super. 515, 30 A.2d 621. In fact, the legal presumption is to the contrary; that a new note is but security for, and not satisfaction of, the original obligation.

> *Peoples Nat. Bk. v. Bartel et al.,* 128 Pa.Super. 128, 193 A. 59; *Aliquippa N. Bk. v. Harvey Ex'x,* 340 Pa. 223, 16 A.2d 409.

Olyphant Bank v. Boris, 36 A.2d 823, 824 (Pa. Super. 1944). Accordingly, Appellant's post-judgment mortgage modification agreement with Credit Union does not negate the existence or validity of the original mortgage on which the default judgment was premised, and does not mandate the opening of the default judgment.

Moreover, Appellant disregards that the post-judgment mortgage modification agreement is insufficient to defeat Credit Union's entitlement to judgment at law. ***See First Wisconsin Trust Co. v. Strausser,*** 653 A.2d 688, 694 (Pa. Super. 1995) (to defeat a mortgagor's entitlement to a judgment at law, mortgagee must raise a defense that assails the existence and validity of the mortgage); ***see also Chrysler First Business Credit Corp. v. Gourniak,*** 601 A.2d 338, 341 (Pa. Super. 1992) (affirming a trial court's order striking counterclaims and affirmative defenses to a mortgage foreclosure action, and reiterating that "counterclaims in mortgage foreclosure actions are governed by Rule 1148 of the Rules of Civil Procedure, ***supra*** … [which] has been interpreted as permitting to be pled only those counterclaims that are part of or incident to the creation of the mortgage itself … [and] restrict[ing] every defendant to claims which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose"). Accordingly,

Appellant's contention that the post-judgment mortgage modification agreement is a "meritorious defense" to the default judgment is unavailing.

In the third and final section of her tripartite argument, Appellant asserts that the "trial court should have considered the Petition [to strike the judgment] as a Petition to satisfy the judgment[.]" Appellant's Brief at 13. Appellant maintains that "[a]s the Appellant's petition states a valid case for marking the original judgment as satisfied, the trial court's failure to address the question of satisfaction is error." ***Id.*** We disagree. As we reasoned ***supra***, Appellant's post-judgment mortgage modification agreement with Credit Union "is but security for, and not satisfaction of, the original obligation." ***See Olyphant Bank,*** 36 A.2d at 824. Accordingly, the trial court did not err in declining to grant the alternative relief of judgment satisfaction which Appellant sought in her petition to strike.

Judgment affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014