NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SOVEREIGN BANK, N.A., FORMERLY KNOWN AS SOVEREIGN BANK, Appellant v. HAROLD L. HAWKINS A/K/A HAROLD HAWKINS AND BESSIE LUFFBOROUGH, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 297 EDA 2013

Appeal from the Order December 7, 2012
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: 02409, July Term 2012

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED DECEMBER 17, 2013**

Appellant, Sovereign Bank, N.A., formerly known as Sovereign Bank, appeals from the order which granted the preliminary objections of Appellees, Harold L. Hawkins a/k/a Harold Hawkins and Bessie Luffborough, and dismissed Appellant's complaint in foreclosure with prejudice. We vacate the order and remand with instructions.

The trial court summarized the preliminary factual history relevant to this case:

> On October 18, 1990 Appellee Hawkins executed and delivered to Liberty Bank, for value received, a Home Equity Line Revolving Loan Agreement (herein after [sic] referred to as the "Agreement") with a credit limit of twenty-five thousand dollars ($25,000). Appellees also executed and delivered to Liberty

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* Retired Senior Judge assigned to the Superior Court.

> Bank an Advance Money Mortgage (hereinafter referred to as the "Mortgage") securing repayment of the Agreement by encumbering the premises known as 3037 N. 15"' Street, Philadelphia, PA 19132. The Mortgage was duly recorded in the Department of Records and for the County of Philadelphia on the following day. Sometime thereafter, Liberty Bank merged with First Union National Bank (hereinafter referred to as "First Union"), and as a direct result, the Agreement and Mortgage and attendant rights, title, and interest were transferred from Liberty Bank to First Union. On January 18, 1999, First Union assigned the Agreement and Mortgage to Appellant (hereinafter referred to as the "Assignment"), which described the subject premises and was recorded on March 29, 1999.
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> On December 7, 2011 Appellees defaulted on the Agreement and Mortgage. On February 22, 2012, Appellant sent a Notice of Intent to Foreclose by First Class and Certified Mail, addressed to Appellees at the subject premises. On July 18, 2012, Appellant commenced a civil action in the Court of Common Pleas of Philadelphia County, demanding an *in rem* judgment against Appellees. Pursuant to the terms of the Agreement and Mortgage, Appellant sought judgment in the amount of thirty thousand four hundred and sixty dollars and thirty-two cents ($30,460.32), which represents the outstanding principal, interest, attorney's fees and other costs of collection.
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> On September 24, 2012, the [c]ourt entered an order permitting Appellant to seek default judgment in the underlying mortgage foreclosure matter because the subject property was not residential and/or not owner occupied. Accordingly, Appellant entered default judgment against Appellees on October 1, 2012. . . .

(Trial Court Opinion, 3/04/13, at 1-2) (record citations omitted).

At this point, the record becomes less clear. Notably, the civil docket report, included in the certified record, listed as comprising seven pages, is missing pages two through five. However, a second overlapping list of docket entries also appears in the certified record in the Appeal Inventory Report.

Appellees filed preliminary objections to the complaint, challenging Appellant's standing, on October 2, 2012. (***See*** Trial Ct. Op., at 2; ***see also*** Appeal Inventory Report docket entries, at 2; Appellees' Brief, at 6).[1] The record contains a copy of the preliminary objections, manually dated October 2, 2012 and signed, but not time stamped or otherwise noted on its face as docketed.

The certified record also contains "Defendants [sic] Petition to Open Default Judgment." The Appeal Inventory Report includes a docket entry for the petition to open, on October 5, 2012.[2] Neither the petition to open nor the cover page is signed by Appellees' attorney.[3] Pennsylvania Rule of Civil Procedure 1023.1 provides in pertinent part that, "[e]very pleading, written motion, and other paper directed to the court shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." Pa.R.C.P. 1023.1(b).

The trial court explains that it deemed the preliminary objections "premature." (Trial Ct. Op., at 3). It further relates that it entered an order

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[1] As already noted, the relevant page from the primary list of docket entries is missing.

[2] This filing is missing from the primary list of docket entries.

[3] The certificate of service and the supporting memorandum are also unsigned.

granting the petition to open on November 8, 2012. (***See id.***). Both dockets record the entry of this order on November 8. The order included in the certified record is a copy. It has a manually inserted date of November 6, 2012. Neither the docket entry nor the copy of the order indicates that notice of the order was properly provided to Appellant or its counsel.

Both dockets also record the entry, on December 7, 2012, of another order, manually dated **November 5**, 2012, which both "granted" the preliminary objections, and dismissed Appellant's complaint with prejudice. (Order, 12/07/12). There is no explanation in the record why this order was not docketed until December 7, 2012.[4] This is the order from which Appellant has taken its appeal.

In the meantime, Appellant, presumably without notice that the court had dismissed its complaint on November 5, 2012 (**before** it granted the petition to open the default judgment), filed an answer to the preliminary objections, and supporting memorandum, both on November 15, 2012, as also confirmed by the available docket entries.

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[4] The trial court stated that the order was not docketed until December 7, 2012 "[f]or reasons unknown[.]" (Trial Ct. Op., at 3).

Appellant filed a notice of appeal from the December 7, 2012 order, on January 4, 2013, which the trial court acknowledged was timely. (***See*** Trial Ct. Op., at 3).[5] We agree.

Appellant raises three questions on appeal.

> 1. Did the Trial Court err as a matter of law, equating a **merger** of two (2) banks, with one bank transferring a mortgage to another bank by **assignment**, then dismissing [Appellant's] Complaint in Mortgage Foreclosure because no written document evidencing the merger was attached as an exhibit?
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> 2. Did the Trial Court err as a matter of law by considering [Appellees'] Preliminary Objections despite that they were filed only **after** [Appellant] entered judgment by default and **before** the Trial Court opened the judgement [sic]?
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> 3. Did the Trial Court err and abuse its discretion by dismissing [Appellant's] Complaint in Mortgage Foreclosure **with prejudice**, on [Appellees'] first set of Preliminary Objections, without allowing [Appellant] a single opportunity to file an amended complaint?

(Appellant's Brief, at 4) (emphases in original).

We begin our analysis by noting our standards of review and other applicable legal principles.

> Pennsylvania Rules of Civil Procedure 1141-50 govern actions for mortgage foreclosure. Rule 1141(a) provides that an action at law to foreclose a mortgage upon any estate, leasehold or interest in land shall not include an action to enforce a personal liability. It is well-established that an action in

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[5] Appellant also filed a timely statement of errors, on February 5, 2013. ***See*** Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on March 4, 2013. ***See*** Pa.R.A.P. 1925(a).

> mortgage foreclosure is strictly *in rem* and thus may not include an *in personam* action to enforce personal liability. This restriction is equally applicable to a mortgagee and a mortgagor.

Newtown Vill. P'ship v. Kimmel, 621 A.2d 1036, 1037 (Pa. Super. 1993) (citations omitted).

"To the extent that the question presented involves interpretation of rules of civil procedure, our standard of review is *de novo*." ***Sigall v. Serrano***, 17 A.3d 946, 949 (Pa. Super. 2011) (citation omitted). Insofar as the appeal challenges the trial court's dismissal of the complaint with prejudice, our standard of review is abuse of discretion. ***See id.***[6]

> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.

Id. (citation omitted). "Due process requires that a party who will be adversely affected by a court order must receive notice and a right to be heard in an appropriate setting." ***Id.*** at 950 (citation omitted).

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[6] "Pennsylvania jurisprudence does not recognize a 'motion to dismiss' in the context of civil litigation." ***Sigall***, ***supra*** at 949 n.2 (quoting ***DiGregorio v. Keystone Health Plan E.,*** 840 A.2d 361, 365 (Pa. Super. 2003)). "However, '[a] trial court's order dismissing a case prior to trial is properly characterized as either a summary judgment or a judgment on the pleadings.'" ***Id.*** (quoting ***Gallagher v. Harleysville Mut. Ins. Co.,*** 617 A.2d 790, 796 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1381 (Pa. 1993)).

Our review of the trial court's sustaining of the preliminary objections is governed by the following standard:

> When reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, we treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom. Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases that are clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections. Moreover, we review the trial court's decision for an abuse of discretion or an error of law.

Additionally, we note the following:

> In assessing the propriety of the trial court's decision to sustain preliminary objections, we examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven.

D'Elia v. Folino, 933 A.2d 117, 121 (Pa. Super. 2007), *appeal denied*, 948 A.2d 804 (Pa. 2008) (citations omitted).

We address Appellant's third claim first.[7] Appellant asserts trial court error and abuse of discretion, challenging the dismissal of its complaint

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[7] Appellant does not directly challenge the opening of the judgment, although the claims overlap and the underlying assertion of the lack of
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standing is identical. For the sake of completeness and clarity, we note the following:

> In general, a default judgment may be opened when the moving party establishes three requirements: (1) a prompt filing of a petition to open the default judgment; (2) a meritorious defense; and (3) a reasonable excuse or explanation for its failure to file a responsive pleading. The standard of review for challenges to a decision concerning the opening of a default judgment is well-settled.
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> > A petition to open a default judgment is an appeal to the equitable powers of the court. The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court, and we will not overturn that decision absent a manifest abuse of discretion or error of law.
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> > An abuse of discretion is not a mere error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused.

Dumoff v. Spencer, 754 A.2d 1280, 1281-82 (Pa. Super. 2000) (citations and internal quotation marks omitted). However,

> A petition to strike a default judgment and a petition to open a default judgment request distinct remedies and generally are not interchangeable. A petition to open is an appeal to the discretion of the trial court; hence, we cannot reverse the trial court's determination absent a manifest abuse of discretion or error of law. Conversely, a petition to strike a default judgment should be granted where a fatal defect or irregularity appears on face of record. A court may only look at the facts of record at the time judgment was entered to decide if the record supports the judgment. A petition to strike does not involve the discretion of the court.

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based on Appellees' preliminary objections, without the opportunity to amend. We agree.

In their preliminary objections, Appellees assert Appellant's lack of standing to sue based on a purported failure to provide a chain of title in support of its right to foreclose. (***See*** "Defendant's [sic] Preliminary Objections to Plaintiff's Complaint," 10/02/12, at 1 ¶¶ 1-2). This objection patently disregards the contents of the complaint. Appellant's complaint averred:

> The Mortgage and Note, including all rights, title and interest there under [sic], were transferred and assigned from First Union National Bank, Successor by merger to Liberty Bank, to Sovereign Bank by way of an Assignment of Mortgage, dated January 18, 1999 and recorded in the Department of Records in and for the County of Philadelphia, on the 29th day of March 1999 as Book 454 and page 490. A true and correct copy of the Assignment of Mortgage is attached hereto and made a part hereof Exhibit "C" [sic].

(Footnote Continued) ———————————

Erie Ins. Co. v. Bullard, 839 A.2d 383, 386 (Pa. Super. 2003) (citations and internal quotation marks omitted).

Here, our review confirms that even though Appellees framed their petition as one seeking to open the judgment, their petition is in actuality a petition to strike. Appellees make a boiler plate assertion of meritorious defenses, but present none. (***See*** Defendants [sic] Petition to Open Default Judgment, at 1 ¶ 1). The only claim of substance is that Appellant lacked standing because it failed to provide a "legal 'chain of title'" by "written documentation evidencing the assignment or transfer of the Note and Mortgage from Liberty Bank to First Union National Bank." (***Id.*** at ¶¶ 2, 3).

Therefore, Appellees, in essence, alleged a fatal defect or irregularity on the record, not a meritorious defense to the allegation of default, which in fact they did not provide.

(Complaint in Action of Mortgage Foreclosure, 7/18/12, at unnumbered page 2). As indicated, Appellant did include a copy of the relevant document at Exhibit C, Assignment of Mortgage; the exhibit confirms the averment. (***See id.*** at Exhibit C).

Pennsylvania Rule of Civil Procedure 1147 provides in relevant part, that "[t]he plaintiff shall set forth in the complaint . . . 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[.]" Pa.R.C.P. 1147(a)(1). Rule 1019 provides in pertinent part that:

> Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action. A party may incorporate by reference any matter of record in any State or Federal court of record whose records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county.

Pa.R.C.P. 1019(g); ***see also US Bank N.A. v. Mallory***, 982 A.2d 986, 993 (Pa. Super. 2009) (holding appellee's complaint sufficiently put appellant on notice of appellee's claim of interest with regard to the subject mortgage; Pa.R.C.P. 1147(a)(1) does **not** require recorded assignment as prerequisite to filing complaint in mortgage foreclosure).

Here, Appellant properly averred the "chain of title," referenced the location in the record, and included a copy of the assignment as an exhibit to the complaint. We conclude that Appellees' preliminary objection had no basis in law or fact. Accordingly, it was legally frivolous. The trial court

erred in sustaining a frivolous objection. The trial court also failed to "treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom." ***D'Elia***, ***supra***.

Furthermore, the trial court conceded that Appellant might have been a proper party: "Appellant may, in fact, be qualified to bring suit as a real party in interest[.]" (Trial Ct. Op., at 7). Therefore, the trial court erred in sustaining preliminary objections where the objection raised was not free from doubt:

> Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases that are clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections.

D'Elia, supra.

Additionally, the trial court erred in reasoning that "Appellant conveniently fails to account for the significance of the **absence of evidence** documenting the purported 'succession by merger' between Liberty and First Union." (Trial Ct. Op., at 6) (emphasis added). First, the trial court already conceded the merger in its initial recitation of facts. (***See id.*** at 2). More importantly, Appellant complied with the requirements of the applicable rules, and controlling authority. ***See*** Pa.R.C.P. 1147(a)(1); Pa.R.C.P. 1019(g); ***D'Elia***, ***supra***; ***see also Mallory***, ***supra***. Thirdly, additional "evidence" was not necessary, and the court erred in finding that

Appellant had to account for its absence. "The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery **if ultimately proven**." ***D'Elia***, ***supra*** at 121 (emphasis added).

Moreover, the trial court abused its discretion in dismissing Appellant's complaint with prejudice, but without affording Appellant an opportunity to be heard, denying it due process. "Due process requires that a party who will be adversely affected by a court order must receive notice and a right to be heard in an appropriate setting." ***Sigall***, ***supra*** at 950 (citation omitted).

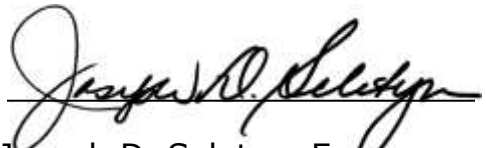
Appellees' preliminary objections failed to provide any legally sufficient basis for dismissal. The trial court erroneously granted them. The trial court abused its discretion in overlooking the very chain of title it found to be missing from Appellant's complaint. (***See*** Complaint in Action of Mortgage Foreclosure, 7/18/12, at unnumbered page 2 ¶6; Exhibit C).

Furthermore, the trial court's order opening the judgment is based on the same error of law as the order sustaining the preliminary objections and dismissing the complaint in foreclosure with prejudice. As previously noted, Appellees' petition to open presented only the same chain of title/standing claim as the preliminary objections, which we have already determined to be legally defective. (***See*** Defendants [sic] Petition to Open Default Judgment, 10/5/12, at 1-2). The claim presented neither a meritorious defense nor a fatal defect on the face of the record. The trial court erred in granting the petition to open.

We reverse the order to the extent it sustained Appellees' preliminary objections, and vacate the order to the extent it dismissed the complaint. We vacate the order granting the petition to open. We remand this case to the trial court and direct it to reinstate the default judgment in favor of Appellant.[8]

Order vacated. Case remanded with instruction. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013

[8] In view of our disposition, Appellant's first and second questions are moot. Therefore, we decline to address them. For the same reason, we decline to address any of the other numerous procedural defects and irregularities apparent from the record in this case. None of them would change our disposition.