

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WELLS FARGO BANK, N.A.,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DEREK FAULK AND ROWENA FAULK,

Appellants

No. 1167 EDA 2013

Appeal from the Order Entered March 26, 2013
In the Court of Common Pleas of Delaware County
Civil Division at No(s): 2011-8100

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E.

FILED APRIL 15, 2014

Appellants, Derek and Rowena Faulk ("the Faulks"), appeal from the trial court's March 26, 2013 order denying their motion to set aside the sheriff's sale of their property located at 613 Glenwood Avenue in Landsdowne, Pennsylvania. After careful review, we affirm.

The trial court set forth the facts and procedural history of this case as follows:

[Appellee, Wells Fargo Bank, N.A., ("Wells Fargo")] initiated the instant action on October 19, 2011[,] by filing a Complaint in Mortgage Foreclosure. When no responsive pleading was filed to the Complaint, a default judgment was entered against the [Faulks] on December 19, 2011. A Praecipe for Execution subsequently was file[d] by [Wells Fargo], and the subject property was listed for Sheriff's Sale on June 15, 2012. The Sheriff's Sale of the property was postponed on three occasions at the request of [Wells Fargo].... The subject property ultimately was sold at Sheriff's Sale on December 21, 2012[,] and the Deed Poll was acknowledged and returned on January 22, 2013.

On February 28, 2013, [the Faulks] filed their Motion to Set Aside the Sheriff's Sale. [Wells Fargo] filed its Reply to [the Faulks'] Motion on March 20, 2013[,], and following a hearing and argument thereon, the [c]ourt, by Order dated March 26, 2013[,], denied [the Faulks'] Motion.

Trial Court Opinion (TCO), 5/31/13, at 1.

The Faulks filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Herein, they raise two issues for our review:

[(1)] Did the trial court commit an error of law in denying [the Faulks'] Motion to Set-Aside [Wells Fargo's] Sheriff's foreclosure Sale when the Act 6/91 Notice was defective?

[(2)] Did the trial court commit an error of law in denying [the Faulks'] Motion to Set-Aside the Sheriff's Sale when [Wells Fargo] lacked "authority" and committed a "fraud" by conducting the Sheriff's Sale despite not holding nor possessing a pre-judgment assignment of mortgage and negotiated transfer of note – both through the chain of loan title?

Faulks' Brief at 9 (emphasis omitted).

Before addressing the Faulks' issues, we note that

[t]he purpose of a sheriff's sale in mortgage foreclosure proceedings is to realize out of the land, the debt, interest, and costs which are due, or have accrued to, the judgment creditor. **Bank of America, N.A. v. Estate of Hood**, 47 A.3d 1208, 1211 (Pa. Super. 2012) (quoting **Provident Nat'l Bank, N.A. v. Song**, 832 A.2d 1077, 1081 (Pa. Super. 2003), *appeal denied*, 577 Pa. 736, 848 A.2d 929 (2004)). Pursuant to Rule 3132 of the Pennsylvania Rules of Civil Procedure, a sheriff's sale may be set aside upon petition of an interested party "upon proper cause shown" and where the trial court deems it "just and proper under the circumstances." Pa.R.C.P. 3132. The burden of proving circumstances warranting the exercise of the court's equitable powers is on the petitioner. **Bornman v. Gordon**, 363 Pa.Super. 607, 527 A.2d 109, 111 (1987), *appeal denied*, 517 Pa. 620, 538 A.2d 874 (1988). Equitable considerations govern the trial court's decision to set aside a sheriff's sale, and

this Court will not reverse the trial court's decision absent an abuse of discretion. **Blue Ball Nat. Bank v. Balmer**, 810 A.2d 164, 167 (Pa. Super. 2002), *appeal denied*, 573 Pa. 662, 820 A.2d 702 (2003). An abuse of discretion occurs where, for example, the trial court misapplies the law. **Warmkessel v. Heffner**, 17 A.3d 408, 413 (Pa. Super. 2011), *appeal denied*, 613 Pa. 671, 34 A.3d 833 (2011).

Nationstar Mortg., LLC v. Lark, 73 A.3d 1265, 1267 (Pa. Super. 2013).

The Faulks first contend that the court erred by denying their motion to set aside the sheriff's sale where the "Act 6/91" notice was defective.¹ We need not address the requirements of an Act 6/91 notice, or the alleged deficiencies of the notice in the instant case, as the Faulks did not file their motion raising this claim in a timely manner. Rule of Civil Procedure 3132 states: "Upon petition of any party in interest *before delivery of ... the sheriff's deed to real property*, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances." Pa.R.C.P. 3132 (emphasis added). Additionally, the Homeowner Assistance Settlement Act (HASA), 35 P.S. §§ 1681.1-1681.7, specifies that a challenge to an Act 6/91 notice "must be raised in a legal action *before the ... delivery of a sheriff's or marshal's deed in the foreclosure action.*" 35 P.S. § 1681.5(2) (emphasis added).²

¹ "Act 6/91 notice" refers to the notice requirements set forth in sections 1680.402c(a)-1680.403c(a)-(b) of the Homeowner's Emergency Mortgage Act ("Act 91"), 35 P.S. §§ 1680.401c-1680.412c.

² HASA was enacted on June 22, 2012, and 35 P.S. § 1681.7 states that the provisions of section 1681.5 apply retroactively to June 5, 1999.

Here, the certified record confirms that after the December 21, 2012 sale of the at-issue property, the sheriff's deed was delivered on January 22, 2013. It was not until over one month later, on February 28, 2013, that the Faulks filed their motion to set aside the sheriff's sale raising the issue of the defective Act 6/91 notice. Under the plain language of Rule 3132 and section 1681.5(2) of the HASA, the Faulks' motion asserting this claim was untimely. **See Lark**, 73 A.3d at 1267 (concluding that Lark's motion to set aside sheriff's sale on the basis of a defective Act 91 notice was untimely under section 1681.5(2) where Lark filed that motion 13 days after the sheriff's deed was delivered). Accordingly, the trial court did not abuse its discretion in denying the Faulks' motion in this regard.

Next, the Faulks contend that Wells Fargo lacked the authority to proceed with the sheriff's sale. In their brief argument in support of this issue, the Faulks emphasize that "[i]n order to have 'authority' to foreclose upon a mortgage, the foreclosing lender-Plaintiff ([Wells Fargo]) must have a pre-judgment assigned mortgage and negotiated transferred note." Faulks' Brief at 16 (citations omitted). The Faulks maintain that here, "[t]here [was] no transfer of the note by negotiation at all." **Id.** They further allege that "[e]ven up to the time of the [trial] [c]ourt[s] ... hearing, [Wells Fargo] claimed to[,] but did not produce[,] an assignment of mortgage through the chain of loan title. [Wells Fargo] did not even claim to have a negotiated transferred note." **Id.** Accordingly, the Faulks aver that

the trial court should have granted their motion to set aside the sheriff's sale.

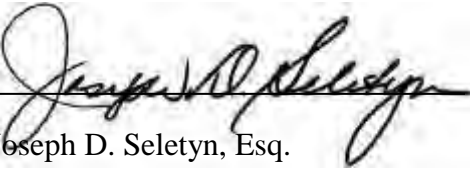
Initially, we acknowledge that “[a] sheriff’s sale may be set aside after delivery of the sheriff’s deed based on fraud or lack of authority to make the sale.” ***Mortgage Electronic Registrations Systems, Inc. v. Ralich***, 982 A.2d 77, 80 (citation omitted). However, the Faulks’ failed to prove that Wells Fargo lacked the requisite authority to make the sale in this case. In its response to the Faulks’ motion to set aside the sale, Wells Fargo submitted a document entitled “Assignment of Mortgage.” **See** Wells Fargo’s Reply, 3/20/13, Exhibit C. That document stated that Home 123 Corporation, the original mortgagee, assigned the mortgage, “together with the note(s)” to Wells Fargo. **Id.** The “Assignment of Mortgage” was recorded on September 16, 2011, prior to Wells Fargo’s filing the complaint on October 19, 2011. In that complaint, Wells Fargo incorporated by reference the “Assignment of Mortgage” document. Because the Faulks failed to file a responsive pleading to Wells Fargo’s complaint, they effectively admitted all of the allegations set forth therein, including that the mortgage and note were assigned to Wells Fargo by way of the “Assignment of Mortgage” document. **See** Pa.R.C.P. 1029; ***Lark***, 73 A.3d at 1269 n.4 (finding that where Lark failed to file responsive pleading to the complaint, she “admitted that GMAC [Mortgage, Inc., which commenced the action in foreclosure against Lark,] was the ‘legal owner’ of the mortgage in the foreclosure action, [and] Lark cannot now allege to the contrary on appeal in

an effort to avoid the result of the default judgment properly entered in this case). Accordingly, the Faulks' claim that Wells Fargo lacked authority to sell the property is meritless.

In sum, we ascertain no abuse of discretion in the court's decision to deny the Faulks' motion to set aside the sheriff's sale.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014