

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CITIMORTGAGE, INC. S/B/M ABN AMRO
MORTGAGE GROUP INC.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

JEFFREY F. KRATZ AND MARGUERITE F.
KRATZ

APPEAL OF: JEFFREY F. KRATZ

No. 298 EDA 2014

Appeal from the Judgment Entered December 18, 2013
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 09-31939

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and PLATT, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED OCTOBER 24, 2014

Jeffrey F. Kratz (Kratz) appeals from the judgment entered on December 18, 2013, granting the motion for judgment on the pleadings filed by Citimortgage, Inc. s/b/m ABN AMRO Mortgage Group Inc. (CMI and/or ABN AMRO) and dismissing with prejudice Kratz's new matter and counterclaim. After review, we affirm.

On October 6, 2009, CMI filed a complaint in mortgage foreclosure against Kratz, and an amended complaint on November 27, 2009. Kratz responded with an answer, new matter and a counterclaim on June 29, 2010. In its amended complaint, CMI averred that Kratz and Marguerite F. Kratz¹ are the "mortgagors and/or owners" of real property located in

¹ Marguertie F. Kratz is not a party to this appeal.

Harleysville, Pennsylvania. Amended Complaint, 11/27/09, at ¶ 2. CMI also asserted that Kratz executed a note and a mortgage for \$950,000 in favor of ABN AMRO, attaching both documents to the amended complaint. CMI further averred that it now holds the mortgage as a result of its merger with ABN AMRO. The merger documents were also attached to the amended complaint. Additionally, CMI indicated that the mortgage is in default in that monthly payments of principal and interest due since April 1, 2009, have not been paid. Thus, CMI sought an *in rem* judgment against Kratz for \$981,041.46 plus interest from October 5, 2009, at the rate of \$199.16 per day up to the date of judgment.

In his answer, Kratz responded to each allegation. To many of the averments, Kratz stated that CMI's allegations were either conclusions of law, requiring no answer, or that "[a]fter reasonable investigation [Kratz] is unable to form a belief as to the truth of the averments ... and [that] strict proof thereof is demanded at [t]rial." Kratz's Answer/New Matter/Counterclaim, 6/29/10, at 2.

Kratz included new matter, alleging that CMI has no standing to bring this foreclosure action in that there has been "no assignment of the [m]ortgage between [CMI] and ABN AMRO Mortgage Group Inc." *id.* at 3, and that "there is no evidence that [CMI] own[s] the [n]ote...." *Id.* at 4. Kratz also claimed that CMI's complaint indicated that the alleged merger became effective on September 1, 2007, and because the mortgage at issue was executed on September 28, 2007, the entity with whom he entered into

the mortgage no longer existed. *Id.* at 3. He also claimed that there was no assignment of the note from ABN AMRO to CMI. *Id.*

Additionally, Kratz filed a counterclaim, asserting that CMI “failed to disclose ... that there was a Pricing Premium to [Kratz] because this was a ‘No Dock’/‘Limited Dock’ Mortgage.” *Id.* at 5. Kratz also claimed that the failure to disclose “violated [CMI’s] duty to Borrower Defendant under the Mortgage Broker Loan Agreement[,]” and that, therefore, he was “unable to make regular payments on his mortgage” and “has suffered damage in the amount of \$43,048.40.” *Id.* In his counterclaim, Kratz also asserted that CMI “engaged in Predatory Lending by knowingly putting Borrower Defendant into an unaffordable Mortgage Loan within three (3) years of his prior Mortgage[,]” thus, violating “the Pennsylvania Unfair Trade Practices and Consumer Protection law.” *Id.* at 5-6. CMI filed a reply to Kratz’s new matter and counterclaim.

On June 11, 2013, CMI filed a motion for judgment on the pleadings and Kratz filed an answer, essentially averring that CMI did not have standing to bring this foreclosure action in that CMI is not the holder of the note. Kratz also asserted that since ABN AMRO merged with CMI on September 1, 2007, CMI would have been the proper mortgagee, not ABN AMRO, on the date the mortgage and note were executed. Moreover, in Kratz’s supporting memorandum, he attempted to reserve the right to respond to CMI’s other arguments “in a subsequent [b]rief.” Kratz’s Memorandum in Opposition to CMI’s Motion for Judgment on the Pleadings,

at 5. CMI responded to Kratz, asserting that it had merged with ABN AMRO prior to the execution of the mortgage and was the registered owner of the fictitious name ABN AMRO when the mortgage was executed. CMI also indicated that it had produced the original note and that Kratz had acknowledged that fact.

On December 18, 2013, the trial court entered the order now on appeal, granting CMI's motion for judgment on the pleadings, ordering judgment in mortgage foreclosure against Kratz in the amount of \$1,248,712.50, and dismissing with prejudice Kratz's new matter and counterclaim. Kratz filed a timely appeal and a lengthy Pa.R.A.P. 1925(b) statement of errors complained of on appeal, which contained twelve subsections. He now sets forth the following, single issue for our review in his brief:

Whether [CMI], based upon the Pleadings filed, is entitled to a Judgment on the Pleadings when in fact [Kratz's] Answer, New Matter and Counterclaim to [CMI's] Complaint have raised genuine issues of material fact?

Kratz's brief at 6.²

Our scope of review on an appeal from the grant of judgment on the pleadings is plenary. ***Meehan v. Archdiocese of Philadelphia***, 870 A.2d 912 ([Pa. Super.] 2005). Entry of judgment on the pleadings is permitted under Pennsylvania Rule of Civil Procedure 1034, which provides that "after the pleadings

² Despite listing one very general issue for our review in his brief, Kratz's argument section sets forth a number of subsections, which delineate various arguments based upon the parties' pleadings.

are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings.” Pa.R.C.P. 1034(a). A motion for judgment on the pleadings is similar to a demurrer. **Citicorp North America, Inc. v. Thornton**, 707 A.2d 536, 538 (Pa. Super. 1998). It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. **Id.** In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents. **Id.** On appeal, we accept as true all well-pleaded allegations in the complaint. **Meehan, supra.**

On appeal, our task is to determine whether the trial court’s ruling was based on a clear error of law or whether there were facts disclosed by the pleadings which should properly be tried before a jury or by a judge sitting without a jury. **Citicorp, supra.**

Neither party can be deemed to have admitted either conclusions of law or unjustified inferences. Moreover, in conducting its inquiry, the court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. It may not consider inadmissible evidence in determining a motion for judgment on the pleadings. Only when the moving party’s case is clear and free from doubt such that a trial would prove fruitless will an appellate court affirm a motion for judgment on the pleadings.

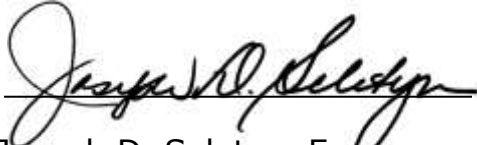
Kelly v. Nationwide Insurance Company, 414 Pa. Super. 6, 606 A.2d 470, 471-72 (Pa. Super. 1992) (quotations and citations omitted).

Consolidation Coal Co. v. White, 875 A.2d 310, 325-26 (Pa. Super. 2005).

We have reviewed the certified record, the briefs of the parties, the applicable law, and the thorough opinion of the Honorable Garrett D. Page of the Court of Common Pleas of Montgomery County, dated March 5, 2014.

We conclude that Judge Page's well-reasoned opinion accurately disposes of the issue presented by Kratz. Accordingly, we adopt his opinion as our own and affirm the judgment in mortgage foreclosure on that basis.

Judgment in mortgage foreclosure 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: 10/24/2014

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CIVIL ACTION – LAW

CITIMORTGAGE INC.

V.

JEFFREY KRATZ et al

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:

Superior Court No.:
298 EDA 2014

Common Pleas Court No.:
2009-31939

OPINION

PAGE, J.

MARCH 5, 2014

FACTS AND PROCEDURAL HISTORY

Appellant, Jeffrey Kratz, filed this appeal in response to this Court's Order dated December 18, 2013 which granted Appellee, Citimortgage, Inc.'s Motion for Judgment on the Pleadings. (Order (2009-31939) *seq.*67)). On October 6, 2009, Appellee filed a Complaint in Mortgage Foreclosure against Jeffrey Kratz ("Appellant") and Marguerite Kratz alleging that Appellant and Marguerite Kratz defaulted on their mortgage payments in the amount of \$985,020.26. (Compl. ¶ 5-6.) On February 26, 2010, Appellant filed an Answer, New Matter, and Counterclaim on June 29, 2010 alleging improper assignment of the mortgage from ABN AMRO Mortgage Group, Inc. to Appellee. (2009-31939) *seq.*23)).

On June 11, 2013, Appellee filed a Motion for Judgment on the Pleadings alleging that Appellant failed to pay his mortgage payments and that it was entitled to judgment on the pleadings. (2009-31939) *seq.*52)). Subsequently, on December 18, 2013, this Court granted Appellee's Judgment on the Pleadings and dismissed Appellant's new matter and counterclaim with prejudice.

ISSUES

Appellant filed the instant appeal on January 9, 2014 and filed a Concise Statement of Matters Complained of on Appeal, raising the following issues:

1. The Order of the Honorable Garrett Page dated January 17, 2014 provides no reason why Judge Page granted Judgment for Plaintiff and that Jeffrey Kratz's New Matter and Counterclaim should be dismissed with Prejudice.
2. In a Motion for Judgment on the pleadings the Court is limited to construing only the Pleadings and any relevant documents attached to the Pleadings.
3. Plaintiff filed a Complaint and an Amended Complaint. Defendant filed an Answer to Plaintiff's Amended Complaint, New Matter and Counterclaim. Plaintiff filed an Answer to Defendant's New Matter and Counterclaim. Those were the only pleadings which came before Judge Page on Plaintiff's Motion for Judgment on the Pleadings.
4. The Honorable Garrett D. Page erred in entering an Order granting Plaintiff's Motion for Judgment on the Pleadings and dismissing Defendant's new Matter and Counterclaim for the following specific reasons:
 - a. Defendant raised the issue as to whether Citimortgage, Inc. has standing to bring the within lawsuit as Plaintiff. Defendant executed a mortgage in favor of ABN AMRO Mortgage Group Inc. without further evidence Citimortgage Inc.'s standing to bring the within lawsuit is at issue [*sic*].
 - b. Judge Page failed to allow Defendant to engage in discovery to determine the effect of an alleged merger document attached to Plaintiff's Complaint allegedly filed in New York on August 31, 2007, with an effective date of September 1, 2007 received by the New York Department of Labor and Economic Growth, Bureau of Commercial

Services on September 21, 2007 between ABN AMRO and Citimortgage Inc., when in fact the mortgage between Plaintiff and Defendant was executed on September 28, 2007.

c. The Honorable Garrett D. Page failed to address Plaintiff's standing. There is no evidence that Plaintiff owns the Note upon which this action is based.

d. The Honorable Garrett D. Page's Order does not address Defendant's defense regarding the Truth in Lending Statement raised by Defendant.

e. The Honorable Garrett D. Page failed to address Plaintiff's failure to disclose a pricing premium to Defendant which was raised in Defendant's Counterclaim.

f. The Honorable Garrett D. Page's Order failed to address Plaintiff's ownership and possession of the Note as a prerequisite in the foreclosure action.

g. The Honorable Garrett D. Page erred in granting Plaintiff's Motion for Judgment on the Pleading when Plaintiff's original Pleadings attached a Note to Plaintiff's Amended Complaint and then a different Note was produced at the time of argument on Plaintiff's Motion for Judgment on the Pleadings.

h. The Honorable Garrett D. Page erred by granting Plaintiff's Motion for Judgment on the Pleadings when Plaintiff produced no evidence that it is the owner or the holder of the note. Plaintiff is nothing other than a "servicer" of the loan.

i. The Honorable Garrett D. Page erred in dismissing Defendant's Counterclaim based upon Plaintiff's Breach of Fiduciary Duty without

allowing Defendant to produce any evidence regarding Plaintiff's Breach of Fiduciary Duty.

j. The Honorable Garrett D. Page erred by dismissing Defendant's Counterclaim for Unjust Enrichment without allowing Defendant to present evidence on his claim.

k. The Honorable Garrett D. Page erred in dismissing with prejudice Defendant's Counterclaim based upon Plaintiff's Predatory Lending Practices.

l. The Honorable Garrett D. Page erred by dismissing Defendant's Counterclaim under the UTPCPL.

STANDARD OF REVIEW

When reviewing a trial court's decision to grant a Motion for Judgment on the Pleadings, the appellate court's scope is plenary. *Heasley v. KSM Energy, Inc.*, 52 A.3d 341 (Pa. Super. 2012). The Superior Court's review of a trial court's decision to grant judgment on the pleadings is limited to determining whether the trial court committed an error of law or whether there were facts presented which warranted a jury trial. *Id.* The Superior Court looks only to pleadings and any documents properly attached thereto. *Id.*

ANALYSIS

Appellant states several issues on appeal which have been summarized since issues overlap.

1. THIS COURT PROPERLY GRANTED PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS.

Judgment on the pleadings may be granted only in cases where based upon the pleadings themselves, and any documents properly attached thereto, there are no material issues of fact, and the case is so clear that a trial would clearly be a fruitless exercise. Where the applicable law is unclear, or where there is any uncertainty or doubt, the motion should be denied. *Steinhardt v. Russian Orthodox Catholic Mut. Aid Soc. of U.S.*, 77 A.2d 393 (Pa. 1951); *Miami Nat. Bank v Willens*, 190 A.2d 438 (Pa. 1963); *Keil v. Good*, 356 A.2d 768 (Pa. 1976); *Rice v. Rice*, 359 A.2d 782 (Pa. 1976).

A plaintiff who institutes a mortgage foreclosure action may rely upon its unsubstantiated averment that it has been assigned the relevant instrument in establishing its prima facie case. *JP Morgan Chase Bank, N.A. v. Murray*, 63 A.3d 1258, 1263 (Pa. Super. 2013) (citing *US Bank, N.A. v. Mallory*, 982 A.2d 986 (Pa. Super. 2009)). Further, the Pennsylvania Rules of Civil procedure does not require that a party have a recorded assignment as a prerequisite to filing a complaint in mortgage foreclosure. *Mallory*, 982 A.2d at 993. A mortgage assignee's complaint in foreclosure action will sufficiently put mortgagor on notice of assignee's claim with regard to the mortgage where assignee sufficiently set forth the existence and date of the mortgage, alleged that assignee was now the legal owner of the mortgage, indicated it had assumed all the rights and remedies related to the mortgage, and was seeking to formalize the assignment. *Id.* When a corporation merges, the surviving corporation succeeds in both the rights and liabilities of the constituent corporation. *LTV Steel Co., Inc. v. Workers' Comp. Appeal Board*, 754 A.2d 666, 677 (Pa. 2000). All property, real, personal, and mixed, and franchises of each shall be deemed to be vested in and to belong to the surviving or new corporation. 15 Pa.

C.S.A. §1929(b). As persuasive authority, Ohio's Uniform Commercial Code which was relied upon by Appellee in its Motion for Judgment on the Pleadings, supports the above-cited proposition and states that where a mortgage has transferred through merger, there is no need to record an assignment for the surviving entity to have authority to foreclose the mortgage because the surviving entity has "stepped into the shoes" of the entity that held the mortgage before the merger. *CitiMortgage, Inc. v. Schippel*, 2012 WL 3144044, at *4 (Ohio App. 2012).

Here, Appellant executed a mortgage and promissory note with ABN AMRO on September 28, 2007. Amended Complaint at ¶2-3. Appellee alleged in its Amended Complaint filed on November 27, 2009 that it is the successor by merger, rather than assignment, to ABN AMRO and the current holder of the mortgage. *Id.* at ¶3. Appellee further alleged that the mortgage was in default due to non-payment by Appellant and sought an in rem judgment against Appellant. *Id.* at ¶5, 8. Similarly, where a mortgage complaint sets forth the necessary elements of mortgage foreclosure and the mortgagor fails to specifically deny those elements, judgment in favor of the mortgagee is appropriate. *Wachovia Bank, N.A. v. Springhouse Partners, Inc.*, 2010 WL 8366960 (Montg. Cty. Ct. Com. Pls. 2010). Here, Appellant effectively admitted all the material allegations in Appellee's mortgage foreclosure complaint as a result of the general denials in Appellant's Answer. Further, Appellant admitted that he executed a mortgage in favor of ABN AMRO Mortgage Group, Inc. and generally denied the allegations in Appellee's Complaint. Answer to Complaint ¶5-10. In paragraph 6, Appellant purports to specifically deny owing the amount stated in this paragraph. However, Appellant's denial must be treated as an admission because he failed to respond with a specific denial

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explaining why he believed the amount of the mortgage was correct, *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 692 (Pa. Super. 1995). Therefore, after a review of the pleadings, there is no genuine issue of material fact regarding Appellee's standing and it was proper for this Court to enter judgment on the pleadings in Appellee's favor.

Pursuant to Pennsylvania law, a borrower cannot raise a counterclaim under the Truth in Lending Act when claims under said Act are in personam in nature and a mortgage foreclosure action is strictly in rem. *In re Blythe*, 413 B.R. 205, 209-10 (Bkrctcy E.D. Pa. 2009). Here, Appellee asserts a cause of action in mortgage foreclosure against Appellant in rem. Amended Complaint at ¶5. Therefore, Appellant's counterclaim under the Truth in Lending Act must fail. In the alternative, Appellant's failure to tender the proceeds from the mortgage loan back to Appellee nullifies his counterclaim for rescission under the Truth in Lending Act since Appellant must be capable of tendering the amount of the loan in exchange for its cancellation. *See Parker v. Long Beach Mort.*, 534 F.Supp.2d 528, 537 (E.D. Pa. 2008); *Jobe v. Argent Mortgage Company*, 2009 WL 2461168 (M.D. Pa. 2009).

A defense alleging predatory lending practices will only survive a motion for summary judgment dismissing the action in favor of the mortgagee when the borrower presents evidence of such a claim. *Sovereign Bank v. Gawron*, 2010 WL 3491356, 73-73 (Pa. Com. Pl. 2010). Further, there is no common law cause of action for predatory lending under Pennsylvania law and any such claim for relief must be supported by some statutory basis. *Schnell v. Bank of New York Mellon*, 828 F.Supp.2d 798 (E.D. Pa. 2011); *In re McConnell*, 390 B.R. 170, 182 (Bkrctcy. W.D. Pa. 2008).

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Here Appellant argues that Appellee engaged in predatory lending by knowingly placing him into an unaffordable mortgage loan within three years of a previous mortgage, that Appellee's agent was aware of his income and that his income would not sustain his mortgage payments. Accordingly, Appellant concludes that Appellee violated the Pennsylvania Unfair Trade Practices and Consumer Protection law. In order to state a cause of action for predatory lending, a claimant must show justifiable reliance on the wrongful conduct or representation of another party and that harm was suffered due to that reliance. *Morilus v. Countrywide Home Loans, Inc.*, 651 F.Supp.2d 292, 308 (E.D. Pa. 2008). Appellant has not alleged an independent statutory basis for his predatory lending claim and received the benefit of the bargain between himself and Appellee. It was only after receiving the loan proceeds and subsequent default, that Appellant claimed Appellee was wrong for giving him the money. Further, Appellant never alleged in his Answer, New Matter, and Counterclaim Appellee's specific wrongful conduct or representation upon which he relied or attached evidence of Appellee's predatory lending to its Answer, New Matter and Counterclaim. Therefore, Appellant's predatory lending claim should fail.

The quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between parties is founded on a written agreement or express contract. *Benefit Trust Life Ins. Co. v. Union Nat. Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3rd Cir. 1985). Here, because the relationship between Appellant and Appellee is based on a contract, a mortgage, Appellant's claim for unjust enrichment must fail.

Appellant contends that Appellee violated its fiduciary duty by failing to disclose a pricing premium which rendered him unable to make regular mortgage payments. There is no case law which states or suggests that there is a duty under Pennsylvania law for a mortgagee

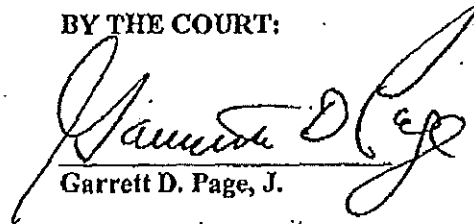
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to disclose a pricing premium to a mortgagor. Therefore, Appellant's argument on this issue fails.


CONCLUSION

For the reasons set forth above, this Court's Order dated December 18, 2013, which granted Appellee's Motion for Judgment on the Pleadings should be **AFFIRMED**.

BY THE COURT:


Garrett D. Page, J.

Copies sent March 5, 2014, to:
Craig H. Fox, Esquire
Gerald M. Barr, Esquire
Douglas A. Gifford, Esquire
Court Administration


Judicial Secretary