

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ONE WEST BANK, FSB,

Appellant

v.

MARIE B. LUTZ AND CLAUDIA PINTO,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 320 EDA 2014

Appeal from the Order Entered November 19, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): July Term, 2011, No. 00645

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.:

FILED JULY 23, 2014

One West Bank, FSB, appeals from the November 19, 2013 order granting preliminary objections filed by one of the defendants in this action and dismissing its lawsuit. We reverse and remand.

Appellant instituted this mortgage foreclosure action against Marie B. Lutz and Claudia Pinto. Ms. Pinto was personally served with the complaint and has been defending herself. Appellant successfully petitioned for alternative service on Ms. Lutz, who has not filed any pleadings. The complaint indicated the following. On December 30, 2005, Ms. Lutz executed a mortgage, which was duly recorded, on property located at 9277 Angus Place, Philadelphia. The mortgage in question was a home-equity conversion mortgage, which is commonly known as a reverse mortgage. Default occurred under the terms of the mortgage if Ms. Lutz transferred the real estate subject to the mortgage from her ownership. Ms. Lutz defaulted

on the mortgage when she transferred the property in question on August 6, 2010, to Ms. Pinto, who admittedly is now its titleholder.

Appellant, assignee of the mortgage in a duly-recorded assignment, filed a complaint, an amended complaint, and a second amended complaint in mortgage foreclosure. On October 18, 2013, Ms. Pinto filed preliminary objections endorsed with a notice to plead to the second amended complaint. She averred that Appellant had failed to join a necessary party, as follows. The property in question is subject to a lien that is subordinate to the one owned by Appellant. Specifically, when she purchased it, Ms. Pinto obtained a mortgage on the property from Precision Funding Group, LLC, which assigned that mortgage to Wells Fargo. Ms. Pinto maintained that Wells Fargo was a necessary party to this action. In her preliminary objections, Ms. Pinto also alleged that the complaint was not properly verified since the signer did not set forth the source of his knowledge as to the pertinent allegations in the second amended complaint.

On November 13, 2013, Appellant filed an answer to the preliminary objections. The following day, on November 14, 2013, the trial court granted the preliminary objections and dismissed this action with prejudice. The court dismissed the action on three bases. It believed that the preliminary objections were unopposed, concluded that Wells Fargo was a necessary party, and ruled that the complaint was defective as improperly verified. This appeal followed. Appellant raises the following positions:

A. Whether the court erred in sustaining the preliminary objections to the second amended complaint based on the alleged failure by appellant to join necessary parties in the underlying action[?]

B. Whether the court erred in sustaining the preliminary objections to the second amended complaint based on the alleged improper verification of the second amended complaint[?]

C. Whether the court erred in dismissing the action with prejudice[?]

Appellant's brief at 4.

Initially, we outline that, "In reviewing a trial court's grant of preliminary objections, the standard of review is *de novo* and the scope of review is plenary. The salient facts are derived solely from the complaint and pursuant to that standard of review, the court accepts all well-pleaded material facts in the complaint, and all inferences reasonably deduced therefrom must be accepted as true." ***Martin v. Rite Aid of Pennsylvania, Inc.***, 80 A.3d 813, 814 (Pa.Super. 2013) (citation omitted).

Before addressing the merits of this appeal, we make the following observations. The trial court has indicated that it believes that its rulings were erroneous, that its order should be reversed, and that the matter should be remanded. Specifically, in its Pa.R.A.P. 1925(a) opinion, the court first concluded that the preliminary objections should not have been granted as unopposed since the local rule did not require a response to the preliminary objections in question. It also decided that Wells Fargo was not an indispensable party in this mortgage foreclosure action and that the

complaint was properly verified. Additionally, Appellee has not filed a responsive brief.

We next must address the existence of a factual error by the trial court regarding the procedural posture of this case. Contrary to the trial court's belief, Appellant did file an answer to the preliminary objections. The trial court's mistake in this respect was likely a result of the fact that the response was not filed until the day prior to its ruling and was untimely. We also conclude that, contrary to the trial court's position, the response in question was required.

Pa.R.C.P. 1017 outlines the pleadings that can be filed in a civil action. Those pleadings include, in pertinent part, "a preliminary objection and a response thereto." Pa.R.C.P. 1017(a)(4). The note to Rule 1017 indicates that an "answer needs to be filed to a preliminary objection only when the preliminary objection alleges facts not of record." The preliminary objections herein were two-fold, the one regarding verification was of record but the alternative one regarding the second-lien holder, Wells Fargo, was not. Hence, these preliminary objections, which were endorsed with a notice to plead did require a response.

This conclusion is reinforced by Pa.R.C.P. 1028, which delineates the grounds for filing preliminary objections. Rule 1028 states, in relevant part that, "Preliminary objections may be filed by any party to any pleading and are limited to the following grounds . . . nonjoinder of a necessary party." Pa.R.C.P. 1028(a)(5). One of the comments to Rule 1028 indicates that

preliminary objections raising an issue under (a)(5) pertaining to the failure to join an indispensable party, "cannot be determined from facts of record." Since the issue of whether Wells Fargo was an indispensable party could not be resolved by the record facts and since there was a notice to plead attached to the preliminary objections, a response to the preliminary objections was mandated by the applicable rules of civil procedure.

As noted, however, a response was filed. The trial court was unaware of that document since it was filed merely one day prior to its ruling on the preliminary objections. Pa.R.C.P. 1026 governs the time within which pleadings must be filed after the complaint. It provides in applicable part that "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading[.]" Pa.R.C.P. 1026(a). Appellee Pinto filed her preliminary objection on October 18, 2013, and the response was due on November 7, 2013. Appellant did not file the pertinent pleading until six days later, on November 13, 2013.

Despite the fact that the response was late, we do not consider the averments in the preliminary objections as unopposed. We have ruled that the twenty-day filing deadline under Pa.R.C.P. 1026 is not inflexible:

Pa.R.C.P. 1026(a) provides: "every pleading subsequent to the complaint shall be filed within twenty days after the service of the preceding pleading." Pa.R.C.P. No. 1026(a), 42 Pa.C.S.A. This twenty day filing period has been interpreted liberally and is permissive rather than mandatory. The decision of whether an extension of time shall be granted is within the discretion of the trial court. A late pleading may be filed if the opposing party is not prejudiced and justice requires. Prejudice results when an

opposing party's delay causes a party any substantial diminution in their ability to present factual information in the event of trial.

Weaver v. Martin, 655 A.2d 180, 183-84 (Pa.Super. 1995) (case citations and quotation marks omitted).

In this case, Appellees suffered no prejudice, as defined above, by the six-day delay in the filing of a response. Moreover, the trial court evidently would have granted the extension of time since it believed that no response was even required in the first instance. Therefore, we agree with the trial court that the preliminary objections should not have been granted on the basis that they were unopposed. We further conclude that the lateness of response does not compel a grant of the preliminary objections.

We now examine whether Wells Fargo, which possessed a lien admittedly recorded after and subordinate to that owned by Appellant, was an indispensable party to this mortgage foreclosure action. Our Supreme Court has articulated: "In determining whether a party is indispensable, the basic inquiry remains whether justice can be done in the absence of a third party." **Pennsylvania State Educ. of Ass'n ex rel. Wilson v. Department of Community and Economic Development**, 650 A.3d 1263, 1277 (Pa. 2012) (citation and quotation marks omitted). These considerations inform the decision as to whether a party is indispensable: "1. Do absent parties have a right or an interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without

violating the due process rights of absent parties?" ***Martin v. Rite Aid of Pennsylvania, Inc.***, 80 A.3d 813, 814 (Pa.Super. 2013) (citation omitted).

Additionally, in resolving this inquiry, we are guided by Pa.R.C.P. 1144, which governs mortgage foreclosure actions and states: "The plaintiff shall name as defendants (1) the mortgagor; (2) the personal representative, heir or devisee of a deceased mortgagor, if known; and (3) the real owner of the property, or if the real owner is unknown, the grantee in the last recorded deed." Pa.R.C.P. 1144(a). Herein, the plaintiff joined as parties the mortgagor, who was not deceased, and the present owner of the property. This action satisfied the mandates of Rule 1144.

The sole issues in this action are whether the mortgagor defaulted on the mortgage and, if so, the amount of money owed to the mortgagee. Appellant, as plaintiff, will have the burden of proof respecting these matters and cannot obtain a judgment without proving the amount owed to it. Wells Fargo, which is a subordinate lienholder, has no rights or interests involved in these inquiries and will be notified, in due course, if the matter eventually proceeds to a sheriff's sale. It thus will be afforded due process protection. Rule 1144 reinforces the conclusion that Wells Fargo is not an indispensable party as it does not require the joinder of junior lien holders on the mortgaged property. Hence, we conclude that Wells Fargo was not an indispensable party herein.

The second issue raised by Appellant is whether the complaint was properly verified. Ms. Lutz claimed that the verification was improper since

it failed to delineate the source of the knowledge of the person who executed that document as to the facts outlined in the second amended complaint. The second amended complaint was verified by an employee of the Appellant herein, Rudy Lara. Mr. Lara indicated that he had personal knowledge of the events occasioning default and the amount owed under the mortgage, as set forth in the complaint:

Rudy Lara, hereby states that he/she is Assistant Secretary of One West Bank, FSB, Plaintiff in this matter, and that he/she is authorized to make this Verification and verify that the statements made in foregoing Civil Action in Mortgage Foreclosure are true and correct to the best of his/her knowledge, information and belief. The undersigned understands that this statement is made subject to the penalties of the 18 Pa. C.S. Sec 4904 relating to unsworn falsification to authorities.

Verification, Second Amended Complaint, 9/30/13.

Initially, we set forth the

generally accepted premise that a corporation can only act through its officers, agents, and employees. **See Weatherly Area Sch. Dist. v. Whitewater Challengers, Inc.**, 532 Pa. 504, 507, 616 A.2d 620, 621 (1992) (noting that governmental agencies, political subdivisions, and private corporations can act only “through real people—its agents, servants or employees.”); **Maier v. Maretti**, 448 Pa.Super. 276, 671 A.2d 701, 707 (1995) (concluding employees, agents, and officers of a corporation may not be regarded as separate parties when acting in their official capacity). Indeed, under the doctrine of vicarious liability, the corporation, not the employee, is liable for acts committed by the employee in the course of employment. **See Travelers Cas. & Sur. Co. v. Castegnaro**, 565 Pa. 246, 252, 772 A.2d 456, 460 (2001) (concluding a principal is liable for the negligent acts and torts of its agents, as long as those acts occurred within the agent's scope of employment).

Tayar v. Camelback Ski Corp., Inc., 47 A.3d 1190, 1196 (Pa. 2012).

Thus, the verification is considered to have been filed by the party plaintiff herein, Appellant, which is a fictitious entity that can only act through its employees and agents.

The governing principles applicable to verification are located in Pa.R.C.P. 1024:

(a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder.

. . . .

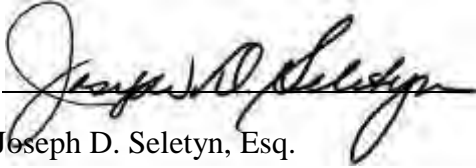
(c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

If a verification is executed by a party, it does not need to set forth the source of the person's information. Since the verification at issue herein was executed by a party, the source of Mr. Lara's knowledge of the pertinent facts was not required. Thus, the document in question was sufficient under the applicable rule of civil procedure, and the trial court erred in sustaining

the preliminary objections to the second amended complaint due to a purportedly invalid verification. Based upon the foregoing analysis, we agree with the trial court that its order dismissing this action was in error.¹

Order reversed. Case remanded. Jurisdiction relinquished.

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: 7/23/2014

¹ In light of our grant of relief to Appellant on its first two issues, we need not address its final issue.