

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SABR MORTGAGE LOAN 2008-1
SUBSIDIARY-1, LLC, C/O OCWEN LOAN
SERVICING, LLC 1661 WORTHINGTON
ROAD #100, WEST PALM BEACH, FL
33409

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

KIMBERLY A. SCHWEISS & RANDY
SCHWEISS, 15 SOUTH GOODWIN AVE.
KINGSTON, PA 18704

APPEAL OF: ANGELS SAVING HOMES,
LLC, AGENT FOR RANDY SCHWEISS

No. 202 MDA 2014

Appeal from the Order December 16, 2013
in the Court of Common Pleas of Luzerne County
Civil Division at No.: 2012-01526

BEFORE: DONOHUE, J., JENKINS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED AUGUST 14, 2014

Appellant, Angels Saving Homes, LLC, appeals on behalf of Randy
Schweiss (Homeowner), as his agent, from the trial court's order denying his

* Retired Senior Judge assigned to the Superior Court.

petition to strike and/or open a default judgment in this mortgage foreclosure action.¹ We affirm.

On February 9, 2012, Appellee, SABR Mortgage Loan 2008-1 Subsidiary-1, LLC, c/o Ocwen Loan Servicing, LLC (SABR), filed a complaint in mortgage foreclosure against Appellant and Kimberly A. Schweiss. Neither Appellant nor Ms. Schweiss responded. On August 8, 2012, Appellee served Appellant and Ms. Schweiss a ten-day notice of its intent to seek a default judgment.² Appellee filed a praecipe for judgment for failure to answer and for an assessment of damages on September 18, 2012. The same day, the prothonotary of the Court of Common Pleas of Luzerne County entered judgment in Appellee's favor and assessed damages in the amount of \$133,502.68. A sheriff's sale occurred on June 7, 2013, and Appellee became the owner of the subject property pursuant to a sheriff's deed recorded on August 14, 2013.

On September 19, 2013, Appellant filed a petition to strike and/or open the default judgment. After argument and the parties' submission of

¹ On March 26, 2013, Homeowner filed a notarized December 5, 2012 limited power of attorney appointing Appellant to act as his agent to perform any acts involving the note and mortgage at issue in this action. (**See** Limited Power of Attorney, 3/26/13, at 1).

² "[D]efault judgments are valid where a party, once served, fails to answer or defend a suit filed against them." **Wells Fargo Bank, N.A. v. Vanmeter**, 67 A.3d 14, 19 (Pa. Super. 2013), *appeal denied*, 76 A.3d 540 (Pa. 2013).

briefs, the court denied the petition to strike and/or open on December 16, 2013.³ Appellant timely appealed.⁴

Appellant raises eight questions for this Court's review:

1. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike the [d]efault [j]udgment due to the fact that the notice to plead attached to the [f]oreclosure [c]omplaint was in violation of Pa. R.C.P. 1018?

2. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because there was no power of attorney filed of record authorizing Ocwen, as the Plaintiff, to file the [f]oreclosure [c]omplaint?

3. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because there was no valid assignment of the [m]ortgage to Ocwen, the named [p]laintiff, and therefore, [Ocwen] could not have asserted a cause of action in the [f]oreclosure [c]omplaint?

4. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because Ocwen, as the named [p]laintiff, was never the owner of the originally-signed [n]ote,

³ As noted by the trial court in its December 16, 2013 memorandum:

A review of [Appellant's] post[-]argument submission in support of "the Petition to Strike the Default Judgment[,]" as well as [counsel's] representation during the September 19, 2013 argument [on Appellant's petition,] permit[] the conclusion that the request to open has been abandoned and/or waived. . .

(Trial Court Opinion, 12/16/13, at 2 n.2; **see also** N.T. Argument, 9/09/13, at 55 (Appellant's counsel stating that he is "going to pass" on the petition to open)).

⁴ The court did not order Appellant to file a Rule 1925(b) statement, and did not file a Rule 1925(a) opinion. **See** Pa.R.A.P. 1925.

and therefore, could not have asserted a cause of action in the [f]oreclosure [c]omplaint?

5. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because the verification attached to the [f]oreclosure [c]omplaint was in violation of Pa. R.C.P. 1024?

6. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because there was no power of attorney previously filed of record, authorizing MERS, on behalf of New Century, to assign the [m]ortgage to Ocwen, as the [p]laintiff?

7. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because there was no copy of the loan history attached to the [f]oreclosure [c]omplaint, in violation of Pa.R.C.P. 1019?

8. Did the [t]rial [c]ourt commit reversible error by denying [Appellant's] [p]etition to [s]trike, because there was no copy of the loan history attached to the [f]oreclosure [c]omplaint and therefore [Appellant] could not determine independently, the correct amount due, if any, to [Appellee]?

(Appellant's Brief, at 10-12 (record citations and quotation marks omitted)).⁵

Our review of the trial court's denial of Appellant's petition to strike is guided by the following well-settled principles:

A petition to strike does not involve the discretion of the court. Instead, it operates as a demurrer to the record. A demurrer admits all well-pleaded facts for the purpose of testing conclusions of law drawn from those facts. Because a petition to strike operates as a demurrer, a court may only look at the

⁵ We remind counsel that, pursuant to Rule 2135 of the Pennsylvania Rules of Civil Procedure, an appellant's principal brief shall only contain 14,000 words and, where the brief is more than thirty pages long, counsel "shall include a certification that the brief complies with the word count limits." Pa.R.A.P. 2135; **see also id.** at 2135(a)(1).

facts of record at the time the judgment was entered to decide if the record supports the judgment. A petition to strike can only be granted if a fatal defect appears on the face of the record.

Cintas Corp. v. Lee's Cleaning Svcs., Inc., 700 A.2d 915, 919 (Pa. 1997)

(citations and quotation marks omitted).

Preliminarily, we observe that any allegation that there was a technical defect in the complaint or that it did not conform to a rule of court must be brought by filing preliminary objections, not in a petition to strike the default judgment. ***See Roberts v. Estate of Pursley***, 700 A.2d 475, 479 (Pa. Super. 1997) (finding "objection to the form of the pleading" to be waived for failure to raise preliminary objections on this issue); ***see also*** Pa.R.C.P. 1028(a)(2) (providing that failure of a pleading to conform to law or rule of court must be raised by preliminary objection); Pa.R.C.P. 1032 (providing that failure to raise such an objection by preliminary objection results in waiver).

Here, Appellant failed to file preliminary objections. Accordingly, issues one through seven are waived. ***See*** Pa.R.C.P. 1028(a)(2), 1032; ***Roberts, supra*** at 479. Moreover, the issues would lack merit.

Appellant first argues that the notice to plead attached to the complaint in foreclosure violated Pennsylvania Rule of Civil Procedure

1018.1⁶ because pages two and three were out of numerical order. (**See** Appellant's Brief, at 17, 24). This issue would lack merit.

"[T]o the extent that we are required to interpret a rule of civil procedure, our standard of review is *de novo*, and our scope of review is plenary." ***Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity***, 32 A.3d 800, 808 (Pa. Super. 2011), *affirmed*, 91 A.3d 680 (Pa. 2014) (citation and internal quotation marks omitted).

We note that the notice to plead attached to the filed complaint is paginated correctly. (**See** Complaint in Mortgage Foreclosure, 2/09/12, at unnumbered pages 1-3). Moreover, although Appellant correctly states that "a plaintiff's original pleading is facially and fatally defective when the plaintiff omits the required notice to plead[,]" (Appellant's Brief, at 23 (citations omitted)), Appellant does not claim that Appellee omitted a notice to plead nor does he cite any caselaw to support his claim that incorrect pagination renders a notice to plead defective, and we are not aware of any. (**See id.**).

Therefore, as observed by the trial court, "there is no suggestion that the original notice contained a substantive defect and/or false or inaccurate information." (Trial Ct. Op., at 6). Hence, we conclude that the court

⁶ Rule 1018.1 provides, in pertinent part, that: "Every complaint filed by a plaintiff and every complaint filed by a defendant against an additional defendant shall begin with a notice to defend in substantially the form set forth in subdivision (b)." Pa.R.C.P. 1018.1(a).

properly found that, even “[a]ssuming *arguendo* that the complaint actually served on [Appellant] had pages [two] and [three] out of order, this does not establish a fatal defect[.]” (***Id.***). Therefore, Appellant’s issue would not merit relief. ***See Cintas, supra*** at 919; ***Barrick, supra*** at 808.

Appellant’s second through fourth issues are premised on the assumption that Ocwen Loan Servicing, LLC, was the named plaintiff, and lacked standing to bring the mortgage foreclosure action. (***See*** Appellant’s Brief, at 30, 42, 49).⁷ These issues would lack merit.

Here, our review of the complaint reveals that SABR, not Ocwen, was the plaintiff in this matter. (***See*** Complaint, 2/09/12, at unnumbered pages 1, 5). Ocwen Loan Servicing, LLC is listed only as the entity in whose care mail is to be sent to SABR. (***See id.*** at unnumbered page 1). Any evidence to rebut the well-pleaded fact that SABR was the plaintiff would have required evidence outside of the record, which a court is not permitted to consider in a petition to strike. ***See Cintas, supra*** at 919. Hence, the trial court properly found that Appellant’s second through fourth issues did not merit relief where the record expressly identifies the plaintiff as SABR.

⁷ Specifically, Appellant claims that the trial court erred in denying his petition to strike where “there was no power of attorney filed of record authorizing Ocwen . . . to file the [f]oreclosure [c]omplaint,” no valid assignment of the mortgage to Ocwen, and Ocwen never owned the mortgage note. (Appellant’s Brief, at 30; ***see id.*** at 42, 49).

In his fifth issue, Appellant claims that the trial court erred in denying his petition to strike where “the verification attached to the [f]oreclosure [c]omplaint was in violation of Pa. R.C.P. 1024[.]”⁸ (Appellant’s Brief, at 62). Appellant’s fifth claim would not merit relief.

As observed by the trial court:

An examination of the original complaint reveals the signature of Attorney Paige M. Bellino, of the Udren Law Offices, P.C. Immediately beneath this signature is the verification signed by Juanita Rogers. The verification indicates Ms. Rogers is the contract management coordinator for Ocwen Loan Servicing, LLC, as servicers on behalf of SABR Mortgage Loan 2008-1 Reo Subsidiary-1, LLC. . . .

* * *

. . . . SABR has consistently argued that Ocwen is not the plaintiff. Accepting that position, Juanita Rogers as an employee of Ocwen could not be considered to be an officer of the plaintiff and therefore, at best, was an officer of a non-party entity acting on behalf of the plaintiff and could verify the complaint only if she certified satisfaction of the requirements outlined in Rule

⁸ Pennsylvania Rule of Civil Procedure 1024(c) provides as follows:

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.

Pa.R.C.P. 1024(c).

1024(c). However, . . . [w]hile Ocwen is not a plaintiff, *per se*, it is listed in the complaint's caption as the servicer of the loan. Therefore, Ms. Rogers signs on behalf of Ocwen in that capacity. Additionally, whether we call this error *de minimis* or non prejudicial, we conclude that it does not rise to the level of a fatal defect.

(Trial Ct. Op., at 9-11).

We conclude that the above reasoning of the trial court is legally persuasive and adopt it as our own. **See *Barrick, supra*** at 808. Accordingly, this issue would not merit relief, even if it were not waived.⁹

Appellant "has abandoned" his sixth issue. (Appellant's Brief, at 72).

In Appellant's seventh issue, he argues that the court erred in denying his petition to strike "because there was no copy of the loan history attached to the [f]oreclosure [c]omplaint, in violation of Pa. R.C.P. 1019(g)[.]"

⁹ We note that, in the argument section, Appellant relies on 21 P.S. § 356 to support his argument that Appellee's complaint was defective. (**See** Appellant's Brief, at 62-63). However, the issue of section 356 is not "stated in the statement of questions involved [n]or [is it] fairly suggested thereby." Pa.R.A.P. 2116(a). Accordingly, any argument regarding section 356 is waived on that basis, as well. Moreover, we conclude that this argument lacks merit.

As correctly observed by the trial court, section 356 "is designed to protect the owner[']s interest in real property against a claim from a bona fide purchaser." (Trial Ct. Op., at 7 (citing ***Levnick v. Chartiers Natural Gas Co.***, 889 A.2d 1282, 1284 (Pa. Super. 2005) (observing that section 356 "requires all transferences of real property to be recorded or they shall be judged fraudulent and void as to any subsequent bona fide purchaser.") (internal quotation marks omitted))). This section is not pertinent to this action for mortgage foreclosure.

(Appellant's Brief, at 72). This issue, even if not waived, would not merit relief.

Pennsylvania Rules of Civil Procedure 1141 through 1150 specifically regulate mortgage foreclosure proceedings. **See** Pa.R.C.P. 1141-1150. Pursuant to Rule 1147(a)(5), "[t]he plaintiff shall set forth in the complaint . . . an itemized statement of the amount due." Pa.R.C.P. 1147(a)(5). Here, the complaint in mortgage foreclosure contains a detailed summary of the amount due at the time of filing the complaint. (**See** Complaint in Mortgage Foreclosure, 2/09/12, at unnumbered page 6). Appellant does not provide citation to any pertinent authority that construes Rule 1147(a)(5) as requiring a mortgage foreclosure plaintiff to attach a copy of the loan history to the complaint. (**See** Appellant's Brief, at 72-75). Accordingly, after our *de novo* review, we conclude that the trial court did not commit an error of law when it found that this claim would fail, even if it were not waived.¹⁰ **See Barrick, supra** at 808.

In his eighth and final issue, Appellant argues that the trial court erred in denying his petition to strike because "SABR intentionally adulterated the

¹⁰ Moreover, Appellant's attempt to construe Rule 1019(f)-(g) as requiring that a loan history be attached to a complaint in mortgage foreclosure is equally unpersuasive. (**See** Appellant's Brief, at 73-75). Appellant fails to cite any pertinent law that held these Rules created a more stringent requirement than that mandated by Rule 1147(a)(5), and we are not aware of any. **See** Pa.R.A.P. 2119(a)-(b).

caption to SABR's [r]esponse [to the petition to strike] by deleting Ocwen's name as being agent for SABR[.]” (Appellant's Brief, at 75).¹¹ Specifically, Appellant claims that SABR's counsel's “attempt[] to illegally remove” Ocwen from the caption “was done in a deceptive attempt . . . to mislead [the] [c]ourt, and also to mislead [Appellant]” (***Id.*** at 77-78). This issue does not merit relief.¹²

As aptly stated by the trial court:

[Appellant's] argument in this regard is neither logically nor legally coherent. [Appellee] could do nothing to change the caption as it appears in the originally filed complaint. All issues raised in the petition to strike referencing the original complaint have been considered and determined by this court. If [Appellant's] argument possessed even a scintilla of substance, this [c]ourt could not have done so. To attribute unethical conduct to [Appellee's] counsel in this context is, at a minimum, inappropriate.

(Trial Ct. Op., at 12). We concur with the trial court that “the facts of record at the time the judgment was entered” do not support Appellant's frivolous claim. ***Cintas, supra*** at 909. Appellant's eighth issue has no merit.

¹¹ Appellant's counsel raised this issue in the court-ordered post-argument brief on the petition to strike. (***See*** Post-Hearing Memorandum of Law, 9/30/13, at 10, 37-39).

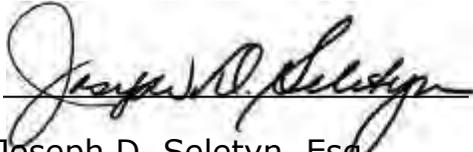
¹² We could find that Appellant waived this issue for his failure to provide any pertinent citation or discussion. ***See*** Pa.R.A.P. 2119(a)-(b). However, because we can discern Appellant's claim, we decline to do so.

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Order affirmed.

Donohue, J., concurs in the result.

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: 8/14/2014