

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

XCEND FINANCIAL, LLC, Plaintiff	: NO. 08 - 00,620 : : CIVIL ACTION - LAW
vs.	: : :
MVJ PROPERTIES, INC., ANDREW LOPEZ, LLC, CUAUHTEMOC LOPEZ and GERTRUDE LOPEZ, Defendants	: : Petition to Open : Default Judgment

OPINION AND ORDER

Before the Court is the Defendants' Petition to Open Default Judgment, filed May 9, 2008. Argument on the petition was heard July 23, 2008.

This action in mortgage foreclosure was filed on March 28, 2008 and served on MVJ Properties and Gertrude Lopez that same date.¹ On April 29, 2008, Plaintiff filed a Praecipe to Enter Default Judgment against MVJ Properties and Gertrude Lopez for failure to Plead to the Complaint, and judgment was entered that same date. As noted above, Defendants filed a petition to open on May 9, 2008.

This matter is governed by Pa.R.C.P. 237.3, subsection (b) of which provides as follows:

(b) If the petition is filed within ten days after the entry of the judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

Pa.R.C.P. 237.3(b). As there is no dispute that the petition was indeed filed within ten days of the entry of judgment, this Court must open the judgment if Defendants' proposed Answer sets forth a meritorious defense.

In their Answer, Defendants admit that there are balances due on the notes but in New Matter set forth in boiler plate fashion the following defenses:

¹ Attached to Plaintiff's Praecipe to Enter Default Judgment are Acceptances of Service signed by Gertrude Lopez on behalf of herself and MVJ Properties.

19. Plaintiff is not entitled to any relief based on MJZ's* breach of the fiduciary duty that he owed to Defendants.
20. Plaintiff's Complaint is barred by fraud and illegality.
21. Plaintiff's Complaint fails to state a claim upon which relief may be granted.
22. Defendants did not breach any duty, contractual or otherwise, allegedly owed to Plaintiff.
23. Plaintiff's claims against Defendants are barred, in whole or in part, by the equitable doctrines of estoppel, laches and waiver.
24. Plaintiff's claims are barred by the defense of accord and satisfaction.
25. Plaintiff's recovery is barred or diminished by its failure to mitigate damages.
26. Plaintiff's recovery is barred or diminished because Plaintiff has already received a full and fair compensation.

Defendants also allege, in Paragraph 12 of their Answer, that in the transactions supporting the note and mortgage in question, "Defendants were represented by Z* Law Office and MJZ*, Esquire, the attorney foreclosing in this matter² and, based on information and belief, the manager of Plaintiff in this matter." In their petition to open, Defendants argue that they have an equitable defense to the mortgage foreclosure, specifically, "that Petitioners' attorney, or former attorney, is attempting to foreclose on his own clients whom he represented in these transactions and in other matters." Defendants refer the Court to Union National Bank v. Cobbs, 567 A.2d 719 (Pa. Super. 1989), for the proposition that it is possible to raise an equitable defense to a foreclosure action.

In Union National Bank, the Court noted that "[a]lthough an action of mortgage foreclosure is an action at law in Pennsylvania, equitable relief is nevertheless available in such an action if it can be granted consistently with principles of law." Id. at p. 721. The Court went on to hold that "[o]n the facts of this case, ... we hold that appellant may raise the Bank's failure to comply with the servicing provisions of the VA Lenders Handbook as an equitable defense in the Bank's mortgage foreclosure action." Id. at p. 723. Specifically relied on by the Court was "the fact that the guidelines in the Handbook were "sensible, equitable standards of

conduct, consistent with, and issued in furtherance of, the national housing goals.” *Id.* at p. 722, *quoting Fleet Real Estate Funding Corp. v. Smith*, 530 A.2d 919, 923 (Pa. Super. 1987), *quoting Brown v. Lynn*, 392 F.Supp. 559, 563 (N.D. Ill. 1975). Critical to its decision, however, appears to be the fact that the actions *of the mortgagee* were at issue; where a defendant has attempted to raise as an equitable defense to a mortgage foreclosure the actions of a third party, such an attempt has been rejected. *See First Wisconsin Trust Company v. Strausser*, 653 A.2d 688 (Pa. Super. 1995)(claim that defenses of duress, fraud and unjust enrichment resulting from undue influence by co-borrower “strike at the validity of the mortgage” was rejected since allegations of wrongdoing were directed at co-borrower, not mortgagee). *See also Leedom v. Spano*, 647 A.2d 221 (Pa. Super. 1994)(claim of equitable estoppel based on forbearance rejected since mortgagee had no duty to exercise due diligence with respect to collecting the debt owed to them). In the instant case, Defendants attempt to raise an equitable defense based on the actions of the attorney they claim represented them at the time of the transactions and not the mortgagee, which at the time was Sovereign Bank.³ While they may have some claim against Mr. Z* personally, their attempt to defend this action by Xcend Financial on that basis must fail.

Defendants also argue that even if the Court rejects their defense of breach of fiduciary duty, it must allow them to proceed on their defense of “fraud and illegality”. This defense is set forth as the statement quoted above in Paragraph 20 of the proposed Answer and no allegations of fact are offered in support of the claim. As noted in *Castings Condominium Association, Inc. v. Klein*, 663 A.2d 220, 224 (Pa. Super. 1995), however, such a defense must be set forth in “precise, specific and clear terms.” No facts in support of such a fraud claim have been included in the proposed Answer. Therefore, Defendants’ attempt to defend on this basis must also fail.

Accordingly, Defendants having failed to set forth in their proposed Answer a meritorious defense to the Complaint, the petition to open must be denied.

² The Complaint and Praecipe to Enter Default Judgment were filed by Mr. Z*; subsequently, Mr. Z* withdrew his appearance and present counsel entered his appearance.

ORDER

AND NOW, this 25th day of July 2008, for the foregoing reasons, the Petition to Open Default Judgment is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

*Name redacted at the request of the court. Ed.

cc: Gregory Stapp, Esq.
Thomas Schmidt, Esq., Pepper Hamilton, 100 Market St., Ste. 200, Harrisburg, PA 17108
Gary Weber, Esq.
Hon. Dudley Anderson

³ The note and mortgage were subsequently purchased from Sovereign Bank by Xcend Financial, LLC, and while it is alleged that Mr. Z* is a member of that entity, Xcend is nevertheless a legally separate entity.