IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CAPITAL ONE, N.A., Plaintiff	:	NO. 16-0814
	:	CIVIL ACTION - LAW
vs.	:	
JEFFREY L. and TAMMY E. DIEHL, Defendants	:	Petition to Open Judgment

OPINION AND ORDER

Before the court is Defendants' Petition to Open Judgment, filed August 5, 2016. Argument on the petition was heard August 31, 2016.

Plaintiff filed a Complaint in mortgage foreclosure on June 6, 2016. The Complaint was served on Defendants on June 9, 2016. Default judgment for lack of a response was filed July 26, 2016. As stated above, the instant petition to open was filed August 5, 2016.

As the petition was filed within ten days of the default judgment, ordinarily Defendants would be entitled to the benefit of Pa.R.C.P. 237.3 (b), which requires the court to open the judgment if the proposed answer states a meritorious defense. In other words, only that prong of the three-prong test is to be considered, as it is presumed that the petition is timely and that there is a legitimate excuse for the failure to file an Answer. As Defendants have attached proposed preliminary objections rather than an Answer, however, they are not entitled to the benefit of Rule 237.3(b) but must meet all three prongs. Pa.R.C.P. 237.3 Note.

There is no dispute that the petition is timely.

As for the second prong, Defendants contend they did not file any responsive pleading as they were negotiating with Capital One and were told not to "worry about" the legal filings. While in hindsight it would have been advisable to consult counsel or inquire with the court rather than rely on the opposing party,[1] the court finds this to be a legitimate excuse for their failure to file an Answer.

The third prong prevents the opening of the judgment, however, as the court cannot find a meritorious defense in the proposed preliminary objections. Those objections raise two issues: (1) Plaintiff lacks standing and (2) the court lacks jurisdiction. Neither has merit.

Defendants' first objection is based on the fact that Plaintiff is Capital One, N.A. but the mortgage and note were given by Defendants to Chevy Chase Bank. Defendants argue that Plaintiff did not sufficiently allege ownership of the mortgage and note and without such ownership, they lack standing to bring the action. While the court agrees that ownership must be sufficiently alleged, it has been so alleged here. Plaintiff asserts in Paragraph 6 that "Plaintiff is the current Mortgagee by successor by merger to the original Mortgagee." While this sentence could have referred to the note as well as the mortgage, such is reasonably implied; by merger, Plaintiff would have succeeded to the ownership interest of all instruments held by the other company and in Paragraph 4, Plaintiff alleges that Defendants executed and delivered to Chevy Chase Bank the note in question.

[1] The court notes the foreclosure complaint is prefaced with a Notice which informs that settlement is an option, through the court-sponsored diversion program, but also informs the defendant that he "will still be held responsible for any deadlines set forth in the papers you have already received and in the Rules of Civil Procedure."

With respect to the challenge to this court's jurisdiction, Defendants contend that since a mortgagee may not proceed with foreclosure until a borrower who requests it is evaluated for HAMP[2], and since Defendants "reasonably believed that they were, in fact, being evaluated for HAMP and/or a mortgage diversion program", this action is premature and the court lacks subject matter jurisdiction. Defendants' argument is faulty, however, because the "rule" upon which they rely is actually this: "*A servicer participating in HAMP* may not proceed with a foreclosure sale on a property in default until the borrower has been evaluated for HAMP eligibility." HSBC Bank, NA v. Donaghy, 101 A.3d 129, 135 (Pa. Super. 2014), quoting Markle v. HSBC Mortgage Corp. (USA), 844 F. Supp. 2d 172, 176-77 (D. Mass. 2011) (emphasis added). Plaintiff asserted at argument that Capital One does not participate in HAMP.[3] The court will concede that this assertion raises a factual issue, but even so, such does not require the opening of the judgment in this case.

In HSBC Bank, *supra*, the Court rejected a similar challenge to a motion for summary judgment:

> Instantly, as stated above, Appellant cites to HAMP only as a defense to Appellee's summary judgment motion, alleging that a factual dispute exists over Appellee's compliance with HAMP, i.e., Section 3 of MHA handbook. We, however, reject Appellant's effort to raise the existence of a factual dispute by asserting HAMP as a defense. Our review of the law indicates that, even if Appellee failed to comply with Section 3 of MHA handbook prior to proceeding

[2] "'HAMP' is an acronym for the Home Affordable Modification Program, which is a program of the United States Departments of the Treasury & Housing and Urban Development. See http://www.makinghomeaffordable.gov/programs/lowerpayments/ Pages/hamp.aspx. HAMP was created pursuant to the Emergency Economic Stabilization Act, 12 U.S.C. § 5201, for the purpose of assisting homeowners who defaulted on their mortgages, or are in imminent risk of default, by reducing their monthly payments to sustainable levels. HSBC Bank, NA v. Donaghy, 101 A.3d 129, 135 (Pa. Super. 2014)

[3] It does appear that Capital One is not a participating company. *See* www.makinghomeaffordable.gov.

> with its foreclosure action against Appellant, Appellant does not have a right to bring an action against Appellee for such noncompliance. It, therefore, logically follows that Appellant's raising of Appellee's noncompliance with HAMP is futile when Appellant has no right to enforce compliance.

Id. at 136-37. Thus, even if Plaintiff does participate in HAMP, and even if Plaintiff failed to comply with the "rule", that does not act to serve as a meritorious defense in this matter.

The court also finds that any potential HAMP rule violation would not deprive the court of subject matter jurisdiction. The provision of a defective Act 91 notice was held to *not* deprive the courts of subject matter jurisdiction in Beneficial Consumer Discount Company v. Vukman, 77 A.3d 547 (Pa. 2013). In reaching that holding, the Supreme Court reasoned that "the Act 91 notice requirements certainly do not sound in jurisdiction as they do not affect the classification of the case as a mortgage foreclosure action." Id. at. 553. Similarly, the HAMP requirements at issue here do not affect the classification of the case as a mortgage foreclosure action. Moreover, the HAMP requirements at issue here are merely program requirements, contained in the contract between lenders and the government,[4] and not statutory directives. "In the absence of a

[4] "Congress enacted the Emergency Economic Stabilization Act in the midst of the financial crisis of 2008. The centerpiece of the statute, the Troubled Asset Relief Program (TARP), delegated to the Secretary of the Treasury broad powers to mitigate the impact of the foreclosure crisis and preserve homeownership. One component of TARP requires the Secretary to implement a plan that seeks to maximize assistance for homeowners and encourage the servicers of the underlying mortgages to take advantage of available programs to minimize foreclosures. Congress also granted authority to use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.

Acting under this authority, the Secretary introduced the Making Home Affordable Program in February 2009. Within this initiative is HAMP, which is administered by Fannie Mae. HAMP aims to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels. Under HAMP, loan servicers receive incentive payments for each permanent loan modification completed. HAMP modifications derive from a uniform process designed to identify eligible borrowers and render their debt obligations more affordable and sustainable.

clear legislative mandate, laws are not to be construed to decrease the jurisdiction of the courts." Id. at 552. Surely the same principle applies to the HAMP requirement at issue here, and there is nothing in that requirement which even speaks to jurisdiction, let alone provides a "clear legislative mandate."

The court does sympathize with Defendants, who believe they were misled by the mortgage company in this matter, but the court is constrained to enforce the judgment obtained by Plaintiff and may not open that judgment where there has been no showing of a meritorious defense.

ORDER

AND NOW, this 1st day of September 2016, for the foregoing reasons, the Petition to Open Judgment is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Benjamin Landon, Esq.
Jennifer Heverly, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

Mortgage lenders approved by Fannie Mae must participate in HAMP. This obligation stems from the Mortgage Selling and Servicing Contract (MSSC), a form contract entered into by Fannie Mae and approved lenders that establishes the parties' basic legal relationship. The contract incorporates by reference Fannie Mae's Selling and Servicing Guides. The latter guide requires servicers of mortgage notes owned by Fannie Mae to participate in HAMP and to abide by HAMP directives and guidelines. Lenders servicing mortgages not owned or guaranteed by Fannie Mae or Freddie Mac may elect to participate in HAMP by executing a Servicer Participation Agreement [(SPA)] with Fannie Mae in its capacity as financial agent for the United States.

The Department of the Treasury and Fannie Mae have issued a series of directives that provide guidance to mortgage servicers implementing HAMP." HSBC Bank, NA v. Donaghy, supra at 134-35.