IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST not in its individual capacity but solely as TRUSTEE FOR BANTAM FUNDING TRUST 2018-1,	:	**NO. 18-1132**
Plaintiff	:	
	:	
vs.	:	
	:	**CIVIL ACTION – LAW**
UNKNOWN HEIRS, SUCCESSORS, ASSIGNS, and ALL PERSONS, FIRMS, or ASSOCIATIONS CLAIMING RIGHT, TITLE, or INTEREST FROM OR UNDER JOHN R. DREVENAK, DECEASED and THOMAS J. DREVENAK, KNOWN HEIR OF JOHN R. DREVENAK, DECEASED,	:	**MOTION FOR SUMMARY JUDGMEMT**
Defendants	:	

OPINION

I. Procedural History

This mortgage foreclosure action arises out of a Complaint filed on August 9, 2018 following this Court's Order dated November 7, 2019 removing the matter from the Mortgage Foreclosure Settlement Program due to Defendant's failure to appear and the lack of progress in moving the matter forward. Plaintiff initially filed this action against both Thomas Drevenak and Penny Sines as heirs of the above-captioned deceased persons. However, on October 1, 2018, Plaintiff discontinued the action as it related to Penny Sines, leaving Thomas Drevenak as the only known heir.

Defendant Drevenak filed an Answer with New Matter and Affirmative Defenses on December 4, 2019.[1] Plaintiff served discovery including

[1] Plaintiff argues, and Defendnat does not dispute, that the general denials in Defendant's Answer to Plaintiff's Complaint are insufficient to survive summary judgment pursuasnt to Pa.R.C.P. 1029(c) (a "statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial" but "[r]eliance on subdivision (c) does not excuse a failure to admit or deny a

Interrogatories, Requests for Production of Documents, and Requests for Admission on Defendant on January 15, 2020. All discovery has gone unanswered.[2] Plaintiff now files a Motion for Summary Judgment setting forth several arguments in support of its position and the Defendant has filed a response. Oral argument was held on July 28, 2020 at which time Defendant conceded that, given the current circumstances, Plaintiff is entitled to judgment as a matter of law. In the interest of preserving the record, the Court will briefly discuss the facts and relevant law below.

II. Factual History

The following facts are undisputed by the parties. On February 4, 2004, Plaintiff extended a loan to Patricia Drevenak for $102,000. The loan was and currently is secured by a mortgage on the subject property located at 167 North 4th Street, Hughesville, PA. The owners of this property were Ms. Drevenak and

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factual allegation when it is clear that the pleader must know whether a particular allegation is true or false. *See also New York Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 952 (Pa. Super. 1987) (holding that a general denial that a Defendant is "without sufficient information to form a belief as to the truth" of Plaintiff's averments is insufficient and will be considered an admission). Those averments to which Defendnat did not specifically deny are therefore admitted.

[2] In support of its position, Plaintiff points out that its Request for Admissions sent to the Defendant on January 15, 2020 have gone unanswered and therefore, all matters in the requests are admitted pursuant to Pa.R.C.P. 4014 ("the matter is admitted unless, within thirty days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney"). Defendant does not dispute this argument and, therefore, the following matters have been admitted by the Defendant:

1. Patricia Drevenak not only executed a note in the amount of $102,000 but also executed a Loan Modification Agreement in the amount of $93,089.76 as well as additional amounts of $5,710.15 for taxes and insurance.
2. Defendant is not the real owner of the subject property but does reside at that address.
3. Defendant has failed to make the monthly payments since July 2017 and is therefore is default of the mortgage.
4. Defendant has not cured the mortgage on the delinquent account.
5. The figures set forth at Paragraph 8 of Plaintiff's Complaint are correct and recoverable.
6. A 6% interest rate accrues for each day that the debt remains unpaid.

See Exhibit K to Plaintiff's Motion.

her husband, John Drevenak who are now both deceased. The mortgage, after several different assignments, was ultimately assigned to the Plaintiff on November 18, 2018.

A Loan Modification Agreement was executed by Ms. Drevenak on August 29, 2008 which modified the original loan amount to $93,089.76 plus advances of taxes and insurance in the amount of $5,710.15. *See Exhibit D to Plaintiff's Motion.* Based on this Agreement, Ms. Drevenak was obligated to make monthly payments in the amount of $558.12 as well as additional payments toward escrow for taxes and insurance from November 1, 2008 through October 1, 2038. *See Exhibit D to Plaintiff's Motion at Paragraphs 6 and 15.* Plaintiff alleges that from July 2017 to the present, no payments have been made and therefore, the mortgage is in default. On February 22, 2018, Plaintiff sent a notice pursuant to Act 91 and Act 6 to Patricia and John Drevenak at the subject address via first class and certified mail. *See Exhibit F to Plaintiff's Motion.*

Plaintiff claims that the total amount due and owing by the Defendant to the Plaintiff is $111,177.42 which includes the mortgage principal, interest calculated at the per diem rate of $13.14, late charges, escrow advances, appraisal fees, property inspection, foreclosure fees, and title fees. *See Paragraph 29 of Plaintiff's Motion and Exhibit M to Plaintiff's Motion.* Finally, Plaintiff avers that the pleadings in this case are closed and that there is no issue of genuine fact, to which Defendant admits. *See Paragraphs 17 of Plaintiff's Motion for Summary Judgment and Defendant's Reply.*

III. Discussion

a. Summary Judgment Standard

Pennsylvania Rule of Civil Procedure 1035.2 provides the following regarding summary judgment:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

In order to defeat a motion for summary judgment, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense and cannot rest on the mere allegations or denials of the pleadings. Pa.R.C.P. 1035.2 (Note) and Pa.R.C.P. 1035.3(a). It is well established in Pennsylvania that summary judgment must be decided on the evidentiary record only and the Court views the record in the light most favorable to the non-moving party. *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 194-57 (Pa. 2007). The Court may grant summary judgment only where the right to such a judgment is clear and free from doubt. *Id.*

b. Summary Judgment in a Mortgage Foreclosure Action

A mortgage foreclosure action is strictly an *in rem* proceeding. The "purpose of a judgment in mortgage foreclosure is solely to effect a judicial sale of the mortgaged property" rather than a judgment for money damages. *New York Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. 1987), *citing Meco Realty Co. v. Burns*, 200 A.2d 869 (Pa. 1964). Plaintiff argues that it is entitled to benefits because it is a real party in interest. Black's Law Dictionary defines the real party in interest to be the "[p]erson who will be entitled to benefits of action if successful . . . [A] party is a real party in interest if it has the legal right under the applicable substantive law to enforce the claim in question". *Cole v. Boyd*, 719 A.2d 311, 312–13 (Pa.Super. 1998); BLACK'S LAW DICTIONARY 874 (abr. 6th ed.1991). Here, it is undisputed by the Defendant that the mortgage was assigned to the Plaintiff. Defendant admits in his Reply to the Motion for Summary Judgment that on November 18, 2018, the Mortgage was assigned to the Plaintiff and there is no evidence to the contrary. Plaintiff is entitled to benefits if successful and therefore is the party in interest here.

Plaintiff also asserts that it has complied with all notice requirements in a foreclosure action pursuant to Act 6 and Act 91. While Defendant specifically denies in his Answer to the Complaint and Reply to Plaintiff's Motion, Plaintiff has sufficiently notified Defendant of the action. Act 6 states that prior a mortgage lender filing suit, it must give the debtor notice of its intention to do so at least thirty days in advance. 41 P.S. § 403(a). The notice must be in writing and "sent to the residential mortgage debtor by registered or certified mail at his last known address and, if different, at the residence which is the subject of the residential

mortgage." 41 P.S. § 403(b). Subsection (c) provides particular items that must be included in the notice. Act 91 has essentially the same language and even references 41 P.S. § 403. *See generally* 35 P.S. § 1680.402c. Pursuant to Section 1680.403c(a) of Act 91, when both the Act 6 and Act 91 notices are required, it is sufficient to issue a combined Act 6/91 notice. *Wells Fargo Bank N.A. v. Spivak*, 104 A.3d 7, FN 18 (Pa. Super. 2014).

Here, Plaintiff sent a document titled "Act 91 Notice" to Patricia Drevenak and John Drevenak on February 22, 2018 by certified and first class mail. The address listed on the certified mailing is the address of the subject property. Defendant admits that he resided at this property. *See Defendant's Answer at Paragraph 5.* Defendant does not specifically argue that the notice that Plaintiff sent is substantively deficient, but rather that the Defendant himself never received it. However, since Plaintiff sent the notices to the residence which is the subject of the residential mortgage, it has substantially complied with Acts 6 and 91.

"Summary judgment is properly granted in mortgage foreclosure actions where the mortgagor admits that he is delinquent in mortgage payments." *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688. 694 (Pa. Super. 1995). It is well established that when a Defendant admits that he is behind on mortgage payments but denied the amount owed, summary judgment is nevertheless proper. *Landau v. Western Pennsylvania Nat. Bank*, 282 A.2d 335, 340 (Pa. 1971).

Here, Defendant admits that the mortgage on the subject property is in default. *See Defendant's Answer at Paragraph 7*. Defendant states that he is

"without sufficient information to form an opinion or belief as to whether or not the amounts claimed by Plaintiff as due and owing . . . are correct." *See Defendant's Answer at Paragraph 8*. He does admit, though, that interest continues to accrue on the debt. *See Defendant's Answer at Paragraph 9*. For the above reasons, and specifically because Defendant admits that Plaintiff is entitled to summary judgment, Plaintiff's Motion is granted.

Finally, Plaintiff argues that it is entitled to recover the following amounts:

Principal of Mortgage Debt Due and Unpaid	$79,940.09
Interest	$13,970.89
Late Charges	$167.46
Escrow Advances	$7,257.81
Appraisal Fees	$400.00
Property Inspection	$358.00
Foreclosure Fees & Costs	$3,343.57
Suspense/Unapplied Balance	($139.55)
2nd Unpaid Principal Balance	$5,710.15
Title Fee	$175.00
Total	**$111,177.42**

"A mortgagee is entitled upon foreclosure to recover reasonable expenses, including attorney's fees." *Warden v. Zanella*, 423 A.2d 1026, FN1 (Pa. Super. 1980), *citing Foulke v. Hatfield Fair Grounds Bazaar, Inc.*, 173 A.2d 703 (Pa. Super. 1961). "The debt owed on the mortgage changed and can be expected to change from day to day . . . . Judgment in a mortgage foreclosure action must be entered for a sum certain or no execution could ever issue on it." *Landau v. Western Pennsylvania Nat. Bank*, 282 A.2d 335, 340 (Pa. 1971). Plaintiff argues that it has established the amount of the mortgage that is due and owing by sworn Affidavit as well as the payment history, which shows that there have been no payments made toward the above balance since July 2017. Further, the Note and Mortgage state that costs and charges incidental to the

foreclosure are recoverable. Defendant has pointed to no evidence in the record that contradicts this and therefore, Plaintiff is entitled to recover the above amounts.

ORDER

AND NOW, this **11th** day of **August, 2020**, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's response thereto, Plaintiff's motion is **GRANTED** and Plaintiff is entitled to recover **$111,177.42.**

BY THE COURT,

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Hon. Ryan M. Tira, Judge

RMT/ads

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