

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA

ESTATE OF TAMMY J. MAYER,	:	
Deceased, KEITH E. MAYER,	:	No. 21-00,531
Administrator,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION – LAW
	:	MORTGAGE FORECLOSURE
JAMES HALKIAS,	:	
	:	
Defendant.	:	

**OPINION AND ORDER**

AND NOW, this 21<sup>st</sup> day of September, 2023, upon consideration of the Motion for Summary Judgment filed by the Plaintiff, it is hereby ORDERED and DIRECTED that the Motion is GRANTED, as explained below.

***I. BACKGROUND.***

Plaintiff, Estate of Tammy J. Mayer, Deceased, Keith E. Mayer, Administrator, commenced this action against Defendant, James Halkias, by Complaint in Mortgage Foreclosure filed on June 8, 2021. Following resolution of preliminary objections, Defendant filed his Answer and New Matter on April 18, 2022. Plaintiff replied to Defendant's New Matter on May 4, 2022, and the pleadings are now closed.

***A. Factual Background.***

Defendant is the owner of the real property at issue (the "Property"), which is situate in Muncy Township, Lycoming County, by virtue of a Tax Claim Bureau Deed dated January 8, 2021. Previously, the Property was owned by Jerry L. Winters (the "Mortgagor"). On or about July 9, 2010, Mortgagor executed a

promissory note and mortgage upon the Property to Tammy J. Mayer (the "Decedent") in the amount of \$45,000. The Decedent passed away on March 29, 2018, and an estate was raised thereafter.

On January 13, 2019, the Decedent's estate, Plaintiff here, alleging that Mortgagor had failed to repay the promissory note as required, filed a Complaint in Mortgage Foreclosure against Mortgagor and the Property.<sup>1</sup> On August 8, 2019, Mortgagor filed an Answer to the Estate's Complaint. In his Answer, Mortgagor admitted that he had made, executed and delivered to the Decedent a promissory note and mortgage as set forth above and that the Property is subject to the mortgage. Mortgagor also alleged that he had made an arrangement with the Decedent whereby he would provide services to Decedent in lieu of making payments on the Mortgage.

On September 23, 2019 trial was held before the Honorable Ryan M. Tira. At trial, the administrator of the Decedent's estate testified that he had found the note and mortgage but no evidence of payment thereon. The Mortgagor testified that the Decedent had agreed to accept services in lieu of payment, but the Court struck any reference to the Decedent's agreement to accept services in lieu of payment based upon the Dead Man's Act.<sup>2</sup> Mortgagor testified but failed to

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<sup>1</sup> The Complaint is docketed to Lycoming County Court of Common Pleas Civil Action No. 19-00,937.

<sup>2</sup> See 42 Pa. C.S. § 5930 ("Except as otherwise provided ..., in any civil action or proceeding, where any party to a thing or contract in action is dead, ... neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased ..., shall be a competent witness to any matter occurring before the death of said party ..."). The purpose of the Dead Man's Act "is obviously to prevent the injustice which might flow from permitting the surviving party to a transaction with a decedent to give testimony thereon favorable to himself and adverse to the decedent, which the latter's representative would be in no position to refute." *Weaver v. Welsh*, 191 A. 3, 7 (Pa. 1937), overruled on other grounds by *Estate of Grossman*, 406 A.2d 726 (Pa. 1979).

introduce any evidence of his having provided services to the Decedent.

Ultimately, by Order dated September 23, 2019, the Court entered judgment *in rem* in favor of the Plaintiff and against Mortgagor, in the amount of \$60,868.39.<sup>3</sup>

After filing of a Writ of Execution, the property was scheduled for sheriff's sale on February 7, 2020. Due to complications relating to the pandemic, the sale was continued to November 6, 2020. In the interim, the property was exposed to upset tax sale on September 16, 2020 for unpaid taxes. Defendant here purchased the property at the upset tax sale. Plaintiff thereafter cancelled the November foreclosure sale as a result. The Tax Claim Bureau subsequently issued a deed to Defendant on January 8, 2021, by virtue of which deed Defendant now owns the Property.

Plaintiff thereafter commenced this action in mortgage foreclosure against Defendant on June 8, 2021. In answer to the Complaint, Defendant asserts that Decedent's loan to Mortgagor of \$45,000.00 was never conveyed, that the mortgage against the property was fraudulent and was created to shield the property from creditors, that Mortgagor was in a relationship with Decedent, and that Mortgagor "paid" the mortgage by providing services in lieu of monetary payment. He also asserts the judgment in mortgage foreclosure did not survive the tax sale. Plaintiff contends that its prior *in rem* judgment is valid and enforceable, that the affirmative defenses raised by the Defendant are barred by the doctrines of *res judicata* and collateral estoppel, and that the upset tax sale did not disturb or erase Plaintiff's *in rem* judgment against the Property.

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<sup>3</sup> A review of the docket indicates the judgment was not appealed and has never been stricken, opened, vacated, set aside or otherwise disturbed.

### ***B. Procedural Background.***

The pleadings being closed, Plaintiff filed a Motion for Summary Judgment on May 12, 2023.<sup>4</sup> Defendant filed an Answer to the Plaintiff's Motion on May 22, 2023. The Court heard argument on the Plaintiff's Motion on August 10, 2023. Accordingly, the Plaintiff's Motion is now ripe for decision.

## ***II. LAW AND ANALYSIS.***

### ***A. Legal Standard.***

A party may move for summary judgment, in whole or in part,

[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial ...

(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.<sup>5</sup>

The Court finds that Plaintiff filed its Motion timely. The relevant pleadings are closed, and Plaintiff filed this Motion in accordance with this Court's Scheduling Order, so there is no risk trial will be delayed unreasonably.

Once a party has filed a motion for summary judgment,

(a) ... the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

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<sup>4</sup> The Court entered a Scheduling Order in this matter on August 10, 2022. The Scheduling Order set May 12, 2023 as the cut-off date for filing dispositive motions such as motions for summary judgment. Plaintiff timely filed its Motion for Summary Judgment, as it did so on May 12, 2023.

<sup>5</sup> Pa. R. Civ. P. 1035.2.

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.<sup>6</sup>

The court may enter summary judgment against a party who fails to respond to the motion.<sup>7</sup> “Where a motion for summary judgment has been made and properly supported, parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.”<sup>8</sup>

Defendant filed an Answer to the Plaintiff’s Motion on May 22, 2023, within the time required. Defendant’s answer to the Motion raises various questions concerning the validity of the mortgage at issue and suggests that it is fraudulent; however, Defendant does not supplement the record<sup>9</sup> or identify “one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion.”<sup>10</sup>

Our Supreme Court has explained that

“Summary judgment is properly granted where ‘the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine

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<sup>6</sup> Pa. R. Civ. P. 1035.3(a).

<sup>7</sup> Pa. R. Civ. P. 1035.3(d) (“Summary judgment may be entered against a party who does not respond”).

<sup>8</sup> *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. Super. 1991) (citing *Overly v. Kass*, 554 A.2d 970 (Pa. Super. 1989); *Tom Morello Construction Co., Inc. v. Bridgeport Federal Savings and Loan Ass’n*, 421 A.2d 747 (Pa. Super. 1980)).

<sup>9</sup> Pa. R. Civ. P. 1035.3(b).

<sup>10</sup> Pa. R. Civ. P. 1035.3(a)(1).

issue of material fact and that the moving party is entitled to judgment as a matter of law'...."<sup>11</sup>

When considering a motion for summary judgment, a court must view the record in the light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party.<sup>12</sup> A court should grant summary judgment "only in cases where the right is clear and free from doubt."<sup>13</sup> The burden is on the moving party to show that there is no genuine issue of material fact,<sup>14</sup> and the court's function is to ascertain whether a material issue of fact exists rather than to determine the facts.<sup>15</sup>

### **B. The Tax Sale.**

Defendant purchased the Property at an upset tax sale. Property sold at upset tax sale is generally conveyed subject to recorded obligations.<sup>16</sup> As the Commonwealth Court has explained:

A property listed at an upset tax sale is offered for sale at a minimum price, known as the "upset price." 72 P.S. § 5860.605. The upset price is the sum of: "all accrued taxes including taxes levied for the current year, whether or not returned," and tax liens and claims. *Id.* However, it is not sold free and clear of all liens and claims. See Section 609 of the Tax Sale Law, 72 P.S. § 5860.609. Rather, it remains "subject to the lien of every recorded obligation, claim, lien, estate, mortgage, ground rent and Commonwealth tax lien **not**

<sup>11</sup> *Ducjai v. Dennis*, 656 A.2d 102, 107 (Pa. 1995) (quoting *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (Pa. 1992) (citations omitted)), disapproved of on other grounds by *Gardner v. Erie Ins. Co.*, 722 A.2d 1041 (Pa. 1999).

<sup>12</sup> *Sevast v. Kakouras*, 915 A.2d 1147, 1152-53 (Pa. 2007) (citing *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001)).

<sup>13</sup> *Marks v. Tasman*, *supra*, 589 A.2d at 206 (citing *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279, 280 (Pa. 1989)).

<sup>14</sup> *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1035 (Pa. Super. 1999) (citing *Accu-Weather v. Prospect Communications*, 644 A.2d 1251 (Pa. Super. 1994)).

<sup>15</sup> *Swartley v. Hoffner*, 734 A.2d 915, 918 (Pa. Super. 1999) (citing *McDonald v. Marriott Corp.*, 564 A.2d 1296, 1298 (Pa. Super. 1989)).

<sup>16</sup> See 72 P.S. § 5860.609 ("Every such sale shall convey title to the property under and subject to the lien of every recorded obligation, claim, lien, estate, mortgage, ground rent and Commonwealth tax lien not included in the upset price with which said property may have or shall become charged or for which it may become liable").

included in upset price.” *Id.* (emphasis added). It is only divested of tax liens and claims, which are or could have been included in the upset price. *Id.*; 72 P.S. § 5860.605.<sup>17</sup>

The *in rem* judgment entered against Mortgagor and the Property, by this Court on September 23, 2019 in the amount of \$60,868.39<sup>18</sup> was not included in the upset price here, although it could have been included therein. As such, the lien of the mortgage Plaintiff seeks to enforce, which is a recorded obligation, survived the tax sale pursuant to Section 609 of the Real Estate Tax Sale Law.<sup>19</sup>

### C. *Res Judicata.*

“[T]he doctrine of *res judicata* holds that a final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action.”<sup>20</sup> “A judgment is deemed final for purposes of *res judicata* or collateral estoppel unless or until it is reversed on appeal.”<sup>21</sup> *Res judicata* in Pennsylvania encompasses both issue preclusion and claim preclusion<sup>22</sup> and “bars the relitigation of issues that either were raised or could have been raised in the prior proceeding.”<sup>23</sup> The Superior Court recently explained when *res judicata* applies:

For *res judicata* to apply, there must be four common elements between the two actions: “(1) identity of the thing sued upon; (2)

<sup>17</sup> *In re Balaji Investments, LLC*, 148 A.3d 507, 510-11 (Pa. Commw. 2016).

<sup>18</sup> A document filed of record is legal evidence in all matters in which the document would be competent evidence when provision has been made by law for recording or filing the document in a public office, 42 Pa. C.S. § 6106, and a properly authenticated record of governmental action or inaction is admissible evidence that the governmental action or inaction was in fact taken or omitted. 42 Pa. C.S. § 6104.

<sup>19</sup> Judge Carlucci of this Court decided a similar case, *Kitzmiller v. Halkias*, 2023 WL 3075760 (Lyc. Cnty. 2023), docketed to no. CV 21-00,588, in April of this year. He concluded that a mortgage that had been duly recorded prior to a tax sale survived the tax sale.

<sup>20</sup> *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679, 680-81 (Pa. Super. 1995) (en banc).

<sup>21</sup> *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996) (citation omitted).

<sup>22</sup> *Khalil v. Cole*, 240 A.3d 996, 1002 (Pa. Super. 2020) (citing *Chada v. Chada*, 756 A.2d 39, 42 (Pa. Super. 2000)).

<sup>23</sup> *McArdle v. Tronetti*, 627 A.2d 1219, 1222 (Pa. Super. 1993) (citations omitted).

identity of the cause of action; (3) identity of the parties; (4) identity of the capacity of the parties." ... When examining these elements, "a court may consider whether the factual allegations of both actions are the same, whether the same evidence is necessary to prove each action and whether both actions seek compensation for the same damages." ... "*Res judicata* may bar a second action based upon the same transaction even if additional grounds for relief are presented."<sup>24</sup>

*Res judicata* will be held to apply when the persons, parties and things being sued for in a subsequent action are the same as those in the first action.<sup>25</sup>

Identity of the parties is satisfied when a subsequent litigant is in privity with the original litigant.<sup>26</sup> There is no prevailing definition of "privity" that applies automatically in all cases,<sup>27</sup> but it is generally defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right."<sup>28</sup> Such instances typically implicate the same or nearly identical issues of fact and law and the same measure of damages.<sup>29</sup> As our Supreme Court explained long ago:

Privies are those whose relationship to the same right of property is mutual or successive. In other words, privity denotes mutual or successive relationship to the right of property, title or estate.... The

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<sup>24</sup> *Khalil v. Cole*, *supra*, 240 A.3d at 1002 (quoting *Dempsey v. Cessna Aircraft Co.*, *supra*, 653 A.2d at 681-82).

<sup>25</sup> *Northwestern Lehigh School Dist. v. Commw., Agr. Lands Condemnation Approval Bd.*, 578 A.2d 614, 617 (Pa. Commw. 1990).

<sup>26</sup> See, e.g., *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 902 A.2d 366, 376 (Pa. 2006).

<sup>27</sup> *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1317 (Pa. Super. 1983).

<sup>28</sup> *Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. Super. 1995), *alloc. denied*, 670 A.2d 139 (Pa. 1995). See also, e.g., *Flinn's Estate*, 388 A.2d 672 (Pa. 1978) (holding that a transferee who receives an interest in property as a gift is a successor in interest); *Sheils as Trustee for Smith & Morris Holdings, LLC v. Bartles*, 295 A.3d 302, 310-11 (Pa. Commw. 2023) (holding that Borough Council Members are in privity with Borough such that they cannot contradict a jury determination concerning the Borough); *Robinson v. Fye*, 192 A.3d 1225, 1233 (Pa. Commw. 2018) ("[P]rivacy between the parties to past and present suits ... can exist when the parties to such suits bear an agency relationship"); *Montella v. Berkheimer Assocs.*, 690 A.2d 802, 804 (Pa. Commw. 1997) ("Generally, parties are in privity if one is vicariously responsible for the conduct of another, such as principal and agent or master and servant.") (citation omitted).

<sup>29</sup> *Day*, *supra*, 464 A.2d at 1317 (citing Restatement (Second) of Judgments § 51, comment b at 50-51).

essential privity was not in the parties to the actions which determined the location of the Nelson survey, but in the right of property involved therein; and all parties subsequently coming into the title, no matter how, and relying on a right of property derived from either of the warrants and surveys, are visited with notice of the adjudication to which those surveys were subjected between the parties who were then the owners.<sup>30</sup>

Based upon the foregoing, the Court finds that Defendant is in privity with Mortgagor with respect to their rights, if any, in the Property and with respect to the subject mortgage. Here, Defendant raises the same defenses that Mortgagor raised or could have raised with respect to the subject mortgage. Defendant sits in the same position as Mortgagor with respect to the subject mortgage. As such, the Court finds that the persons, parties and things being sued for in this action are the same as those in the action docketed to No. CV 19-00,937 that resulted in an *in rem* judgment against Mortgagor and the Property on September 23, 2019. Accordingly, the defenses raised by the Defendant to Plaintiff's Complaint in Mortgage Foreclosure here are barred by the doctrine of *res judicata*.

***D. Defendant's Response to Plaintiff's Motion.***

In addition, as noted in Part II.A. of this Opinion, Defendant's Answer to Plaintiff's Motion for Summary Judgment does not supplement the record or identify "one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion," as required by Rule 1035.3 to avoid imposition of summary judgment. By virtue of the judgment obtained in the action docketed to No. CV 19-00,937, the Court finds that Plaintiff

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<sup>30</sup> *Strayer v. Johnson*, 1 A. 222, 224-25 (Pa. 1885) (holding that a purchaser at a tax sale is in privity to the title, if any, that is divested by the sale and passes to him and that he is bound by concurrent verdicts and judgments in prior actions of ejectment to which his predecessors in title were parties, as to the location and title of the land in question).

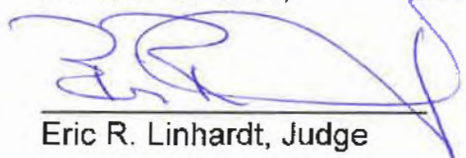
has made out a *prima facie* case of mortgage foreclosure.<sup>31</sup> As the Plaintiff made out a *prima facie* case and the Defendant did not identify a disputed issue of material fact, imposition of summary judgment against the Defendant is appropriate.

### **III. CONCLUSION.**

Plaintiff's Motion for Summary Judgment is GRANTED for the reasons explained above. Accordingly, it is here ORDERED and DIRECTED that Summary Judgment is entered in favor of the Plaintiff and against Defendant, *in rem* only, in Mortgage Foreclosure, in the amount of \$64,468.39,<sup>32</sup> together with further interest and late charges that may accrue, costs, advances, and taxes, if any, and any other charges collectible under the note and mortgage, for foreclosure and sale of the Property.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

cc: Thomas A. Burkhardt, Esq.  
James Halkias  
5540 Westbury Drive, Enola, PA 17025  
Gary Weber, Esq. (Lycoming Reporter)  
Court Administration/Court Scheduling

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<sup>31</sup> Generally, an action in mortgage foreclosure may be commenced when a debt is secured by a mortgage and there has been a default in the performance of obligations of the mortgage. See, e.g., *Scranton Bldg. Ass'n No. 10 v. Murray*, 36 A.2d 831 (Pa. Super. 1944).

<sup>32</sup> This is the amount sought by the Plaintiff in its Complaint and includes interest calculated through May 1, 2021. See Plaintiff's Complaint, ¶ 9.