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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Magnolia Portfolio, LLC, Plaintiff v. Woods Properties, LLC,
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch,
Civil Action – Writ of Execution No. 2014-1030

HEADNOTES

Civil Law- Writ of Execution- Exceptions to a Proposed Distribution of Proceeds from a Sheriff's Sale

Civil Law- Jurisdiction to Hear Exceptions to the Proposed Distribution of Proceeds from a Sheriff's Sale

1. The Court of Common Pleas in the county in which the sheriff's sale occurred has jurisdiction to settle disputes concerning the proposed distribution of proceeds from a sheriff's sale.

Civil Law- New Matter

1. New matter that is not answered because the opposing party failed to attach a notice to plead is deemed denied. See Slaughter v. Gruntz, 323 A.3d 152 (Pa. Super. Ct. 1974).

Civil Law- Exhibits Attached to Briefs

1. For the interest of accuracy and in order to prevent confusion, courts have historically held that exhibits attached to briefs are not to be construed as exhibits or evidence of record, as briefs are not considered to be pleadings. Scopel v. Donegal Mut. Ins. Co., 698 A.2d 602, 606 (Pa. Super. Ct. 1997), citing Erie Indemnity Co. v. Coal Operators Casualty Co., 272 A.2d 465, 466-467 (Pa. 1971).

2. Typically, attachments to briefs are offered just for illustrative purposes to provide ease of reference for the court to locate exhibits in other pleadings that were previously mentioned.

Civil Law- Appointment of an Auditor to Hear Exceptions to the Proposed Distribution of Proceeds from a Sheriff's Sale

1. The Court of Common Pleas may appoint an auditor to hear evidence concerning exceptions to the proposed distribution of proceeds from a sheriff's sale. Pa. R. Civ. P. 3136(f).

Appearances:

Scott A. Dietterick, Esq.

Robert L. Knupp, Esq.

J. McDowell Sharpe, Esq.

OPINION AND ORDER

Before Meyers, J.

This matter is now before the Court for a decision regarding exceptions to the proposed distribution of proceeds from a Sheriff's sale conducted July 11, 2014. This Court has jurisdiction pursuant to the statutory provisions set forth in Pa. R.C.P. 3136 **Distribution of Proceeds**, which is a subsection of the Pennsylvania Rules of Civil Procedure regarding the enforcement of money judgments for the payment of money.

Procedural History and Facts Found by the Court

The dispute surrounds the ultimate disposition of funds acquired from a Sheriff's sale of a parcel of property located at 985 Superior Avenue, Chambersburg, Pennsylvania, 17201. The parcel of real estate is located within the former Letterkenny Army Depot, now managed by the Letterkenny Industrial Development Authority. The tract in question was conveyed by the Letterkenny Industrial Development Authority to Woods Properties, LLC, a Pennsylvania limited liability company by a deed dated November 21, 2002, and recorded on November 25, 2002, with the Office of the Recorder of Deeds of Franklin County, Pennsylvania in record book 2004, page 32.

On or about January 28, 2005, Orrstown Bank took an open-ended mortgage up to the amount of \$200,000.00 on the property with Woods Properties, LLC being the obligor to repay any sums advanced under the terms of the mortgage.

On or about May 25, 2005, Franklin County Area Development Corporation (hereinafter referred to as "FCADC") issued a mortgage in the amount of \$200,000.00, it also being an open-ended mortgage, which was recorded on June 16, 2005. Subsequent to the issuance of the second mortgage by FCADC, Orrstown Bank issued a series of three mortgages secured by the same tract of real estate. The third mortgage was in an amount of \$100,000.00, dated August 25, 2005, and recorded on September 12, 2005. The fourth mortgage was in the amount of \$350,000.00 dated September 19, 2005 and recorded on September 19, 2005, and a fifth mortgage in the amount of \$240,000.00 dated July 12, 2006 and recorded on August 7, 2006. FCADC issued a sixth mortgage on the property dated November 7, 2006 and recorded November 6, 2006 in the amount of \$120,000.00. Orrstown Bank subsequently issued seventh, eighth, ninth, and tenth mortgages in the sums of \$200,000.00 for the seventh mortgage, \$300,000.00 for the eighth mortgage, \$375,000.00 for the ninth mortgage, and \$150,000.00 for the tenth mortgage on the same tract of real estate.

Subsequently, the first mortgage of Orrstown Bank dated January

28, 2005 and recorded on February 1, 2005 was assigned to the Plaintiff, Magnolia Portfolio, LLC. The assignment of the mortgage was recorded in the Office of the Recorder of Deeds for Franklin County on February 14, 2013.

Woods Properties, LLC ultimately entered into a consent judgment and mortgage foreclosure with the Plaintiff, Magnolia *Portfolio*, LLC in the amount of \$761,269.60 plus additional late charges, attorney's fees, and costs and interest on the unpaid balance from July 1, 2013 at the contractual rate. It was agreed that the judgment and mortgage foreclosure would be entered against the Defendant *in rem*. At the same date and time, Woods Properties, LLC executed a deed in lieu of foreclosure to Magnolia *Superior* Holdings, LLC. The deed in lieu of foreclosure referenced the \$200,000.00 first mortgage issued by Woods Properties, LLC to Orrstown Bank and assigned to Magnolia Portfolio, LLC. The property was ultimately offered for sale by the Franklin County Sheriff on July 11, 2014. The Sheriff accepted a bid, and the property was struck down to Magnolia *Superior* Holdings, LLC in the amount of \$350,000.00. The Sheriff demanded that the sum of \$350,000.00 be paid in full. In accordance with Pa. R.C.P. 3136, subsequent to the sale, the Sheriff posted a proposed net distribution of \$343,699.76, with \$226,021.54 to be distributed to Magnolia *Portfolio*, LLC, and \$117,678.22 to be distributed to FCADC.

Subsequent to the posting of the proposed distribution by the Franklin County Sheriff, Magnolia *Superior* Holdings, LLC filed exceptions to the Franklin County Sheriff's proposed distribution of proceeds from the July 11, 2014 sale. The exceptions were set forth in 19 numbered paragraphs. Counsel for Magnolia *Superior*, LLC filed a Certificate of Service to counsel of record in the case which included FCADC's counsel, Jack Sharpe, Esquire. Upon receipt of the exceptions, then President Judge Douglas W. Herman, issued a rule to show cause upon the FCADC to show cause why the Plaintiff should not be entitled to the requested relief, and directed that an answer be filed within twenty (20) days.

On or about October 31, 2014, FCADC filed a response to the exceptions of Magnolia *Superior* Holdings, LLC, along with an attached order which referenced New Matter. In addition to providing some admissions and denials in response to paragraphs 1 through 19, the FCADC pleading included paragraphs number 20 through 27 under the title of New Matter. On its face, the response of FCADC does not contain a notice to plead. By order of court of December 2, 2014, in response to a November 11, 2014 praecipe to list the matter for oral argument, the matter was reassigned from then sitting President Judge Douglas W. Herman to the undersigned judge for argument. Thereafter, the issue of the filing of briefs in accordance

with the Pennsylvania Rules of Civil Procedure and local rules of court was brought to the attention of the Court by the parties' counsel, and resolved by the Court. Argument was permitted to be made by both parties on January 8, 2015 with the understanding that the parties would rely upon the briefs that were filed, and FCADC being permitted to file a responsive brief.

Discussion

This Court notes that a review of the initial exceptions filed by Magnolia *Superior* Holdings, LLC fails to reference an assignment of Magnolia *Portfolio*, LLC's mortgage assignment from Orrstown Bank's mortgage to Magnolia *Superior* Holdings, LLC. The matter of Magnolia *Superior* Holding, LLC's standing was raised by FCADC in its New Matter. As a matter of law, new matter that is not answered because a notice to plead has not been attached to the pleading is deemed denied. See Slaughter v. Gruntz, 277 Pa. Super. 164, 323 A.3d 152 (1974).

The issue of standing was ultimately answered by Magnolia *Superior* Holdings, LLC's counsel, not in the form of an additional pleading, but rather as part of its brief and attachments thereto. Historically to avoid confusion and maintain accuracy of records, courts have held that exhibits attached to briefs are not considered as exhibits or evidence of record, as briefs are not considered to be pleadings. Scopel v. Donegal Mut. Ins. Co., 698 A.2d 602, 606 (Pa. Super. 1997), citing Erie Indemnity Co. v. Coal Operators Casualty Co., 441 Pa. 261, 263-266, 272 A.2d 465, 466-467 (1971). Usually attachments to briefs are merely offered for illustrative purposes to provide ease of reference for the court to exhibits previously referenced in other pleadings.

Although counsel has chosen to attempt to address the challenge to standing informally through their briefs, the Court is of the opinion that the matter is still at issue as the pleadings have not been amended to reflect consent as to standing on the part of Magnolia *Superior* Holdings, LLC to participate in this action based upon an assignment of the mortgage of Orrstown Bank from Magnolia *Portfolio*, LLC to Magnolia *Superior* Holdings, LLC. Since the record has not been properly created to reflect counsels' informal acknowledgment of standing, the issue is unresolved. The Court will not accept the arguments set forth in counsels' briefs to that effect.

In addition to the unresolved question of standing, the ultimate question of apportionment of the Sheriff's sale proceeds is at issue. Magnolia *Superior* Holdings, LLC asserts that the Sheriff has erred as a matter of law in deciding to not accept the stated and announced debt made by counsel for Magnolia *Portfolio*, LLC at the time of the Sheriff's sale and permit a cost bid. The argument offered by counsel is that the cross-

collateralization clause of the Orrstown Bank mortgage entitled the Plaintiff to use a “dragnet” to gather up all debt secured by Woods Properties, LLC under the eight mortgages issued by Orrstown Bank and presumptively assigned to Magnolia Portfolio, LLC into one sum, which now take priority to the FCADC mortgage. FCADC has challenged that argument and has urged the Court to adopt the principle that the debt accumulated under a cross-collateralization clause is either prohibited to statute, or in the alternative, must be shown to be “related” to the original debt. A review of the pleadings of record does not provide this Court with adequate facts on which to issue a decision.

For the foregoing reasons, this Court will exercise the authority granted under Pa. R.C.P. 3136(f) and appoint an auditor who shall be charged with the responsibility of hearing the evidence, considering any depositions taken, analyzing the argument submitted by counsel, and the record that is properly established. Once a record has been made complete and arguments considered, the auditor shall file a report with the Court for approval. The Court will issue a separate order appointing an auditor, but the parties are advised that they are expected to take certain actions consistent with the appointment of the auditor, and in accordance with Pa. R.C.P. 3136(f). These are the items the Court expects the parties to complete:

1. Within thirty (30) days of the date of this order, review the pleadings and take such steps as to correct the pleadings to conform with appropriate pleading rules so that all pleadings comply with required pleading practice under the Pennsylvania Rules of Civil Procedure.
2. Within thirty (30) days of the date of this order, execute a joint stipulation of facts on which the auditor can rely.
3. Within thirty (30) days of the date of this order, and after consultation with the auditor, establish a schedule for depositions, hearing and/or argument so that a proper record can be developed by the auditor for a report and recommendation to this Court.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.

ORDER OF COURT

AND NOW, this 20th day of February 2015;

WHEREAS, the Court has reviewed the pleadings in the above-captioned action, including the exceptions to the proposed distribution of proceeds by the Franklin County Sheriff, the response thereto, and related briefs, and the Court determining that the matter is not ripe for decision as there are outstanding factual issues that need to be developed of record before a proper order can be entered by the Court;

IT IS HEREBY ORDERED pursuant to Pa. R.C.P. 3136(f) that Bradley Griffie, Esquire is hereby appointed as auditor by the Court. The costs of Mr. Griffie's appointment as auditor shall be assessed as costs of the case, and to be deducted from any net distribution determined by the Sheriff.

In addition to considering the questions of standing of parties and the proper distribution of the proceeds from the Sheriff's sale, the auditor is also directed and instructed by this Court to review the issues raised by both sides and to make a recommendation to this Court as to the apportionment of the auditor's cost in this case between the parties.

The auditor is advised by the Court that the Court has already mandated the parties to execute revised pleadings to bring the existing pleadings into conformity with the Rules of Civil Procedure and to enter into a joint stipulation of facts for presentation to the auditor.

The parties are also directed to consult with the auditor and to establish a joint stipulation/ agreement for the conducting of depositions and presentation of evidence to the auditor, and the time limits within which the case will be decided. A report will be filed by the auditor with the Court for final approval.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.