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Franklin County Legal Journal

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Pontus Investment Portfolio III, LLC, Plaintiff vs. Mark D. Grove, Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Fulton County Branch, Civil Action No. 2014-199

HOLDING: *Defendant's Motion to Vacate Default Judgment is DENIED.*

a. Where a defendant alleges only meritorious defenses and does not raise any facial defects in his Motion to Vacate Default Judgment, the Court interprets the pleading as a Motion to Open Default Judgment filed pursuant to Pa. R.C.P. 237.3.

b. Where the Defendant received proper notice of entry of default judgment, and did not file a Motion to Vacate/Open until seventy days later without any excuse from Defendant or his counsel, the Court cannot find that the Motion to Vacate/Open was promptly filed.

c. Mortgage foreclosure complaint is sufficiently specific where the itemized statement of the amount due includes the rate at which the principal and interest have accrued and continue to accrue.

d. The Court will not require the mailing of a newly adopted form of Act 6/Act 91 Notice adopted in 2016, when the original Act 91 Notice was initially lawfully mailed to the mortgagor in 2013.

e. The Court will not require a new Act 91 Notice to be sent to a mortgagor when an Act 91 Notice has already properly been mailed and a foreclosure action has already been initiated against the mortgagor, thereby negating the need for a thirty day period in which to cure any default.

f. Plaintiff is not barred from relief as a matter of law where mortgage foreclosure complaint is compliant with Pa. R.C.P. 1147.

g. The Court finds no reasonable explanation for failure to file a responsive pleading where plaintiff was represented by counsel of record when he received the Plaintiff's Notice of Praecipe to Entry Judgment two weeks before default judgment was entered, and presented no reasonable explanation for still failing to file a responsive pleading and avoid entry of default judgment.

HEADNOTES

Motion to Open vs. Motion to Strike

1. Petitions to strike a default judgment are distinguishable from petitions to open a default judgment. U.S. Bank National Association for Pennsylvania Housing Finance Agency v. Watters, 163 A.3d 1019, 1027 (Pa. Super. 2017).

2. A petition to open a judgment seeks to establish a meritorious defense in hopes that the court will re-open case. Watters, 163 A.3d at 1027-28.

3. A motion to strike is based off allegations that the default judgment itself was improperly granted due to "fatal irregularities appearing on the face of the record." Watters, 163 A.3d at 1028.

Standard of Review: Motion to Open Default Judgment

4. "[T]rial courts can apply legal or equitable principles in reviewing petitions to strike or open default judgments." Wells Fargo Bank, N.A. v. Vanmeter, 67 A.3d 14, 17 (Pa Super. 2013).

5. "The decision to grant or deny a petition to open a default judgment is within the sound

discretion of the trial court . . ." Watters, 163 A.3d at 1028 (quoting Smith v. Morrell Beer Distributors, Inc., 29 A.3d 23, 25 (Pa. Super. 2011)).

6. "In determining whether a judgment by default should be opened, the court acts as a court of conscience." Rigid Fire Sprinkler Service, Inc. v. Chaiken, 482 A.2d 249, 251 (Pa. Super. 1984).

7. Under Pa. R.C.P. 237.3(a), a copy of the proposed responsive pleading the defendant is seeking leave to file shall be attached to his Motion to Open Default Judgment.

8. Under Pa. R.C.P. 237.3(b), if the petition is filed within ten days after entry of default judgment, "the court shall open the judgment if one or more of the proposed preliminary objections has merit or the proposed answer states a meritorious defense."

9. If the motion to open is filed more than ten days after entry of default judgment, three prongs must be met: "the movant must promptly file a petition to that effect, must plead a meritorious defense to the claims raised in the complaint, and provide a reasonable excuse for not filing a responsive pleading." Vanmeter, 67 A.3d at 18 (citing Seeger v. First Union National Bank, 836 A.2d 163, 165 (Pa. Super. 2003).

10. "If a petition to open a default judgment fails to fulfill any one prong of this test, then the petition must be denied." Myers v. Wells Fargo Bank, N.A., 986 A.2d 171, 178 (Pa. Super. 2009).

Prompt Filing of Motion to Open Default Judgment

11. The timeliness of a petition to open a judgment is measured from the date that notice of entry of the default judgment is received. Kelly v. Siuma, 34 A.3d 86, 92 (Pa. Super. 2011)

12. There is no specific time deadline for filing a "prompt" Motion to Open Default Judgment. Kelly, 34 A.3d at 92.

13. The Court must consider the timing of the filing and any reason for delay in filing the Motion to Open Default Judgment to determine whether that filing can be considered "promptly filed." Kelly, 34 A.3d at 92.

Meritorious Defense

14. A meritorious defense is one which, if proven at trial, would establish grounds for relief. Seeger v. First Union Nat. Bank, 836 A.2d 163, 166 (Pa. Super. 2003).

15. Every element need not be proven, but the meritorious defense must be pled precisely, specifically, and in clear terms. Seeger, 836 A.2d at 166.

Failure to Comply with Rule or Law: Pa. R.C.P. 1147 and 1019(i)

16. Under Pa. R.C.P. 1147(a)(1), a mortgage foreclosure complaint must aver the parties to any assignments and state the place of record of the assignments.

17. Under Pa. R.C.P. 1019(i), if a claim is based on a writing, that writing must be attached to the pleading.

18. Under Pa. R.C.P. 1019(g), "any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county" may be incorporated by reference.

19. Therefore, a complaint in mortgage foreclosure is compliant with Rule 1147 where the mortgage and assignments are not attached to the complaint, but are incorporated by reference under Rule 1019(g). See LSF8 Master Participation Trust v. Dougherty, 2017 WL 3142528 (Pa. Super. July 25, 2017) ("Here Appellee's complaint complied with Rule 1147

and incorporated by references the copies of the original recorded mortgage and assignments pursuant to Pa. R.C.P. 1019(g)"); Bank of New York Mellon v. Johnson, 121 A.3d 1056 (Pa. Super. 2015) (holding mortgage foreclosure complaint complied fully with Pa. R.C.P. 1147 by incorporating mortgage and assignment by reference under Pa. R.C.P. 1019(g)).

Standing to Challenge Mortgage Foreclosure Actions

20. Under Pa. R.C.P. 2002(a), "all actions shall be prosecuted by and in the name of the real party in interest."

21. "A real party in interest in any given contract or chose in action is the person who can discharge the duties created and control an action to enforce rights." J.P. Morgan Chase Bank, N.A. v. Murray, 63 A.2d 1258, 1261 (Pa. Super.) (quoting McIntyre Sq. Assocs. v. Evans, 827 A.2d 446, 455 (Pa. Super. 2003)).

22. An assignee is a real party in interest if the original mortgagor/assignor would have had the right to bring the foreclosure action. See U.S. Steel Homes Credit Corp. v. South Shore Development Corp., 419 A.2d 785, 789 (Pa. Super. 1980) ("Under the law of assignments, the assignees stands in the same shoes as the assignor.").

23. A mortgage foreclosure plaintiff need not attach a copy of the mortgage note to its complaint in order to establish standing where the complaint avers that monthly payments were due and the defendant defaulted on those payments. Bank of New York Mellon v. Johnson, 121 A.3d 1056, 1063 (Pa. Super. 2015).

Standing to Challenge Validity of Assignments

24. A borrower cannot demonstrate injury in fact from the enforcement of the note by a party acting under a defective assignment. In re Walker, 466 B.R. 271 (Bankr. E.D. Pa. 2012).

25. Even if an assignment is invalid, the borrower is protected from double liability under 13 Pa. C.S.A. §3602(a).

26. A borrower lacks standing to challenge the chain of possession by which the mortgage foreclosure plaintiff came to hold the note because such an inquiry is irrelevant to enforceability against the borrower. Murray, 63 A.3d at 1265-66.

Sufficient Specificity: Pa. R.C.P. 1147(a)(5)

27. To determine whether a complaint is sufficiently specific, the Court must evaluate "whether [it] is sufficiently clear to enable the defendant to prepare his defense" or "whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)).

Service of Act 91 Notice

28. Under 35 P.S. §1680.403c(b)(2)(ii), the mortgagee must wait at least thirty days from the date the Act 91 Notice before taking any legal action to collect amounts due; during this time period, the mortgagor has the opportunity to cure any default.

29. Under 35 P.S. §1680.403c(c), "the mortgagee may, *at any time thereafter*, take any legal action to enforce the mortgage without any further restriction or requirements under this article." (emphasis added).

30. There is no statutory mandate that legal action must be taken within a certain period of

time after mailing of the Act 91 Notice.

Demurrer

31. "A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded." Allegheny Sportsmen's League v. Ridge, 790 A.2d 350 (Pa. Cmwlth. 2002) (internal citations omitted).

32. When making this determination, "the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom." Allegheny Sportsmen's League, 790 A.2d at 354.

Appearances:

Daniel Muklewicz, Esq. *for the Plaintiff*

J. Gregory Hannigan, Esq. *for Defendants*

OPINION

Before Meyers, J.

PROCEDURAL AND FACTUAL HISTORY

The Plaintiff filed a Complaint in Mortgage Foreclosure on July 29, 2014. The Complaint was served on the Defendant, but no further action was taken by either party because shortly after service, the Defendant filed for bankruptcy, which automatically stayed these proceedings. Therefore, on October 6, 2016, this Court issued a Notice of Intent to Terminate the Case due to inactivity under Pa. R. Jud. Admin 1901. Both parties appeared at the scheduled 1901 hearing on November 29, 2016, where the Court issued an Order based on the parties' representations that they would file pleadings relating to their arguments as to why the case should remain open despite inactivity.

The automatic stay of these proceedings had been lifted by the Defendant's bankruptcy case being dismissed on July 22, 2016. In accordance with this Court's November 29, 2016 Order, the Plaintiff filed a Motion to Proceed with Foreclosure Action on January 31, 2017. The Defendant retained new counsel who entered his appearance on February 7, 2017, but the Defendant did not file a Response to Plaintiff's Motion. Unfortunately, on that same date, the Court issued an Order granting Plaintiff's Motion to Proceed with the Foreclosure Action and allowed the case to proceed forward.

Thereafter, due to Defendant's continued failure to file an Answer

to Plaintiff's Complaint in Foreclosure for nearly three years, the Plaintiff filed a Praecipe to Enter Judgment by Default on March 8, 2017, and Notice of Entry of Judgment was mailed to the Defendant that same day. The Defendant still took no action to respond. On April 28, 2017, the Plaintiff filed a Praecipe for Writ of Execution against the Defendant which was served on the Defendant on May 3, 2017.

The Defendant did not act on these proceedings until May 17, 2017, when he filed a Motion to Stay Sheriff's Sale, to Vacate Judgment, and to Dismiss Complaint, which is presently before this Court. On May 25, 2017, this Court issued an order staying the Sheriff's Sale pending disposition of the Defendant's Motion, issued a Rule to Show Cause on the Plaintiff, and scheduled a hearing for June 30, 2017. The Plaintiff filed a Reply in Opposition to Defendant's Motion on June 7, 2017. Although Plaintiff's Counsel did not appear at the scheduled hearing because they were not served notice of the hearing, the Court issued an Order directing the parties to confer and file a statement regarding whether the factual record for purposes of deciding Plaintiff's Motion could be agreed upon or require further hearing. On August 14, 2017, the parties filed a Joint Statement of Counsel as directed, which asserted that the parties were unable to agree as to the factual matters set forth in Defendant's Motion and Plaintiff's Response, and requested a hearing.

A hearing to establish a factual record was held on November 29, 2017. At that time, the Court issued an Order setting forth the parties' factual stipulations and documents to be considered in this Court's review of the record to decide Defendant's Motion. The Court issued a second order setting forth a briefing schedule for the parties. The Court issued a third order which accepted Plaintiff's Counsel's explanation for his absence at the previous hearing due to the notice being mailed to the incorrect business address.

The Stipulated documents were filed on December 4, 2017. Defendant filed his Brief on December 21, 2017. Plaintiff filed its Reply Brief on January 12, 2018. Defendant filed a Sur-reply Brief on January 26, 2018 with a Praecipe to deliver the file to this Court for review.

The Defendant's Motion to Stay Sheriff's Sale, to Vacate Judgment, and to Dismiss Complaint is now ripe before this Court.

DISCUSSION

I. STANDARD OF REVIEW: MOTION TO VACATE/OPEN JUDGMENT

"[T]rial courts can apply legal or equitable principles in reviewing

petitions to strike or open default judgments." Wells Fargo Bank, N.A. v. Vanmeter, 67 A.3d 14, 17 (Pa Super. 2013). "The decision to grant or deny a petition to open a default judgment is within the sound discretion of the trial court . . ." U.S. Bank National Association for Pennsylvania Housing Finance Agency v. Watters, 163 A.3d 1019, 1028 (Pa. Super. 2017) (quoting Smith v. Morrell Beer Distributors, Inc., 29 A.3d 23, 25 (Pa. Super. 2011)). "In determining whether a judgment by default should be opened, the court acts as a court of conscience." Rigid Fire Sprinkler Service, Inc. v. Chaiken, 482 A.2d 249, 251 (Pa. Super. 1984).

Petitions to strike a default judgment are distinguishable from petitions to open a default judgment. Watters, 163 A.3d at 1027. A petition to open a judgment seeks to establish a meritorious defense in hopes that the court will re-open case. Id. at 1027-28. On the other hand, a motion to strike is based off allegations that the default judgment itself was improperly granted due to "fatal irregularities appearing on the face of the record." Id. at 1028. Here, the Defendant filed a Motion to Vacate the Default Judgment entered against him, which alleges lack of standing and related failure of the pleading to conform to rule as a meritorious defense. The Defendant's Motion does not allege any facial defect in the default judgment itself, such as a failure to give proper notice of entry of the Judgment. For those reasons, the Court interprets the Defendant's Motion to Vacate as a Petition to Open the Default Judgment under Pa. R.C.P. 237.3.

Rule 237.3 states that "a petition from a judgment of . . . default entered pursuant to Rule 237.1 shall have attached thereto a copy of the complaint, preliminary objections, or answer which the petitioner seeks leave to file." Rule 237.3 further states that "[i]f the petition is filed within ten days after the entry of a default judgment on the docket, the court shall open the judgment if one or more of the proposed preliminary objections has merit or the proposed answer states a meritorious defense." If the motion to open is filed more than ten days after entry of default judgment, "the movant must promptly file a petition to that effect, must plead a meritorious defense to the claims raised in the complaint, and provide a reasonable excuse for not filing a responsive pleading." Vanmeter, 67 A.3d at 18 (citing Seeger v. First Union National Bank, 836 A.2d 163, 165 (Pa. Super. 2003). "If a petition to open a default judgment fails to fulfill any one prong of this test, then the petition must be denied." Myers v. Wells Fargo Bank, N.A., 986 A.2d 171, 178 (Pa. Super. 2009).

Therefore, the questions before this Court are (1) whether the Defendant promptly filed his Petition to Vacate/Open the Default Judgment; (2) whether the Defendant established a meritorious defense; and (3) whether the Defendant provided a reasonable excuse for failing to promptly file a

response pleading to Plaintiff's Complaint.

II. ANALYSIS

A. PROMPT FILING

The Superior Court has set forth the following standard the Courts shall apply to determine whether a petition to open default judgment is promptly filed:

> The timeliness of a petition to open a judgment is measured from the date that notice of entry of the default judgment is received. The law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely. Instead, the court must consider the length of time between discovery of the entry of the default judgment and the reason for the delay. In cases where the appellate courts have found a 'prompt' and timely filing of the petition to open default judgment, the period of delay has normally been less than one month.

Kelly v. Siuma, 34 A.3d 86, 92 (Pa. Super. 2011) (internal citations omitted) But see Rigid Fire Sprinkler Service, 482 A.2d at 252 (holding petition to open judgment untimely when filed only 18 days after entry of default judgment in absence of reasonable excuse for delay").

The initial lull in activity in this case was cause by the Defendant filing for Bankruptcy on August 22, 2014, one month after the initial Complaint in Mortgage Foreclosure was filed. Defendant's Motion to Stay ¶2. On July 22, 2016, the Defendant's Bankruptcy case was dismissed and the stay effectively lifted in this matter. Id. at ¶4. Although the Bankruptcy action had automatically stayed these proceedings, neither party filed any document of record in this case indicating a lawful stay. Therefore, on November 29, 2016, the case was automatically heard for dismissal under Pa. R. Jud. Admin. 1901. Upon representation by the parties that they wished to move forward with the case, the Court issued an Order directing the parties to appear at a hearing on February 7, 2017, to further address whether the case should be dismissed for inactivity. The Court also provided in the alternative that counsel for the parties could file a motion stating the reasons why the case should or should not remain on the docket despite inactivity, and the scheduled hearing would be cancelled.

The Plaintiff responded to this Court's prompting and timely filed a Motion to Proceed with Foreclosure Action on January 31, 2017. The Court granted Plaintiff's Motion on February 6, 2017. Counsel for the Defendant entered his appearance the following day on February 7, 2017. The hearing

scheduled for February 7, 2017, was cancelled because the issue of whether the case should remain on the docket was resolved by the Court's February 6, 2017 Order.

Despite the Court's Order dated February 6, 2017, the Defendant still did not file anything of record in response to the Plaintiff's original Complaint in Mortgage Foreclosure. Therefore, the Plaintiff filed a Praecipe to Enter Judgment by Default on March 8, 2017. Notice of entry of this default judgment was mailed to the Defendant that same day. Despite notice of this default judgment against him the Defendant and his counsel still refused to file any documentation of record to combat the entry of default judgment. As such, on April 28, 2017, the Plaintiff file a Praecipe for Writ of Execution against the Defendant and the subject property was listed for Sheriff's Sale.

Despite all of this docketed activity against the Defendant, the Defendant did not file any pleading of record until May 17, 2017, when he filed the instant Motion to Stay Sheriff's Sale, Vacate Judgment, and Dismiss the Complaint. Although the Defendant was represented by counsel of record as of February 7, 2017, the Defendant and his counsel waited seventy days from entry of judgment against him before finally filing a pleading before this Court challenging that default judgment. Moreover, the Defendant has not alleged at any point that he never received notice of any of these actions taken against him. Based on the record before the Court and for the reasons explained more fully herein as to any reasonable excuse for delay in filing, this Court cannot find that seventy days is considered prompt filing.

B. MERITORIOUS DEFENSE

Although the Court has already determined that the filing of the Defendant's Motion to Stay was not prompt, which alone defeats the Defendant's Motion, the Court will address each of the Defendant's alleged meritorious defenses in turn for completion of the record. A meritorious defense is one which, if proven at trial, would establish grounds for relief. Seeger v. First Union Nat. Bank, 836 A.2d 163, 166 (Pa. Super. 2003). Every element need not be proven, but the meritorious defense must be pled precisely, specifically, and in clear terms. Id.

The Defendant's Motion to Stay fails to conform to the requirements set forth in Pa. R.C.P. 237.3(a) because it does not attach a copy of the responsive pleading he is seeking leave to file. Rather, the Defendant appears to have simultaneously asserted Preliminary Objections and New Matter in his Motion to Stay with hopes that one of his arguments will stick to establish a meritorious defense. Based on the briefing of both parties,

there appear to be six distinct bases by which the Defendant is seeking to establish a meritorious defense. Even though these defenses have not been properly raised in the proposed responsive pleading, which should have been attached to Defendant's Motion to Stay, the Court will address each of these six issues in turn.

i. Failure to Comply with Rule or Law

The Defendant's first defense asserts that the Plaintiff's Complaint does not comply with Pa. R.C.P. 1147 and 1019(i) because it does not set forth the location of the recorded assignments and the assignments are not attached to the Complaint. This argument fails to establish a meritorious defense.

Under Pa. R.C.P. 1147(a)(1), a mortgage foreclosure complaint must aver the parties to any assignments and state the place of record of the assignments. However, Rule 1147 does not require attachment of the mortgage or any assignments to the Complaint. The Defendant asserts that since the claim is based on a writing, that writing must be attached to the Complaint under Pa. R.C.P. 1019(i). However, the Defendant overlooks the exception set forth in this same rule at 1019(g), which states that "any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county" may be incorporated by reference. Paragraph 3 of Plaintiff's Complaint states, "The Mortgage and Assignment(s) (if any) are matters of public record and are incorporated by this reference in accordance with Pennsylvania Rules of Civil Procedure 1019(g); which Rule relieves the Plaintiff from its obligation to attach documents to pleadings if those documents are matters of public record." Therefore, the Plaintiff has successfully incorporated the assignments relevant to this action by reference under Rule 1019(g) and need not attach them to the Complaint. See LSF8 Master Participation Trust v. Dougherty, 2017 WL 3142528 (Pa. Super. July 25, 2017) ("Here Appellee's complaint complied with Rule 1147 and incorporated by references the copies of the original recorded mortgage and assignments pursuant to Pa. R.C.P. 1019(g)"); Bank of New York Mellon v. Johnson, 121 A.3d 1056 (Pa. Super. 2015) (holding mortgage foreclosure complaint complied fully with Pa. R.C.P. 1147 by incorporating mortgage and assignment by reference under Pa. R.C.P. 1019(g)).

Although the Defendant correctly states that parties to and dates of each of the assignments in this case were not stated in Plaintiff's Complaint, he has also effectively waived this argument by stipulating to entry of each of the assignments into the record via Order dated November 29, 2017. Relatedly, if the Court had been presented with a Preliminary Objection in

this form, it would have seen a defect in the Plaintiff's failure to state the parties to and dates of the assignments under Rule 1147, but also would have allowed for liberal amendment of the Complaint to resolve the defect. Presently, the purported defect in this filing of Plaintiff's failure to name the parties to and dates of each of the recorded assignments has been resolved by the incorporation of the actual documents themselves via stipulation of the parties.

Therefore, Defendant's argument that Plaintiff failed to comply with rule or law for not attaching or specifically alleging the relevant assignments would not relieve the Defendant at trial and is not a meritorious defense.

ii. Standing

The Defendant's second meritorious defense asserts that there is no indication from the Complaint that the Plaintiff has any ownership rights to the mortgage note conferring standing to bring this action. This argument also fails to establish a meritorious defense.

The Plaintiff's Complaint specifically avers that the original mortgagee was Beneficial Consumer Discount Company d/b/a Beneficial Mortgage Co. of Pennsylvania. Complaint ¶3. The Complaint further avers that the Plaintiff in this action obtained ownership of the note and was the last assignee via assignment recorded on October 11, 2013, and incorporated by reference. Id. Under Pa. R.C.P. 2002(a), "all actions shall be prosecuted by and in the name of the real party in interest." "A real party in interest in any given contract or chose in action is the person who can discharge the duties created and control an action to enforce rights." J.P. Morgan Chase Bank, N.A. v. Murray, 63 A.2d 1258, 1261 (Pa. Super.) (quoting McIntyre Sq. Assocs. v. Evans, 827 A.2d 446, 455 (Pa. Super. 2003)). An assignee is a real party in interest if the original mortgagor/assignor would have had the right to bring the foreclosure action. See U.S. Steel Homes Credit Corp. v. South Shore Development Corp., 419 A.2d 785, 789 (Pa. Super. 1980) ("Under the law of assignments, the assignees stands in the same shoes as the assignor.").

In the instant case, each of the recorded assignments admitted to the record confers from assignee to assignor, its successor and assigns, forever, any money due and to become due with interest and all rights together with the note. See Documents 2-4, filed December 4, 2017. Since each of the assignments confers these rights on the assignor, the Plaintiff here has the same rights as the original mortgagee to bring this foreclosure action.

Relatedly, the Defendant takes issue with the Plaintiff's failure to attach a copy of the mortgage note itself to the Complaint. However, Rule

1147 does not require a plaintiff in mortgage foreclosure to attach the note to the complaint. Moreover, the Superior Court held in Bank of New York Mellon v. Johnson, that a mortgage note need not be attached to a mortgage foreclosure complaint where the complaint avers that monthly installments were due and the defendant defaulted on those payments. 121 A.3d 1056, 1063 (Pa. Super. 2015).

In the instant case, the mortgage note need not be attached to Plaintiff's Complaint because the Complaint specifically averred that Defendant defaulted on the loan by failing to make monthly installments as they became due. See Complaint ¶¶5, 7. Therefore, under Johnson, the Plaintiff's Complaint is not defective for failing to attach the mortgage note.

As with the Defendant's first argument, any preliminary objection which could have been raised as to lack of evidence of possession of the note or ownership via assignment would have easily been resolved by liberal amendment of the Complaint. Moreover, the parties have already resolved any arguable defects by stipulating to the entry into the record of all of the relevant recorded assignments. Even in the absence of the mortgage Note, which is currently attached as Exhibit A to Plaintiff's Brief, the incorporation of each of the relevant assignments of record and subsequent admission into the record of each of those assignments by stipulation resolves any defects alleged here by the Defendant.

Therefore, Defendant's argument as to standing would not provide him relief at trial and is not a meritorious defense.

iii. Validity of Assignments

The Defendant's third argument alleges that the assignments recorded and admitted by stipulation to this record are invalid. This argument also fails to established a meritorious defense.

As stated by the Plaintiff, the Defendant does not have standing to challenge the validity of these documents. In In re Walker, the Bankruptcy Court for the Eastern District of Pennsylvania addressed the question of whether a debtor could properly challenge standing of the creditor-mortgagee in a foreclosure action based on assertions that there were defects in assignment of the mortgage. 466 B.R. 271 (Bankr. E.D. Pa. 2012). The Walker Court held that the borrower could not demonstrate injury in fact from the enforcement of the note by a party acting under a defective assignment. Id. at 285-65. Furthermore, the Walker Court reasoned that even if an assignment is invalid, the debtor is protected from double liability under 13 Pa. C.S.A. §3602(a). Id. Stated otherwise, if an assignment is defective, it is up to the creditor-mortgagee and its predecessors to hash

out who has rights to bring the foreclosure action and collect amounts due. The Pennsylvania Superior Court adopted the Walker Court's reasoning in Murray, supra. 63 A.3d at 1265-66 ("As such, we find Murray's challenges to the chain of possession by which Appellee came to hold the Note immaterial to its enforceability by Appellee.").

In the instant case, as in Walker and Murray, the Defendant does not have standing to challenge the validity of the assignments because he suffers no injury in fact resulting from a defective assignment. Rather, if the assignment is defective, the Plaintiff here is actually the injured party because it would lose its rights to bring the instant action and collect amounts due. The Defendant's argument as to the invalidity of previous assignments is barred as a matter of law due to Defendant's lack of standing to raise the issue. Therefore, this argument would fail to provide relief for the Defendant at trial and cannot be considered a meritorious defense.

iv. Inconsistent Calculations

The Defendant's fourth argument alleges that in light of inconsistent calculations of the amount due on the record here and in the related bankruptcy action, the Plaintiff's Complaint has failed to set forth an itemized statement of the amount due in accordance with Pa. R.C.P. 1147(a)(5). Similarly, the Defendant argues that the Plaintiff's Complaint lacks sufficient specificity as to the amount due such that the Defendant cannot calculate the amounts due. In response, the Plaintiff avers and explains that there are no inconsistencies in the amount due as set forth in this record and the related bankruptcy case. The Court agrees with Plaintiff that Defendant's fourth argument is wholly without merit.

To determine whether a complaint is sufficiently specific, the Court must evaluate "whether [it] is sufficiently clear to enable the defendant to prepare his defense" or "whether [it] informed the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Green, 906 A.2d 1232, 1235 (Pa. Super. 2006) (quoting Ammlung v. City of Chester, 302 A.2d 491, 498 n.36 (Pa. Super. 1973)). The Plaintiff's Complaint is sufficiently specific as to the itemized statements of amounts due such that the Defendant has been placed on notice of the amount claimed against him and may therefore formulate appropriate defenses. Specifically, paragraph six of the Plaintiff's Complaint sets forth not only an itemized list of amounts due, but also the means by which the principal and interest have accrued and continue to accrue. Rule 1147 does not require the attachment of payment records or other financial records of any kind to sufficiently aver amounts due and owing on a mortgage. Rather, Rule 1147 requires only an

"itemized statement of the amount due," which has been sufficiently and specifically pled at paragraph six of the Plaintiff's Complaint.

Therefore, this argument would fail to provide relief for the Defendant at trial and cannot be considered a meritorious defense for purposes of opening default judgment.

v. Act 91 Notice

The Defendant's fifth argument contends that the Act 91 Notice which was properly and successfully sent to the Defendant on or about October 9, 2013, was insufficient because the Plaintiff waited too long thereafter to initiate the instant mortgage foreclosure action. However, as stated by the Plaintiff, the only time constraints set forth in conjunction with the issuance of an Act 91 Notice is the thirty day wait period between mailing of the Act 91 Notice and initiation of the foreclosure action under 35 P.S. §1680.403c(b)(2)(ii). Furthermore, under §1680.403c(c) of that same chapter, "the mortgagee may, *at any time thereafter*, take any legal action to enforce the mortgage without any further restriction or requirements under this article." (emphasis added). Here, the Plaintiff waited the requisite thirty days between mailing of the Act 91 Notice and initiating the present action. Indeed, the Plaintiff did not initiate the instant action until nearly ten months after the Act 91 Notice has been sent. However, §1680.403c does not mandate legal action be taken within a certain time period after the mailing of the Act 91 Notice. Therefore, the Plaintiff's Act 91 Notice complied with statute as to the timing of the mailing of the Act 91 Notice itself and the initiation of the present action.

Relatedly, the Defendant argues that a new Act 91 Notice should have been issued after the bankruptcy case was dismissed and the Plaintiff resumed prosecution of this case. However, the Defendant has not cited any case law or statute which requires the mailing of a new Act 91 Notice after that party has already received an Act 91 Notice and a mortgage foreclosure action has already been initiated and is pending against that party. This Court agrees with Plaintiff's conclusion that requiring a new Act 91 Notice to be filed when an Act 91 Notice has already been served in a mortgage foreclosure case still pending before the Court would be confusing. This redundant process would also contradict the intent of the Act 91 Notice, which allows the defendant time to cure default *before any legal action is taken*. If legal action has already been taken, a new Act 91 Notice serves no purpose to notify the defendant of the default and afford him the opportunity to cure that default.

The Defendant further states that the Plaintiff should have served a

newly adopted form of the Act 6/Act 91 Notice on the Defendant after the bankruptcy case was dismissed. However, it would be wholly inappropriate for this Court to impose new requirements on a foreclosure plaintiff where that plaintiff has already complied with the law in place at the time of service of the original Act 91 Notice. There are no grounds by which the Court can bind the Plaintiff here to Act 6/Act 91 Notice requirements which were enacted in September 2016, over three years after the Plaintiff had already complied with the Act 91 Notice requirements in October 2013, and over two years after the Plaintiff had already initiated the instant action.

There is no legal or factual basis for the Defendant's fifth argument that the Act 91 Notice grew stale in the ten months between service and initiation of this action, or that the Plaintiff should have sent a new and different Act 91 Notice after the Defendant's bankruptcy action was dismissed. Therefore, this argument would fail to provide relief for the Defendant at trial and cannot be considered a meritorious defense for purposes of opening default judgment.

vi. Demurrer

The Defendant's sixth and final argument asserts that the Plaintiff's Complaint has failed to state a claim upon which relief can be granted. Specifically, the Defendant alleges that Plaintiff's Complaint has failed "to connect the dots to get to the point where relief can be granted" because no "proper chain of title" has been established. While this argument seems to assert the same points addressed in the Defendant's second argument as to standing, the Court will evaluate this demurrer separately nonetheless.

"A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded." Allegheny Sportsmen's League v. Ridge, 790 A.2d 350 (Pa. Cmwlth. 2002) (internal citations omitted). When making this determination, "the Court must accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom." Id.

In the instant case, the Plaintiff has successfully pled its Complaint in conformity with Rule 1147. Similarly, as set forth more thoroughly above, the Plaintiff is not required to attach the Mortgage Note to the Complaint as a matter of law. Nor is the Plaintiff required to attach the Mortgage or any Assignments to the Complaint since they were incorporated by reference under Rule 1019(g). Accepting all of the facts alleged in the Plaintiff's Complaint as true, and in light of this Court's determination that the Plaintiff has standing to bring this action, the Court cannot find that the Plaintiff is

barred from relief as a matter of law. Therefore, the Defendant's sixth and final argument of demurrer would fail to provide relief for the Defendant at trial and cannot be considered a meritorious defense for purposes of opening default judgment.

C. REASONABLE EXPLANATION FOR FAILURE TO FILE RESPONSIVE PLEADING

Similarly, although the Court has already determined that the Defendant's Motion to Stay was not promptly filed and does not establish a meritorious defense, the Court will address the third and final prong of its analysis for completion of the record.

The Defendant claims that from the time his Bankruptcy case was dismissed on July 22, 2016 through August and September 2016, he sought legal assistance from Darren Aronow, Esq. and Aronow Law, PC. Defendant's Motion to Stay ¶¶5-5.[1] At no point between the dismissal of the Defendant's Bankruptcy case in July 2016 and the termination hearing five months later in November 2016 did the Defendant or Attorney Aronow file a response pleading to the Plaintiff's original Complaint. Despite allegedly retaining and paying for Attorney Aronow's representation at the time, the Defendant claims that he was told by Attorney Aronow's Office to go to the 1901 hearing by himself in November 2016. Defendant's Motion to Stay ¶7. The Defendant further alleges that after the 1901 hearing, admittedly aware that the Plaintiffs were intending to proceed with the foreclosure action, he attempted to contact Attorney Aranow's office, but was unable to reach them. Id. at ¶9.

Two months after the 1901 hearing, the Plaintiff filed its Motion to Proceed with Foreclosure Action. Although the Defendant was aware that the Court had scheduled a hearing for February 7, 2017, to follow-up the November 2016 1901 hearing, the Defendant did not attempt to secure new counsel until four days before the February 2017 hearing. Defendant's Motion to Stay ¶11. Attorney J. Gregory Hannigan, who still serves as Defendant's Counsel, entered his appearance on the day of the scheduled hearing, which was cancelled pursuant to the Court's Order on February 6, 2017, granting the Plaintiff's Motion to Proceed. Id. at ¶12.

The Defendant admits that he received the Plaintiff's Notice of Praecipe to Enter Judgment on February 16, 2017. Id. at ¶13. Still, neither the Defendant nor Attorney Hannigan took action to avoid entry of default judgment. After default judgment was entered against the Defendant, the Prothonotary issued a Writ of Execution on April 28, 2017. On May 2, 2017, the Defendant received Notice of the Sheriff's Sale scheduled for July 6, 2017. Defendant's Motion for Stay ¶16. The Defendant and Attorney

1 There are duplicate paragraph fives with different content in each, to which this Court is citing.

Hannigan still waited an additional fifteen days from receipt of Notice of the Sheriff's Sale before filing his Motion to Stay on May 17, 2017.

The Defendant's only reason for failing to file a responsive pleading to the Complaint is his alleged failure to acquire competent counsel which was willing to assist him or able to practice in this state until about two months into their alleged employment contract. Despite the Defendant's claims of retaining Attorney Aronow, Attorney Aronow never entered an appearance on behalf of the Defendant as mandated by this Court's November 26, 2017 Order. It appears that despite Attorney Aronow's alleged lack of contact or his ability to practice law in Pennsylvania in the period between the November 2016 1901 hearing and the follow-up hearing in February 2017, the Defendant waited until the eleventh hour to secure new counsel in Attorney Hannigan. Since retaining Attorney Hannigan, however, the Defendant has continued to fail to respond to actions taken to enter and enforce default judgment against the Defendant. There is no reasonable explanation presented to this Court why the Defendant or his attorney failed to respond to Plaintiff's Notice of Praecipe to Enter Judgment, received twenty days before Default Judgment was entered. Furthermore, there is no explanation as to why the Defendant and his counsel waited an additional seventy days after entry of Default Judgment before filing a Motion to Stay, to Vacate Judgment, and Dismiss Complaint. Contrary to the Defendant's claims, the Defendant clearly had ample time to not only file a responsive pleading to Plaintiff's original Complaint, but also to prevent entry of default judgment by acting on the Plaintiff's Notice of Praecipe to Enter Judgment with the assistance of counsel.

For the foregoing reasons, this Court cannot find that the Defendant or his counsel has presented any reasonable excuse for delay in responding to the Complaint in Foreclosure or the numerous steps taken by the Plaintiff to enter and enforce default Judgment against the Plaintiff.

CONCLUSION

If the Defendant fails to establish even one of the three points discussed above, this Court cannot open default judgment. See Myers, 986 A.2d at178. Since the Defendant has failed to establish prompt filing of his motion to stay, a meritorious defense, and a reasonable excuse for delay in filing a responsive pleading, thereby failing to establish *any* of the three prongs, the Defendant's Motion to Stay Sheriff's Sale, to Vacate Judgment, and to Dismiss Complaint is DENIED. The Fulton County Sheriff shall proceed with enforcement of the Default Judgment entered on March 8, 2018, and the Writ of Execution issued on April 28, 2017.

ORDER OF COURT

AND NOW THIS 3rd day of April, 2018, upon review of the record, and upon independent review of applicable law,

IT IS HEREBY ORDERED that Defendant's Motion to Stay Sheriff's Sale, to Vacate Judgment, and to Dismiss Complaint is DENIED. The Fulton County Sheriff shall proceed with enforcement of the Default Judgment entered on March 8, 2018, and the Writ of Execution issued on April 28, 2017.

This Order is pursuant to the attached Opinion

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.