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### **Franklin County Legal Journal**

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**CROSSCOUNTRY MORTGAGE, INC., Plaintiff v.**  
**KEVIN GEORGE A/K/A KEVIN M. GEORGE, Defendant**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Civil Action No. 2020-428

**HOLDING:** The Plaintiff’s Preliminary Objections asserting the Defendant’s counterclaims fail to conform to Rule 1148 are overruled. The Defendant’s counterclaims for declaratory judgment and wrongful foreclosure are permissible. However, the Defendant’s request for attorney’s fees and costs are impermissible and stricken.

**HEADNOTES**

*Standard of Review of Preliminary Objections*

1. When a court considers preliminary objections, all material facts in the challenged pleadings and inferences reasonably deducible therefrom are admitted as true. The court will only sustain preliminary objections resulting in dismissal of a cause of action when it is clear and free from doubt the pleader will be unable to prove facts legally sufficient to establish a right to relief. If a court has any doubt whether it should sustain a demurrer, a court must resolve the doubt in favor of overruling the objections. *Liberty Mut. Ins. Co. v. Domtar Paper Co.*, 77 A.3d 1282, 1285 (Pa. Super. 2013).

*Counterclaims – Interpretation*

2. Pa.R.C.P. 1148 must be interpreted narrowly. *Cunningham v. McWilliams*, 714 A.2d 1054, 1057 (Pa. Super. 1998).

*Counterclaims – Mortgage foreclosure*

3. A mortgage foreclosure action is governed by the Pennsylvania Rules of Civil Procedure. *Generation Mortg. Co. v. Nguyen*, 138 A.3d 646, 651 (Pa. Super. 2016).

4. Rule 1148 allows a defendant to assert a contractual counterclaim arising out of a mortgage transaction against the mortgagee. *Signal Consumer Discount Co. v. Babuscio*, 390 A.2d 266, 270 (Pa. Super. 1978).

5. Only those counterclaims that are part of or incident to the creation of the mortgage relationship are permitted in a mortgage foreclosure action. *Cunningham v. McWilliams*, 714 A.2d 1054, 1057 (Pa. Super. 1998).

*Mortgage foreclosure – Restrictions*

6. Rule 1148 is the only exception to Rule 1141(a)’s prohibition on an “action” to enforce personal liability in a mortgage foreclosure action. *Signal Consumer Discount Co. v. Babuscio*, 390 A.2d 266, 270 (Pa. Super. 1978).

7. A judgment in a mortgage foreclosure is solely to effect a judicial sale of the mortgaged property. *New York Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. 1987).

8. A mortgage foreclosure action may not include an *in personam* action to enforce personal liability, either by the mortgagor or the mortgagee. *Newtown Village Partnership v. Kimmel*, 621 A.2d 1036, 1037 (Pa. Super. 1993).

*Mortgage foreclosure – HUD guidelines and regulations*

9. Pennsylvania trial courts may exercise their equity powers to restrict a mortgagee who has not, within the reasonable expectations of good faith and fair dealing, followed or applied the forbearance provisions of HUD regulations. *Fleet Real Estate v. Smith*, 530 A.2d 919, 923 (Pa. Super. 1987).

10. A defendant can raise an equitable defense to foreclosure based on a mortgagee's failure to follow HUD guidelines, despite those guidelines lacking the force of law. *Fleet Real Estate v. Smith*, 530 A.2d 919, 923 (Pa. Super. 1987).

Appearances:

Christine L. Graham, Esquire, and Joseph I. Foley, Esquire, *Attorneys for Plaintiff*

Erik M. Helbing, Esquire, *Attorney for Defendants*

**OPINION**

Before Zook, J.

The above captioned matter is before the Court on the Plaintiff's *Preliminary Objections to Defendant's Answer*, New Matter and Counterclaim, filed July 6, 2020.

**I. PROCEDURAL HISTORY**

The Plaintiff filed a *Complaint in Mortgage Foreclosure (Complaint)* on January 29, 2020. The Defendant filed his *Answer to the Plaintiff's Complaint with Affirmative Defenses and Counterclaims (Answer)* on June 17, 2020.

The Plaintiff filed *Preliminary Objections to Defendant's Answer, New Matter, and Counterclaim (PO)* on July 6, 2020. The Defendant failed to respond<sup>1</sup> to Plaintiff's *PO*. On July 29, 2020, this Court issued an *Order* directing the parties to file legal briefs in support of their respective positions on the *PO*.

The Plaintiff filed its *Brief in Support of Plaintiff's Preliminary Objections to Defendant's Counterclaims (Plaintiff's Brief)* on August 17, 2020. The Defendant filed his *Brief in Opposition to Plaintiff's Preliminary Objections to the Defendant's Counterclaim (Defendant's Brief)* on August

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<sup>1</sup> Any averment of fact in *PO* is deemed admitted by Defendant for purposes of deciding the "PO." See Pa.R.C.P. No. 1026(a) and Pa.R.C.P. No. 1029(b).

17, 2020. This matter is ready for decision.

## II. FACTUAL BACKGROUND

The Defendant is a mortgagor and real owner of the mortgaged property at 153 North Potomac Street, Waynesboro, PA 17268. *See Complaint*, ¶¶ 1, 6; *Answer*, ¶¶ 1, 6. The Defendant executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for the Plaintiff, on October 31, 2018. *See Complaint*, ¶ 3; *Answer*, ¶ 3. The Defendant also executed a promissory note. *See Complaint*, ¶ 4; *Answer*, ¶ 4. The Defendant did not tender the mortgage payment due May 1, 2019, or any mortgage payment due thereafter. *See Complaint*, ¶ 7; *Answer*, ¶ 7.

The mortgage is insured by the Federal Housing Administration. *See Answer*, ¶ 10. Section 22(d) of the mortgage provides that acceleration and foreclosure are subject to the regulations of the Department of Housing and Urban Development (HUD). *See Answer*, ¶ 11. These regulations include 24 C.F.R. § 203.604, which requires the mortgagee to conduct a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting at least 30 days before the mortgagee commences a foreclosure action. *See Answer*, ¶ 14.

## III. THE OBJECTIONS

The Defendant avers by New Matter that the Plaintiff's compliance with HUD regulations is a condition precedent to commencing mortgage foreclosure proceedings. *See Answer*, ¶ 12. The Defendant alleges the Plaintiff did not comply with HUD regulations. *See Answer*, ¶¶ 15-20. The Defendant also asserts the Plaintiff is not in possession of the promissory note nor was the owner of the mortgage prior to the commencement of the foreclosure action. *See Answer*, ¶¶ 21-22. Thus, the Defendant asserts, the Plaintiff lacks standing. *See Answer*, ¶ 23.

The Defendant brings three counterclaims. First, the Defendant seeks declaratory judgment for the reasons stated in the New Matter. *See Answer*, ¶¶ 25-43. This counterclaim includes a request for an award of costs of suit and reasonable attorney's fees. *See Answer*. Second, the Defendant alleges wrongful foreclosure. *See Answer*, ¶¶ 44-47. This counterclaim also includes a request for reasonable attorney's fees. *See Answer*, ¶ 47. Third, the Defendant counterclaims for breach of contract. *See Answer*, ¶¶ 48-54. This allegation also includes a request for costs of suit and reasonable attorney's fees. *See Answer*, ¶ 54.

The Plaintiff raises two preliminary objections. First, the Plaintiff asserts the New Matter and counterclaims fail to conform to Rule 1148 of

the Pennsylvania Rules of Civil Procedure. *See PO*, ¶¶ 3-6. The Plaintiff requests the counterclaims be stricken and dismissed with prejudice. *Id.*

The second preliminary objection is directed at the Defendant's requests for costs and attorney's fees. *See PO*, ¶¶ 7-10. The Plaintiff avers these remedies are prohibited by Pa.R.C.P. No. 1141. *See PO*, ¶ 10. Plaintiff again requests the Defendant's counterclaims be stricken and dismissed with prejudice. *See PO*.

#### IV. CONCLUSIONS OF LAW

##### *A. Failure to Conform to Law or Rule of Court*

###### *(i) New Matter*

Any party may file preliminary objections to any pleading. *See* Pa.R.C.P. No. 1028(a). A preliminary objection may be based on the ground the pleading fails to conform to law or rule of court. *See* Pa.R.C.P. No. 1028(a)(2).

When a court considers preliminary objections, all material facts in the challenged pleadings and inferences reasonably deducible therefrom are admitted as true. *See, e.g., Liberty Mut. Ins. Co. v. Domtar Paper Co.*, 77 A.3d 1282, 1285 (Pa. Super. 2013). The court will only sustain preliminary objections resulting in dismissal of a cause of action when it is clear and free from doubt the pleader will be unable to prove facts legally sufficient to establish a right to relief. *Id.* If a court has any doubt whether it should sustain a demurrer, the court must resolve the doubt in favor of overruling the objections. *Id.*

The decision to sever a counterclaim or new matter lies within the discretion of the trial court. *See* Pa.R.C.P. No. 213(b). In a mortgage foreclosure action, a defendant may plead a counterclaim arising from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose. *See* Pa.R.C.P. No. 1148. However, Rule 1148 must be interpreted narrowly. *See Cunningham v. McWilliams*, 714 A.2d 1054, 1057 (Pa. Super. 1998).

Only counterclaims that are part of or incident to the creation of the mortgage relationship are permitted in a foreclosure action. *Cunningham, supra*. The Plaintiff argues both the New Matter and counterclaims are neither part of nor incident to the creation of the mortgage. *See Plaintiff's Brief*, un-paginated 3-4.

The Plaintiff cites *Chrysler First Business Credit Corp. v. Gourniak*, 601 A.2d 338 (Pa. Super. 1992), for three examples of impermissible counterclaims in a mortgage foreclosure action. In *Chrysler*, the Superior

Court struck a counterclaim for fraudulent misrepresentation because the counterclaim was not part of or incident to the mortgage. *Id.* at 341. The Plaintiff incorrectly asserts the facts underlying the fraudulent misrepresentation counterclaim in *Chrysler* as arising after the mortgage went into default; the facts arose prior to the creation of the mortgage, *i.e.* the alleged misrepresentation occurred in relation to the agreement for the sale of the underlying property, not in the creation of the mortgage. *Id.* at 341.

The Superior Court also struck a counterclaim for unjust enrichment. See *Chrysler*, 601 A.2d at 342. The Court reasoned this counterclaim was impermissible because the facts giving rise to this counterclaim arose after the defendant defaulted on the mortgage. *Id.* at 342. The Court also struck a counterclaim for punitive damages. *Id.* at 342. The Court reasoned this counterclaim was impermissible because the underlying claims (which were not part of or incident to the mortgage) were also struck. *Id.* at 342.

The Plaintiff also cites *Mellon Bank, N.A. v. Joseph*, 406 A.2d 1055, 1059-60 (Pa. Super. 1979), for the assertion that counterclaims arising once the mortgage is in default, rather than part of or incident to the creation of the mortgage, are disallowed. See *Plaintiff's Brief*, un-paginated 4.

For his part, the Defendant indicates *Meritor Savings Bank v. Barone*, 582 A.2d 21 (Pa. Super. 1990), is instructive. See *Defendant's Brief*, un-paginated 3-4. In that case, the mortgagor executed a mortgage with the bank and simultaneously purchased disability insurance through the bank. *Id.* at 22. After the mortgagor subsequently became disabled, the insurance company provided coverage for over one year. *Id.* at 22. However, thereafter the insurance company ceased paying benefits and the mortgagor defaulted on the mortgage. *Id.* at 22. The bank sought mortgage foreclosure; the mortgagor counterclaimed the bank was negligent in obtaining the disability insurance. *Id.* at 22. The mortgagor claimed the insurance coverage the bank provided was inconsistent with the insurance description in the bank's disclosure form. *Id.* at 22-23. The Superior Court held the mortgagor's counterclaim was proper because the counterclaim arose as part of or incident to the creation of the mortgage. *Id.* at 23.

The Defendant's other authorities are not compelling. The Defendant erroneously cites 22 Standard Pennsylvania Practice 2d § 121.67, a source that addresses a mortgagee releasing part of the mortgage premises. The Defendant uses this source to argue that Rule 1148 furthers the policy of resolving an entire controversy in one action rather than forcing a defendant to pursue the remedy in a separate action. See *Defendant's Brief*, un-paginated 2. This argument is instead found in 4 Goodrich Amram 2d § 1148:1 (citing *Provident Nat. Bank v. Eckhardt*, 12 D. & C. 3d 243,

245 (Bucks County 1979)). However, as noted above, Pa.R.C.P. No. 1148 must be interpreted narrowly. *Cunningham, supra*. The Defendant's argument based on secondary sources is contrary to well-established binding precedent.

However, the Defendant is ultimately correct that the HUD regulation at issue is arguably part of or incident to the creation of the mortgage. *See* Defendant's New Matter. Admittedly, the HUD regulation requiring a face-to-face meeting prior to commencing foreclosure proceedings necessarily involves facts arising after the mortgage is in default. However, the applicability of regulation itself is part of or governs the mortgage agreement and may constitute a valid defense to foreclosure. At this stage, the doubt is resolved in favor of the Defendant.

In *Fleet Real Estate v. Smith*, 530 A.2d 919, 923 (Pa. Super. 1987), the court allowed the defendant to raise an equitable defense to foreclosure based on the mortgagee's failure to follow HUD guidelines on forbearance, despite those guidelines lacking the force of law. Pennsylvania trial courts may exercise their equity powers to restrict a mortgagee who has not, within the reasonable expectations of good faith and fair dealing, followed or applied the forbearance provisions of HUD regulations. *Fleet Real Estate*, 530 A.2d at 923.

In the present case, the HUD regulation at issue is codified in the Code of Federal Regulations. *See* 24 C.F.R. § 203.604. This regulation has more legal weight than the handbook at issue in *Fleet*.<sup>2</sup> The Defendant may raise a New Matter based on the HUD regulation at issue. The Plaintiff's *PO* relating to the New Matter will be overruled.

(ii) *Counterclaim for Declaratory Relief*

The Defendant's first counterclaim seeks declaratory judgment based on the Plaintiff's alleged noncompliance with the aforementioned HUD regulation. *See Answer*, ¶¶ 25-43. The HUD regulation, Defendant asserts, is a condition precedent to the commencement of foreclosure proceedings. *See Answer*, ¶¶ 28-29. Based on the foregoing analysis, *Fleet Real Estate, supra*, the Defendant's counterclaim for declaratory judgment is proper.

Further, in mortgage foreclosures, an "action" means an action to foreclose a mortgage upon any estate, leasehold, or interest in land. *See* Pa.R.C.P. No. 1141(a). An "action" does not include enforcing a personal liability. *Id.* Rule 1148 is the only exception to Rule 1141(a)'s prohibition

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<sup>2</sup> The Superior Court has noted that the CFR, unlike the "handbook" at issue in *Fleet*, has the force of law. *See Green Tree Consumer Discount Co. v. Newton*, 909 A.2d 811, 816-17 (Pa. Super. 2006).

on an “action” to enforce personal liability in a mortgage foreclosure action; Rule 1148 allows a defendant to assert a contractual counterclaim arising out of a mortgage transaction against the mortgagee. *Signal Consumer Discount Co. v. Babuscio*, 390 A.2d 266, 270 (Pa. Super. 1978). Thus, under Rule 1148 and *Signal*, the Defendant’s counterclaim for declaratory judgment is permissible. See Pa.R.C.P. No. 1141(a) and *Signal*, 390 A.2d 266.

(iii) *Counterclaim for Wrongful Foreclosure*

The Defendant’s second counterclaim asserts wrongful foreclosure. See *Answer*, ¶¶ 44-47. Plaintiff’s alleged noncompliance with the HUD regulation, Defendant asserts, constitutes a failure to perform a “contractual condition precedent” to the commencement of the foreclosure proceedings. See *Answer*, ¶¶ 44-45.

It is not clear whether the Defendant brings this counterclaim in tort or contract. The “wrongful” language of the counterclaim implies tort and is prohibited. See Pa.R.C.P. No. 1141(a). However, the substantive pleadings imply breach of contract based on the mortgage agreement. See *Answer*, ¶¶ 44-47.

To the extent the counterclaim is based on breach of the mortgage agreement, the counterclaim is permissible under Rule 1148 and *Signal*. See Pa.R.C.P. No. 1141(a) and *Signal*, 390 A.2d 266. On reviewing preliminary objections, the Court will presume the counterclaim is based on breach of contract. To the extent it is later determined the Defendant’s theory is based on tortious conduct, the counterclaim will be barred. The PO related to this counterclaim will be overruled to the extent the counterclaim is based on breach of contract.<sup>3</sup>

(iv) *Counterclaim for Breach of Contract*

The Defendant’s third counterclaim asserts breach of contract. See *Answer*, ¶¶ 48-54. This counterclaim is based on Plaintiff’s alleged noncompliance with the HUD regulation as part of the mortgage agreement’s terms. See *Answer*, ¶¶ 48-49.

The analysis for this counterclaim, like the analysis of the counterclaim for wrongful foreclosure, is based on Rule 1148 and *Signal*. The counterclaim for breach of contract is permissible to the extent the counterclaim is based on breach of the mortgage agreement itself. See Pa.R.C.P. No. 1141(a) and *Signal*, 390 A.2d 266.

*B. The Defendant’s remedies seeking costs and attorney’s fees are impermissible*

<sup>3</sup> It would appear, if this is the case, that this counterclaim is superfluous with the explicit counterclaim for “breach of contract,” discussed *infra*.



The Plaintiff argues Rule 1148 prohibits remedies of costs and attorney's fees. *See Plaintiff's Brief*, un-paginated 3-4. The Defendant argues the Plaintiff's interpretation of Rule 1148 is too restrictive and not consistent with the developing case law. *See Defendant's Brief*, un-paginated 4.

In support of his argument, the Defendant cites *Bayview Loan Servicing v. Lindsay*, 185 A.3d 307 (Pa. 2018). *Bayview* concerned a consumer protection statute for residential mortgage debtors, known as Act 6. *Bayview*, 185 A.3d at 308. Act 6 provides an award of attorney's fees for a residential mortgage debtor who prevails in an "action" arising under the act. *Id.* at 308. The Supreme Court determined an affirmative defense is not an "action" under Act 6 and thus does not entitle a debtor to attorney's fees. *Id.* at 309. The Supreme Court did not go so far as to hold a counterclaim is an "action" under Act 6.

In *Generation Mortg. Co. v. Nguyen*, 138 A.3d 646, 647 (Pa. Super. 2016), the mortgagor appealed from an order denying her motion for attorney's fees, a motion she filed after the mortgagor discontinued its mortgage foreclosure action. The Superior Court held a mortgage foreclosure action is governed by the Pennsylvania Rules of Civil Procedure, not Act 6, i.e., is not an action arising under that statute. *Id.* at 651. Thus, the case law interpreting Pa.R.C.P. No. 1141 and No. 1148 is applicable in the present case, unlike the statutory-bound analysis under *Bayview*. Even if the Defendant can maintain his counterclaim for wrongful foreclosure (breach of contract/HUD regulation), his claimed right of attorney's fees under Act 6 does not arise from an action under Act 6.

The Plaintiff responds that a mortgage foreclosure action is strictly *in rem*. *See Plaintiff's Brief*, un-paginated 2. The Court is persuaded by this argument. *See Newtown Village Partnership v. Kimmel*, 621 A.2d 1036, 1037 (Pa. Super. 1993); *New York Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. 1987). A judgment in a mortgage foreclosure is solely to effect a judicial sale of the mortgaged property. *See New York Guardian Mortg. Corp. v. Dietzel*, 524 A.2d 951, 953 (Pa. Super. 1987). A mortgage foreclosure action may not include an *in personam* action to enforce personal liability, either by the mortgagor or the mortgagee. *See Newtown Village Partnership v. Kimmel*, 621 A.2d 1036, 1037 (Pa. Super. 1993).

A claim for attorney's fees and costs is *in personam*. Therefore, a counterclaim for attorney's fees in this mortgage foreclosure action is impermissible under Pa.R.C.P. No. 1141 and No. 1148. The PO related to attorney's fees and costs will be sustained.

An appropriate order follows.

## ORDER

**NOW**, this 2nd day of October, 2020, on the foregoing *Opinion*, **IT IS HEREBY ORDERED** as follows:

1. The Plaintiffs *Preliminary Objections (PO)*, filed July 6, 2020, asserting the Defendant's counterclaims fail to conform to Rule 1148<sup>1</sup> are **OVERRULED**;
2. The Plaintiff's *PO*, filed July 6, 2020, raising a demurrer to Counterclaims<sup>2</sup> are **SUSTAINED**, limited to the Defendant's requests for attorney's fees and costs; any such claimed remedies are **STRICKEN** from the Defendant's *Answer to the Plaintiff's* Complaint with Affirmative Defenses and Counterclaims, filed June 17, 2020;
3. The Plaintiff shall file an answer to the New Matter and/or Counterclaims within twenty (20) days of service of this order.

Notice of this Judgment shall be given pursuant to Pa.R.C.P. No. 236

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<sup>1</sup> See *PO*, SECTION I.

<sup>2</sup> See *PO*, SECTION II.