

TONI M. COBB, FORMERLY TONI M. TORO,

v. SAMUEL J. MOWEN

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No.2007-1706

Complaint in Action of Mortgage Foreclosure Pursuant to Property and Separation Agreement; Enforcement of Alimony Payments; Lien Priority

1. It is well established that in order to secure an alimony obligation, a party may execute a mortgage on the real property of another, and enforce that lien should payments become delinquent.
2. While overdue support can be a lien on real estate if the underlying action is being enforced by the county domestic relations section, 23 Pa.C.S.A. §4352 (d.1)(1)(i), a mortgage entered prior to the time support becomes delinquent has priority. 23 Pa.C.S.A. §4352 (d.1)(2)(i)(B).
3. In the present case, the mortgage on Defendant's home was executed and recorded pursuant to a Property and Separation Agreement on May 26, 2005. Support became delinquent on May 20, 2006. By virtue of the statute, the Court found that the mortgage has priority.
4. An order for support enforceable through the Domestic Relations Office is a personal obligation, as payments are generally secured through wage attachment. A mortgage foreclosure is an action *in rem*, as the judgment entered is against the land. Therefore, the two present different causes of action with different forms of relief.
5. The Defendant fell behind on his alimony payments due to a disability and was therefore not found in contempt as he had no income and was able to provide Physician's Verification Forms to the Court. The Plaintiff has the right to enforce the mortgage which was executed pursuant to the Property and Separation Agreement, a contract which both parties signed.

Appearances:

Timothy W. Misner, Esquire, *Counsel for Plaintiff*

Clinton T. Barkdoll, Esquire, *Counsel for Defendant*

OPINION

Van Horn, J., November 5, 2007

Statement of the Case

This matter is before the Court as the result of a Complaint in Action of Foreclosure filed by Toni M. Cobb ("Cobb") on May 21, 2007. The Plaintiff, Cobb, and the Defendant, Samuel J. Mowen ("Mowen"), were

divorced in March of 2005, and subsequently entered into a Property and Separation Agreement (Agreement) on March 30, 2005. Under the terms of the Agreement, Mowen was to execute a second mortgage on his real property located at 10222 Polidor Road in Waynesboro in order to secure his alimony obligation of \$298.00 per month. The second mortgage was executed on May 26, 2005 and the agreed upon alimony was also entered as an Order at the Franklin County Domestic Relations office, effective February 21, 2005.

Over a period of time in 2006, Mowen began to fall behind on his alimony payments due to a disability. On March 19, 2007, in response to Mowen's failure to make the monthly payments, Cobb sent Mowen a notice of intention to foreclose on the residential mortgage pursuant to Act 6 of 1974. Since Mowen did not cure the mortgage default, Cobb instituted the present action on May 21, 2007, by filing a mortgage foreclosure action against the Defendant. Cobb demanded judgment against Mowen for \$16,867.12 plus interest together with the costs of this action and for a judicial sale of the property.

On June 12, 2007, Mowen filed Preliminary Objections to Cobb's Complaint in action of mortgage foreclosure. The thrust of Mowen's Preliminary Objections was his assertion that the Complaint must fail due to the fact that a prior action in this matter was already pending. Specifically, Mowen stated that the Franklin County Domestic Relations Office had initiated an enforcement action against Mowen for failure to pay the underlying mortgage obligation and that a hearing was scheduled for June 21, 2007. Mowen further asserted that Domestic Relations has exclusive jurisdiction of the mortgage arrearage issue. Mowen requested a dismissal of Cobb's mortgage foreclosure action.

Prior to Cobb initiating the present action of mortgage foreclosure against Mowen, the Franklin County Domestic Relations Office initiated an enforcement action against Mowen for failure to pay his alimony obligation. After a number of continuances, the latest due to Mr. Mowen's inability to attend due to his recovery from health problems, a contempt hearing was held before the Honorable Judge John R. Walker on June 21, 2007. Judge Walker found that Mowen was not in violation of the Order, as Mowen had provided the Court with a physician's verification form ("PVF") declaring him totally disabled. Mowen was required to continue to provide PVF's on a regular basis proving his continuing disability.

Cobb subsequently filed an Answer to Mowen's Preliminary Objections in the mortgage foreclosure action on June 28, 2007. On July 5, 2007, Cobb filed a Praecipe to list the Preliminary Objections filed by Mowen for oral argument. Both sides presented briefs on these issues, and arguments were heard by this Court on Thursday, October 4, 2007.

Discussion

The issue before the Court is whether the support lien in this matter, enforceable by Franklin County Domestic Relations, has priority over the second mortgage held by Cobb on Mowen's property giving Domestic Relations exclusive jurisdiction of the alimony arrearage issue. Mowen asserts that the present action in foreclosure must fail due to the fact that a support action in the matter is already pending.

In his brief, Mowen cites Pa.R.C.P. 1028(a)(6) as his ground for objecting to Cobb's pleading. In order for a defendant to successfully plead an objection on the ground of pendency of a prior action under Pa.R.C.P. 1028(a)(6), the defendant must prove that in both actions the same parties are involved, the same rights are asserted, and the same relief is being sought. Lowenschuss v. Selnick, 471 A.2d 529 (1984). Clearly the same parties are involved, and neither side disputes this fact. Therefore, the Court must determine whether the cause of action and relief sought are the same.

Cobb submits that the actions and remedies are different, arguing that in the support action, Domestic Relations is attempting to have Mowen pay his alimony obligation from his income, which is a **personal** obligation. The present action in foreclosure is an action *in rem*, to enforce a contractual obligation as set forth in the Agreement. Furthermore, Cobb states that the default by Mowen is not only a failure to pay his alimony obligation but also the failure to provide and name Cobb as a loss payee on his hazard insurance policy by paragraph 3 of the mortgage.^[1]

Mowen argues in his brief that both actions assert the same rights and same relief: Cobb's right to spousal support and payment of the same. Mowen submits that relief sought through the domestic relations Order precludes Cobb from enforcing her contractual rights under the Agreement as an alternative method. He goes on to cite 23 Pa.C.S.A. 4305(10)(v), which purports to give domestic relations the power to enforce support orders by imposing liens on property.

While it may be true that this section of the Domestic Relations Code does authorize enforcement

of a support order by imposing a lien on property, it does not follow that this would bar the present foreclosure action. Moreover, this Court has never witnessed the Franklin County Domestic Relations Office initiate a foreclosure action on a defaulting party in order to provide support payments in arrears, and the Court is not inclined to open a mortgage foreclosure division of an already overworked Domestic Relations Office. Mowen is presently not able to work due to a disability and therefore, has no income from which Domestic Relations can extract his alimony obligation. Therefore, the only way for Cobb to receive these payments is by enforcing the second mortgage which was executed on Mowen's home as security for Mowen's promise to pay. There is no argument that said contract is unenforceable for any legally recognized reason.

Finally, as requested during oral argument, Mowen provided a copy of the statutory authority he asserts supports his argument that the alimony support lien in this matter has priority of the mortgage. The Court reads the statute as providing that the lien for support takes priority from the date support becomes overdue. 23 Pa.C.S.A. 4352(d.1)(2)(i)(B). In the present action, the second mortgage on Mowen's home was executed and recorded on May 26, 2005 (See Exhibit A of Plaintiff's Complaint). The support payments are alleged to have become delinquent on May 20, 2006 (See Paragraph 6 of Plaintiff's Complaint). Therefore, this statute actually supports Cobb's position that the mortgage entered prior to the time support became delinquent has priority.

Conclusion

The Court concludes that, pursuant to Paragraph 9 of the Property and Separation Agreement entered on March 30, 2005, Toni Cobb, as the holder of a second mortgage on Samuel Mowen's real property, has the right to proceed to foreclosure in order to receive any and all balances due to her for the stipulated alimony and arrearages. The support enforcement action instituted by the Franklin County Domestic Relations office is based on Mowen's failure to comply with a court order awarding Cobb alimony and is not based upon Mowen's breach of his obligation under the mortgage and Agreement. Therefore, the enforcement action is not a prior pending action as set forth in Pa.R.C.P. 1028(a)(6).

ORDER OF COURT

And now this 5th day of November, 2007, after consideration of Defendant's Preliminary Objections to Plaintiff's Complaint in Action of Mortgage Foreclosure, briefs submitted by counsel and oral argument on the same, it is hereby determined that

1. Plaintiff may proceed to foreclosure against Defendant's interest in the former marital real estate in order to collect alimony payments in arrears, as per the contractual agreement between the parties set forth in the Property and Separation Agreement;

2. The support enforcement action instituted by the Franklin County Domestic Relations office is not a prior pending action, as the actions do not involve the same rights and relief; therefore,

It is hereby ordered that Defendant's Preliminary Objection on the ground of pendency of a prior action under Pa.R.C.P. 1028(a)(6) is denied.

[1] A copy of the second mortgage is attached to Plaintiff's Complaint