IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL DIVISION

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS INDENTURE TRUSTEE ON BEHALF OF THE NOTEHOLDERS AND THE NOTE INSURER OF ABFS MORTGAGE LOAN TRUST 2001-3,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EMIG & SON, INC.; KENNETH E. EMIG; HILBERT'S 81 DINER, INC.; UNITED STATES DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY,	:	
Defendants	:	**Civil Action – Law**
	:	

MEMORANDUM OPINION OVERRULING DEFENDANT'S PRELIMINARY OBJECTIONS

Before this Court are Defendants' Preliminary Objections to Plaintiff's Complaint pursuant to Pa.R.C.P. No. 1028(a)(4). For the following reasons, Plaintiff's Preliminary Objections are **OVERRULED.**

Facts and Procedural History

On August 31, 2017, Plaintiff, Bank of New York Mellon ("BNYM") filed a Complaint on a mortgage dated August 23, 2001. In its Complaint, BNYM alleges that

Defendant Kenneth E. Emig ("Mr. Emig"), as mortgagor, mortgaged a piece of property ("Property") to American Business Credit, Inc. ("ABC"). By Assignment of Mortgage, the mortgage was assigned to BNYM. The Property was acquired by Emig & Son, Inc. ("Emig & Son") as record owner by deed dated February 23, 1999 and recorded three days later, through which ABC granted and conveyed the property to Emig & Son, Inc. the record owner of the property until it was sold to Hilbert's 81 Diner, Inc. ("Hilbert's).

In the mortgage executed on August 23, 2001, Mr. Emig was identified as the mortgagor even though Emig & Son, Inc. owned the property. Mr. Emig signed the document in an individual capacity and not as an authorized principal of Emig & Son.

The Complaint filed by BNYM contains a count for Equitable Lien, Reformation – Mutual Mistake of the Parties and Unjust Enrichment. Mr. Emig and Emig & Son (collectively, "Defendants"), raise three Preliminary Objections to BNYM's Complaint on the basis that each count in the Complaint is legally insufficient. The first insufficiency claim is that the Complaint fails to allege any facts evidencing intent by the Defendants to create and impose a valid and enforceable first priority mortgage lien against the property. Defendants contend that because BNYM cannot allege that Emig & Son, the owner of the property, intended for the property to serve as security for the payment of the obligation, BNYM's claim for equitable lien should be dismissed as legally insufficient under Pa.R.C.P. No. 1028(a)(4). For similar reasons, Defendants also object to the remaining two counts in the Complaint.

BNYM contends that the Complaint alleges sufficient facts to support the claim that Emig & Son intended for the property to serve as security for the loan; that the Complaint sufficiently alleges that the parties agreed that Emig & Son should have been named as mortgagor but for a mutual mistake; and that the Complaint sufficiently alleges that Emig & Son was unjustly enriched when it obtained the loan without pledging the property as collateral, which unjustly deprived BNYM of a security interest. In its Complaint, BNYM asks the Court to use its equitable powers to grant such a remedy.

Discussion

Preliminary objections, which if sustained, would result in the dismissal of a cause of action "should be sustained only in cases that are clear and free from doubt." *Bower v. Bower*, 531 Pa. 54, 611 A.2d 181, 182 (1992). Furthermore, preliminary objections should be granted "only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover." *Snare v. Ebensburg Power Co*., 431 Pa. Super. 515, 637 A.2d 296 (1993) (citation omitted), appeal denied 538 Pa. 627, 646 A.2d 1181 (1994). In ruling on preliminary objections, "the court must consider the evidence in the light most favorable to the non-moving party." *Maleski by Taylor v. DP Realty Trust*, 653 A.2d 54, 61 (Pa. Commw. Ct. 1994).

A demurrer tests the legal sufficiency of the complaint. *HCB Contractors v. Liberty Place Hotel Associates*, 539 Pa. 395, 652 A.2d 1278, 1279 (1995). A trial court may sustain a demurrer, and thereby dismiss a claim, only when the law is clear that a

plaintiff is not entitled to recovery based on the facts alleged in the complaint. *Id*. In determining the merits of a demurrer, all well-pleaded, material facts set forth in the complaint and all inferences fairly deducible from those facts are considered admitted and are accepted by the trial court as true; conclusions of law are neither deemed admitted nor deemed true. *Small v. Horn*, 554 Pa. 600, 722 A.2d 664, 668 (1998); *Willet v. Pennsylvania Medical Catastrophe Loss Fund*, 549 Pa. 613, 702 A.2d 850, 853 (1997). Furthermore, our Courts have summarized the standard regarding demurrers, stating:

> A demurrer admits all relevant facts pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law. A demurrer may not be sustained unless the complaint evidences on its face that the claim cannot be sustained because the law will not permit recovery . . . If there is any doubt, the doubt should be resolved in favor of overruling the demurrer; summary judgment should be entered only in cases which are clear and free from doubt.

Chorba v. Davlisa Enterprises, Inc., 450 A.2d 36, 37-38 (Pa. Super. 1982) (citations omitted).

It is well settled that, "[i]n reviewing preliminary objections, only facts that are well pleaded, material, and relevant will be considered as true, together with such reasonable inferences that may be drawn from those facts, and preliminary objections will be sustained only if they are clear and free from doubt." *Santiago v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 613 A.2d 1235, 1238 (Pa. Super. 1992) (citing *Ohio Casualty Group Ins. Co. v. Argonaut Ins. Co.*, 500 A.2d 191 (Pa. Commw. 1985)).

The questions here are 1) whether BNYM's Complaint alleges sufficient facts to support the claim that Emig & Son intended for the property to serve as security for the loan, 2) whether BNYM's Complaint sufficiently alleges that the parties agreed that Emig & Son should have been named as the mortgagor but for a mutual mistake, and 3) whether BNYM's Complaint sufficiently alleges that Emig & Son was unjustly enriched. On all three questions before us, the Court finds in the affirmative.

Defendants contend that the Equitable Lien claim should be dismissed because BNYM fails to allege facts in support of the allegation that Emig & Son intended for the property to serve as a security for the payment of the obligation. In its Complaint, BNYM alleges that both parties intended to create and impose a valid and enforceable first priority mortgage lien against the property as security for the loan. In determining the merits of a demurrer, all well-pleaded, material facts set forth in the complaint and all inferences fairly deducible from those facts are considered admitted and are accepted by the trial court as true.[1]

BNYM argues that in addition to alleging intent on part of the parties as a threshold matter, its Complaint also specifically alleges facts in support of that claim, such as the fact that Mr. Emig had previously, as an officer of Emig & Son and on behalf of the company, executed another mortgage using the property as collateral. However, as the facts allege in this case, Mr. Emig executed this mortgage in an individual capacity,

[1] *Small v. Horn* at 664

purportedly as an error, warranting that he possessed good and marketable fee simple title to the property and had the authority to mortgage the property himself, when he did not.

Because he had previously, as an officer of the company, executed a mortgage using the same property as collateral, BNYM argues that this transaction serves as a reasonable inference that Mr. Emig knew that Emig & Son owned the property and thus that he lacked the authority to execute a mortgage using that property as collateral. The Court finds this inference reasonable and the facts alleged in BNYM's Complaint sufficient to establish intent between the parties.

Defendants next contend that BNYM's Complaint fails to sufficiently allege mutual mistake. BNYM, states in its response that Mr. Emig was mistakenly misidentified as the mortgagor as evidenced by (1) Mr. Emig incorrectly warranting he possessed good and marketable fee simple title to the property; (2) Emig & Son's execution of all other loan documentation; and (3) Emig & Son's sole use of the loan records, and that Emig & Son was the intended mortgagor. We concur with BNYM and find BNYM's reformation claim based on mutual mistake is legally sufficient.

Finally, Defendants argue that BNYM's claim for unjust enrichment must fail because BNYM alleges no facts that establish that the Defendants were unjustly enriched. Defendants also contend that the equitable relief sought by BNYM, to add Emig & Son as mortgagor of the mortgage in question, is not cognizable. BNYM counters that its Complaint sufficiently establishes that Emig & Son was unjustly enriched when it

obtained the Loan without pledging the property as collateral. BNYM asserts that the lack of collateral attached to the loan unjustly deprived BNYM of a security interest in the property. On whether the relief sought is cognizable, BNYM properly asserts that this Court has latitude to determine a proper remedy. The Court finds that BNYM's Complaint pleads sufficient facts in support of its claim that Defendants were unjustly enriched by the purportedly erroneous transaction. If the Court were to find that the transaction was in fact, a mistake, it would logically follow that Emig & Son would have also been unjustly enriched in receiving the loan without encumbrance. For these reasons, the Court agrees with BNYM.

CONCLUSION

The Court finds that BNYM's Complaint alleges sufficient facts to support the allegation that Emig & Son intended for the property to serve as a security for the payment of the obligation; sufficiently alleges mutual mistake or at the very least, knowledge on part of the Emig Defendants; and alleges sufficient facts to sustain a claim of unjust enrichment. Thus, Defendants' Preliminary Objections are **OVERRULED**.

BY THE COURT,

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JUDGE

Dated: April 30, 2018

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	:	

ORDER OF COURT

AND NOW, this 30th of April 2018, for the reasons set forth in the Memorandum Opinion of this date, Defendants' Preliminary Objections to Plaintiff Bank of New York Mellon's Complaint are **OVERRULED**.

BY THE COURT,

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JUDGE