

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

| | | |
|--------------------------------|---|-----------------------|
| U.S. BANK NATIONAL ASSOCIATION | : | |
| AS TRUSTEE FOR OWNIT | : | No. 2016-SU-000298-06 |
| MORTGAGE LOAN TRUST, | : | |
| MORTGAGE LOAN ASSET-BACKED | : | |
| CERTIFICATES, SERIES 2006-7, | : | |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| | : | |
| DARRYL A. MITCHELL and | : | |
| APACHE INVESTMENT TRUST, | : | |
| Defendants | : | Mortgage Foreclosure |
| | : | |

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

AND NOW, this 8th of June, 2018, for the reasons set forth in the Memorandum Opinion of this date, Plaintiff's Motion for Summary Judgment is hereby **GRANTED**, with judgment entered against Defendant *in rem* in the amount of \$225,896.65 plus interest, other expenses, costs, and charges collectible under the mortgage for foreclosure and sale of the mortgaged premises.

BY THE COURT,

JOSEPH C. ADAMS, PRESIDENT JUDGE

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| Plaintiff | : | |
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| DARRYL A. MITCHELL and | : | |
| APACHE INVESTMENT TRUST, | : | |
| Defendants | : | Mortgage Foreclosure |
| | : | |

**MEMORANDUM OPINION GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

This case is before the Court on Plaintiff’s Motion for Summary Judgment. For the following reasons, Plaintiff’s Motion is **GRANTED**.

FACTS AND PROCEDURAL HISTORY

Plaintiff, U.S. Bank National Association, as Trustee for OWNIT Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-7 (“U.S. Bank”, “Plaintiff”) commenced the above-captioned action by filing a Complaint in Mortgage Foreclosure on February 3, 2016. Plaintiff’s Complaint alleges that Defendants, Darryl A. Mitchell and Apache Investment Trust (hereinafter, “Defendants”; “Defendant Mitchell”; “Defendant Apache”), are in default under the terms of a Mortgage dated July 20, 2006 and assigned to Plaintiff on December 31, 2015 (hereinafter, “Mortgage”), in favor of Plaintiff, in the original principal amount of \$114,911.47. The property subject to the Mortgage is located at 15 Apache Trail, York Haven, PA 17370-9412

(hereinafter, the “Property”). Defendant Mitchell made, executed and delivered a mortgage upon the premises to Mortgage Electronic Registration Systems, Inc., as nominee for OWNIT Mortgage Solutions, Inc. By Corrective Assignment of Mortgage recorded on December 31, 2015, the mortgage was assigned to Plaintiff. Plaintiff alleges that Defendants are in default because monthly payments of principal and interest upon said mortgage due December 1, 2010 and each month thereafter are due and unpaid and by the terms of said Mortgage, upon failure of Mortgagor to make such payments after a date specified by written notice sent to Mortgagor.

On October 9, 2015, due to Defendants’ default, Plaintiff mailed Defendants notice of its intention to foreclose on the Mortgage to Defendants at their last known address. Plaintiff alleges that Defendants failed to cure the default and did not take any affirmative steps to cure the delinquency. Plaintiff submits that Defendant Apache, in its Answer, only generally denied the default and amounts, effectively admitting every averment of Plaintiff’s Complaint and therefore summary judgment is appropriate. Defendant Mitchell did not file an Answer to the Complaint and Plaintiff filed for Default Judgment against Defendant Mitchell on March 6, 2017

In its Motion for Summary Judgment, Plaintiff alleges that there are no material issues of fact in dispute, that it is seeking only an in rem judgment in this action, that Defendant Mitchell executed a Mortgage and Promissory Note promising to repay the loan on a monthly basis. The Mortgage was transferred to U.S. Bank as Trustee for OWNIT Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-7, who filed this action on February 3, 2016. A corrective Assignment of Mortgage was recorded to correct a scrivener’s error in the Assignment regarding the Mortgage recording information. The Mortgage was transferred to U.S. Bank National Association, as Successor Trustee, to Bank of America, National Association, Successor by Merger to LaSalle National Association, as Trustee for OWNIT Mortgage Loan Trust, Mortgage

Loan Asset0Backed Certificates, Series 2006-7 and a Praeipie for Voluntary Substitution was filed. Apache Investment Trust is the current record owner of the mortgaged property by Special Warranty Deed for Ata Zandieh who purchased the mortgaged property at an upset tax sale. Pursuant to 72 P.S. Section 5860.609 the mortgage against the property was not divested by the upset tax sale. Plaintiff is the current mortgagee of record as well as the holder of the Note and therefore has standing to pursue in rem mortgage foreclosure action. The last payment on the Mortgage was on or around December 3, 2010. Plaintiff applied this payment to the account for the delinquent November 1, 2010 as evidenced by the loan history report provided by Plaintiff. Defendant Apache Investment Trust filed preliminary objections to Plaintiff's Complaint which were overruled on September 28, 2016. Defendant Apache also filed an Answer after filing the preliminary objections, in which it generally denies the default and the amount due on the mortgage. Plaintiff alleges that Defendant Apache has failed to aver any genuine issue(s) of material fact in defense of Plaintiff's Complaint, and that Plaintiff is entitled to summary judgment as a matter of law.

DISCUSSION

The purpose of summary judgment is to assess whether there is a genuine need for trial. Curran v. Philadelphia Newspapers, Inc., 439 A.2d 652, 658 (Pa. 1981). Pennsylvania Rule of Civil Procedure 1035.2(1) permits a party to file a Motion for Summary Judgment after relevant discovery has been completed if there is "no genuine issue of material fact as to a necessary element of the cause of action." Pa.R.C.P. 1035.2(1). In order to grant a Motion for Summary Judgment, such that the moving party is entitled to prevail as a matter of law, there can be no genuine issue of material fact.¹ New York Guardian Mortg. Corp. v. Dietzel, 524 A.2d 951, 952 (Pa.Super. 1987).

¹ A "material fact" is one that directly affects the outcome of the case. Fortney v. Callenberger, 801 A.2d 594, 598 (Pa.Super. 2002).

The moving party has the burden of demonstrating no dispute of fact exists. Lyman v. Boonin, 635 A.2d 1029, 1032 (Pa. 1993). In determining whether granting summary judgment is appropriate, the court must view the record in a light most favorable to the non-moving party. Dorohovich v. West Am. Ins., 589 A.2d 252, 256 (Pa.Super. 1991). All well-pleaded facts must be accepted as true and the non-moving party must be given the benefit of all reasonable inferences that can be drawn therefrom. Goldberg v. Delta Tau Delta, 613 A.2d 1250, 1252 (Pa.Super. 1992). Furthermore, the grant of such a motion must be clear and free from doubt. Toy v. Metro. Life Ins. Co., 928 A.2d 186, 194 (Pa.Super. 2007).

A responsive pleading shall admit or deny each averment of fact. Pa.R.C.P. 1029(a). A party is permitted to admit only part of an averment and deny the remainder. Id. A party is not required to respond to conclusions of law. Rohrer v. Pope, 918 A.2d 122, 129 (Pa.Super. 2007) (citing Devine v. Hutt, 863 A.2d 1160 (Pa.Super. 2004); In re Estate of Roart, 568 A.2d 182 (Pa.Super. 1989)). If an averment is not denied specifically, or by necessary implication, it is considered admitted. Pa.R.C.P. 1029(b). Furthermore, a general denial or a demand for proof, unless pursuant to Pennsylvania Rule of Civil Procedure 1029(c) and (e)², shall also be considered admitted. Id. In an action in Mortgage Foreclosure, the Plaintiff shall set forth in the complaint:

- (1) the parties to and the date of the mortgage, and of any assignments, and a statement of the place of record of the mortgage and assignments;
- (2) a description of the land subject to the mortgage;
- (3) the names, addresses and interest of the defendants in the action and that the present real owner is unknown if the real owner is not made a party;
- (4) a specific averment of default;
- (5) an itemized statement of the amount due; and
- (6) a demand for judgment for the amount due.³

² Subsection (e) is pertinent only to actions where a party is seeking monetary relief for bodily injury, death, or property damage. On its face, this subsection is not relevant and will not be discussed further.

³ Pa. R.C.P. 1147.

“An action in mortgage foreclosure is strictly an *in rem* proceeding, and the purpose of a judgment in mortgage foreclosure is solely to effect a judicial sale of the mortgaged property.” New York Guardian Mortgage Corp. v. Albert Dietzel, 524 A.2d 951, 953 (Pa. Super. 1987) (*internal citations omitted*). In a response to a motion for summary judgment, the “adverse party may not rest upon the pleadings, but must file a response” identifying “one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion” or “evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.” Pa.R.C.P. No. 1035.3(a). Summary judgment may properly be granted only if:

‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.’

Washington Federal Savings. & Loan Association. v. Stein, 515 A.2d 980, 981 (Pa. Super. 1986).

In addition, pursuant to Pennsylvania Rule of Civil Procedure 1029(b), “averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.” Pa.R.C.P. 1035.3(d).

In Defendant’s Answer, Defendant only generally denies the default and the amount due and owing, claiming that it lacks sufficient knowledge or information about any payment or loan history to form a belief as to the accuracy of Plaintiff’s allegations. Plaintiff has filed an Affidavit in Support of Motion for Summary Judgment which states that Defendants are in default for failure to pay installments of principal and interest when due. The averments made in the affidavit are based on the Plaintiff’s loan history records, which is a business record of Plaintiff maintained in the regular course of business. The Affidavit states that: (1) Defendants’ Mortgage payments due

December 1, 2010 and each month thereafter are due and unpaid; (2) the amount due the Plaintiff on the Note through the date of filing is \$225,896.65 which breaks down as follows:

| | | |
|---|-------------|--------------|
| Unpaid Principal Balance | | \$114,911.47 |
| Deferred Principal Balance | | \$0.00 |
| Interest from 11/01/2010 at 7.99900% to 11/14/2017 | | |
| Interest after 11/13/2017 at per diem rate of \$25.532690 | | \$64,674.24 |
| Late Charges | | \$2,447.88 |
| Escrow Balance | | \$41,673.49 |
| Taxes | \$22,399.30 | |
| Insurance | \$7,575.36 | |
| Escrow Payments/Credits | \$0.00 | |
| Prior Servicer Escrow Balance | \$11,698.83 | |
| Fees Billed | | |
| Prior Servicer Fees | | \$569.75 |
| Maintenance | | \$17.67 |
| Property Inspection Fees | | \$366.36 |
| Property Valuation Fee – BPO | | \$1,253.00 |
| Foreclosure Fees | | N/A |
| Less Suspense (if applicable) | | \$(17.21) |
| Grand Total | | \$225,896.65 |

The Affidavit further states that (3) Defendants have failed to reinstate the account or cure the arrears on the past due mortgage payments, and; (4) Defendants were provided with a Notice of Intention to Foreclose Mortgage, but Defendants did not take the necessary affirmative steps to avoid foreclosure.

Defendant Apache contends that summary judgment is not appropriate in this case because material facts remain in dispute, namely, whether Defendant Apache received the required Notice of Intention to Foreclose Mortgage. Defendant Apache alleges that Plaintiff's documentation regarding the Notice is far from proof that such Notice was delivered to Apache.

Defendant Apache argues that notice as set forth in Plaintiff's Exhibit fails to demonstrate compliance with Act 6 of 1974⁴, alleging that "the USPS Tracking documents do not have ZIP Codes that match the addresses on the Notice of Intention to Foreclose Mortgage."⁵ Defendant also asserts that "discovery is necessary to ascertain the veracity of Plaintiff's averment."

§ 403. Notice of intention to foreclose

(a) Before any residential mortgage lender may accelerate the maturity of any residential mortgage obligation, commence any legal action including mortgage foreclosure to recover under such obligation, or take possession of any security of the residential mortgage debtor for such residential mortgage obligation, such person shall give the residential mortgage debtor notice of such intention at least thirty days in advance as provided in this section.

41 P.S. § 403(a).

We find that Plaintiff fully complied with the notice requirements when it sent notice to Defendants' known address by certified mail, proof of which it provided with its Motion for Summary Judgment⁶. Even if Defendant could prove that he did not receive the notice requirement sent by Plaintiff, Pennsylvania law is clear in the fact that actual receipt is not an essential element to fulfill the notice requirement. *Second Fed. Sav. & Loan Ass'n v. Brennan*, 409 Pa.Super. 581, 588–89, 598 A.2d 997, 1000 (1991). Defendants defaulted on their obligations by failing to make the requisite monthly payments of principal and interest when due and owing to Plaintiff. Defendants are currently due and owing from December 1, 2010 through the present. Defendants have failed to present any facts that would contradict the elements of Plaintiff's claim. We therefore find that there is no genuine issue of fact as to the amount owed by Defendants and whether the

⁴ 41 P.S. §§ 101–605 is commonly referred to as Act 6 because it was enacted as the "Act of January 30, 1974 (P.L. 13, No. 6).

⁵ Defendant Apache Investment Trust's Response to Plaintiff's Motion for Summary Judgment at p. 4

⁶ Plaintiff's Motion for Summary Judgment Exhibit D

Defendants are in default under the Agreement. Since the facts presented in the pleadings and other evidence show that Plaintiff complied with the notice requirement, no genuine issue of material fact exists and summary judgment is proper.

CONCLUSION

The Court does not have the benefit of any facts setting out a genuine issue of material fact to preclude summary judgment. As Defendants have not supplied the Court with a reason why summary judgment should not be granted, the Court finds that there is no genuine issue of material fact. Plaintiff's Motion for Summary Judgment is hereby **GRANTED**.

BY THE COURT,

JOSEPH C. ADAMS, PRESIDENT JUDGE

Dated: June 8, 2018